

An appeal

- by -

Vasant Patel  
("Patel")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

pursuant to Section 112 of the  
*Employment Standards Act* R.S.B.C. 1996, C.113

**ADJUDICATOR:** Alison Narod

**FILE No.:** 2002/669

**DATE OF HEARING:** December 7, 2001

**DATE OF DECISION:** May 23, 2002

## DECISION

### APPEARANCES:

The Appellant, Vasant Patel, appeals a determination of a Delegate of the Director dated September 6, 2001. The issue relates to whether or not Mr. Patel is owed unpaid wages by his former employer, National Business Centre (1989) Ltd. The Delegate of the Director determined there had been no breach of the *Act* as alleged by the Appellant.

### *The Determination*

According to the Delegate, Mr. Patel made inconsistent claims respecting the wages he was to be paid and hours he worked for his former employer. The Delegate stated that the work Mr. Patel performed began on or about April 5, 2001, and ended May 2, 2001. Mr. Patel initially claimed that he had worked for the employer for 155 hours. He alleged his pay rate was to be \$15.00 per hour and that later the employer agreed to \$13.00 per hour.

The parties did not dispute that Mr. Patel was paid \$800.00 on or about May 3, 2001. Nor is there any dispute that Mr. Patel was not provided with a payslip indicating his hourly rate of pay, statutory deductions or the basis for the \$800.00 payment.

In a May 11, 2001, e-mail to his employer, Mr. Patel asserted that a total of \$1,289.50 was due.

According to the Delegate, in an undated letter received on July 23, 2001, Mr. Patel alleged that he worked 108.5 hours, that \$1,410.50 was due and of this sum only \$800.00 had been paid. Therefore, \$610.50 remained outstanding.

In an August 14, 2001, letter to the Delegate, Mr. Patel claimed he worked 155 hours. He submitted a worksheet which showed he had worked 108.05 hours. He alleged that it had shown these hours were to be paid at \$13.00 per hour, but the Employer erased that \$13.00 per hour rate and wrote in \$8.00 per hour. He alleged that \$2,089.75 was payable, less the \$800.00 already paid, leaving a gross amount of \$1,289.75 now due.

The Delegate noted that the Employer made a submission dated July 11, 2001, in which it enclosed a timesheet showing Mr. Patel had worked 127.5 hours and that the wage rate payable was \$8.00 per hour. The Delegate mentioned that a copy of an Employer e-mail to Mr. Patel dated April 14, 2001, which noted that his hourly rate was \$8.00 per hour had been provided with Mr. Patel's claim. (The date of this e-mail became an issue in the appeal and it became clear that it was an error and was sent May 14, 2001.)

The Delegate stated that the information and evidence contained in the Employer's submission supported the conclusion that \$7.89 plus 4% of \$1,017.00 as vacation pay, or \$40.64, may still be due. The combined sum still payable appeared to be \$48.53.

The Delegate went on to observe that there was conflicting information concerning the hours Mr. Patel worked and the wage rate he was to be paid. There was no supporting evidence such as a payslip or recent employment contract. The Delegate also noted that Mr. Patel's claim that he worked 155 hours

was not supported by his prior written timesheet totals. There was other evidence supporting the Employer's assertion that his wage rate was to be \$8.00 per hour.

The Delegate observed that there was a lack of evidence and there were flaws in each of the parties' respective positions. The Delegate endeavoured to assist the parties in reaching a settlement, but those efforts failed. The Delegate then went on to say that because of the failure of the settlement, he could not resolve the dispute. He then concluded:

- (a) "[b]ased on limited information and evidence presented and in accordance with Section 76(2)(d) "there is not enough evidence to prove the complaint," this file is being closed" and
- (b) "I can only resolve monetary issues under the *Act* if solid evidence supports this. No such evidence was evident or presented in this case."

The Delegate then made additional comments about the failure of the settlement process and made a determination that the *Act* had not been contravened.

***Written Submissions***

In submissions accompanying his appeal form, Mr. Patel alleged that when he commenced work with the Employer on April 5, 2001, Sylvia McLeod entered into two contracts with him for work to be paid at a rate of \$15.00 per hour. He alleges that she signed these contracts. After 2 days of work, Mr. Patel and Ms. McLeod agreed to change his rate of pay to \$13.00 per hour and he continued to work at that rate until the end of the month. On May 2nd, 2001, he asked that she prepare his pay cheque. He provided her with a copy of a worksheet showing the hours he had worked. On that worksheet, she calculated that he had worked 108.5 hours at \$13.00 per hour, which totals \$1,410.50. This calculation was made in pencil on the document and she erased the calculation when he disputed her calculation of the hours he had worked. A "worksheet" attached to the submission, set out in Mr. Patel's handwriting, Mr. Patel's notes of his hours worked up to April 30, 2001, include the following notations:

15	X	7.5	=	112.5
1	X	3.5	=	3.5
				116.5
				-5.0
				111.0

These notes appear to correspond to the numbers of full dates he worked to April 30 (15) and a half day he worked in that period.

Also noted on the worksheet, in the Employer's handwriting, is:

14 days	@	7.5	=	105.0 hr
1 day	@	3.5	=	3.5 hr
				108.5

And \$1,410.50

monthly

At the hearing, Mr. Patel provided a copy of a second side of this worksheet, which recorded an additional day and a half worked on May 1 and May 2, respectively.

The same day, May 2, 2001, Ms. McLeod gave Mr. Patel a cheque for \$1,410.50 made out to “cash”. No payslip was attached. Mr. Patel asked her to make the cheque out in his name and ensure that the deductions required by law were made from it. Ms. McLeod told him that she was too busy and had not prepared it. Instead, she took back the cheque for \$1,410.50 and gave him a cheque for \$800.00 and told him that she would pay him the remaining balance after she had prepared his payslip.

When she did not provide him with the balance, he wrote her a letter asking for same on May 11, 2001. In the letter which he attached, he wrote that he could not continue working because of the bus strike. He claimed he had worked for 155 hours. He had been paid \$800 on account and was owed \$1,289.50.

On May 14, 2001, he received an e-mail from Ms. McLeod asking him to provide her with a contract stipulating the hourly rate he was to be paid. Later the same day, he received a second e-mail, erroneously dated April 14, 2001, in which he was described as an inexperienced bookkeeper and was told that if he did not provide a contract stipulating the hourly rate he was to be paid, signed by both parties, his cheque would be made out using \$8.00 per hour as the rate of pay. Additionally, the Employer noted that Mr. Patel’s employment ended on April 30, 2001, but he claimed to have worked 6 hours on May 1 and 2. She asked why he was at work and what work did he perform.

On May 15, 2001, Ms. McLeod sent Mr. Patel an e-mail in which she indicated she would calculate his pay base on the terms set out in her e-mail the previous day.

In the meantime, Mr. Patel sought the assistance of the Employment Standards Branch.

Mr. Patel’s grounds of appeal largely repeated his submissions set out above. He denied that he contended he worked 108.5 hours for the Employer. Rather, he had advised that the Employer’s calculation on the worksheet was that he had worked 108.5 hours at \$13.00 per hour, totalling \$1,410.50. He repeated that he disagreed with the Employer’s calculation of his hours as being 108.5 hours as it did not match his records for his hours worked.

He noted that the Employer told him she had no records of the hours he worked and asked him to fax her the details. However, in her letter of July 11, 2001, she attached a worksheet. He queried where the worksheet came from and notes that it did not have all the hours he worked for the Employer on it. He claimed that portions of this worksheet were altered by the Employer.

Additionally, Mr. Patel said that although the Employer took the position in its e-mail that his employment ended on April 30, 2001, he was not provided with notice of termination and he was on duty until May 2, 2001. He attached his calculations respecting his hours of work during that period.

Finally, he claimed that between April 5 and 30, 2001, he worked 130.8 hours at \$13.00 per hour. On April 28, 2001, he worked overtime of 12.9 hours at \$19.50 per hour. On May 1 and 2, 2001, he worked 11 hours at \$13.00 per hour. Additionally, he says the gross amount he was to be paid was \$2,094.75, less the \$800.00 already paid, leaving \$1,294.75 outstanding and still owing to him.

As part of this appeal, I was provided with copies of documents that were submitted by the parties to the Delegate. They included letters from Ms. McLeod. According to those letters, Ms. McLeod agreed that Mr. Patel worked for her during the month of April. Initially, he performed contract work at a fixed rate but that rate was not indicative of an hourly rate. He subsequently wanted to go on a regular hourly rate

and have deductions taken from his pay. She found that his work required a lot of supervision and review. He did not have any experience with income tax. She agreed to pay him \$8.00 per hour to start, with increases based on his performance as a bookkeeper. He worked a 7 ½ hour day, commencing at 9:00 a.m. He never worked any overtime. His ride picked him up at 5:00 to 5:30 each day. He submitted documentation of his hours of work, in his own handwriting, and she accepted those hours.

Ms. McLeod also noted that although Mr. Patel had no experience with income tax, it was agreed that he would use the employer's computer and program to gain experience and Ms. McLeod would assist him in learning. It was also agreed that this would not be an agreement of employment as he was not going to charge the employer for the time he spent learning to do income tax.

On May 2, 2001, Mr. Patel asked for his pay cheque. He submitted documentation indicating he had worked 108 hours. Ms. McLeod gave him an \$800.00 cheque and said she would take deductions off and pay him the rest, if any, in the coming week. At the time, there was a transportation strike, so he indicated he did not know when he would come in as he did not have alternate transportation. She told Mr. Patel that this was agreeable and they could make arrangements that would be suitable for him until the strike was over. She was out of the office for 4 days and on her return she found she had an e-mail demand from Mr. Patel for 155 hours' pay, additionally he demanded to be paid within 24 hours or he would go to the Labour Board. Ms. McLeod responded by e-mailing him back and asking to be provided with documentation in support of the hours claimed, on her receipt of which she would provide him with the remainder of the pay owing.

### ***Submissions at hearing***

A hearing was held respecting this matter, at which time both Mr. Patel and Ms. McLeod gave evidence. During the course of the evidence, each raised the settlement discussions mentioned earlier. Both agreed that the settlement discussions had been on a "without prejudice" basis and therefore I declined to hear evidence of those discussions.

### ***Mr. Patel's Submission at hearing***

At the hearing, Mr. Patel said that he had initially been hired by the Employer as a result of a referral from the Certified General Accountant Association. He was initially hired to do contract work. He said the first two contracts were to be paid for at a rate of \$15.00 per hour. He reached this conclusion because the first contract indicated he would be paid a fee of \$135.00 for 9 hours work and the second that he would be paid \$60.00 for 4 hours work. He noted that he was a recently landed immigrant from Kenya, where he had been an accountant, and needed to learn the system for doing Canadian income tax accounting. Therefore he did not finish the whole of the first contract. However, he finished the second one.

Mr. Patel said he started work between 9:00 and 9:10 in the morning and finished work between 5:00 and 5:15 in the afternoon. He was not always provided with work to do and so he sometimes had to sit idle in the office doing nothing. Mr. Patel says he noted down on his worksheet when he came to work and when he left each day. This was the information he wrote on his worksheet.

After his first 2 days on the job, Ms. McLeod went to Calgary for a few days, during which time Mr. Patel ran out of work. He told her that he had been offered work for \$13.00 an hour by Drake Office Overload. He could not sit idle working for nothing so he wanted to leave the job. Mr. Patel said that Ms. McLeod told him he could continue working on an hourly basis and offered him \$10.00 an hour. He refused. He

said that she then agreed to pay him \$13.00 an hour, to employ him on an hourly basis rather than a contract basis and to make statutory deductions from that amount. This agreement was to be retroactive to April 5, 2001, when he started to work for the Employer.

While Mr. Patel was working for the Employer, there was a bus strike. On April 28, he left work at 10:00 p.m. and, because of the strike, he was able to get a ride from Ms. McLeod to a friend's house.

On May 2nd, he spoke with Ms. McLeod at about 12:00 noon and told her that he was not in a position to come to work because of the bus strike and because he could not get a ride to work from his friends. He asked her to pay him the amount owing to him at that time. She then gave him a cheque for \$1,410.50. Mr. Patel pointed out to Ms. McLeod that she had made a mistake in calculating his hours. He asked her to give him a payslip showing the deductions for that amount. She said she had never made any employment record before and did not know how to prepare it. He insisted on having a payslip with the deductions marked on it. So, Ms. McLeod took the cheque back and gave him part payment of \$800.00. Ms. McLeod said she was really busy and would calculate his hours and mail the balance to him, later.

Mr. Patel said he then waited 10 days, during which time he did not receive payment. He tried to contact Ms. McLeod by phone and she did not respond. Ultimately, he e-mailed her on May 11, 2001, seeking payment before May 16, 2001, failing which he would take action to recover the amount owing. He wrote he had worked for 155 hours and been paid \$800.00. The balance owing was \$1,289.50. He also wrote that he was not in a position to get a ride to and from work and so he could not keep his job until the bus strike was over.

Ms. McLeod responded with an e-mail dated May 14 and an e-mail incorrectly dated April 14, 2001, but sent on May 14, 2001. According to those e-mails, she asked Mr. Patel to provide her with a contract signed by both parties setting out the rate he was to be paid, in the absence of which he would be paid the hourly rate the employer pays for an inexperienced bookkeeper and clerk, which was \$8.00 per hour. Additionally, she wrote that his employment ended on April 30, 2001. She queried the hours he contended he worked on May 1 and 2, 2001.

Mr. Patel said that he disagreed that he was to be paid \$8.00 an hour and so he took his objection to the Employment Standards Branch.

#### *Ms. McLeod's Response at hearing*

Ms. McLeod says that she originally hired Mr. Patel to do bookkeeping on a contract basis, whereby she would provide him with a work-order to perform bookkeeping work for a fixed rate and he would have to pay tax on his income. The "contracts" Mr. Patel supplied as evidence were the first two work-orders he was given. They each set out the fee he was to be paid and the estimated hours the job was expected to take. Although he would earn the equivalent of \$15.00 per hour if he completed the work in the estimated time, he would earn less per hour if the work took him longer to do. At no time did she agree to pay him \$15.00 per hour.

Ms. McLeod disagrees with Mr. Patel's account of how he came to be working on an hourly basis and what was the rate of pay they agreed upon. Ms. McLeod said that shortly after he started working, Mr. Patel indicated he did not want to work on a contract basis; he wanted to be paid an hourly rate.

Ms. McLeod says she told him she would hire him as a bookkeeper/receptionist. He could have the choice of either working on a contract basis, in which case she would draw up a work-order for him

whenever he was assigned bookkeeping work and he would have to pay tax on his income, or he could be employed on an hourly basis, in which case he would be paid \$8.00 per hour and she would make statutory deductions from his pay. He wanted to be paid \$13.00 per hour. Ms. McLeod did not agree to that. Nor did they discuss or agree to an hourly rate of \$10.00 per hour. The only hourly rate she suggested to him was \$8.00 per hour, which is the rate she pays inexperienced bookkeepers. She says that he agreed to work for that hourly rate. She says that after 2 weeks of work, she would not have offered him more than \$8.00 an hour because he was not skilled in Canadian taxes or accounting.

She queries why she would have agreed to pay him \$13.00 per hour if, as he says, there was no work for him to do and he was sitting idle. She says her office is never idle. It was impossible there was no work for Mr. Patel to do.

They had another discussion on or about April 25, 2001. By then, it was tax season and the Employer had a lot of tax work to do. Ms. McLeod said that things were not working out. Mr. Patel was not familiar with Canadian tax bookkeeping and could not do it. At that time, the employment relationship was severed. However, Ms. McLeod told Mr. Patel that while he was looking for another job, he could try to learn how to do Canadian tax bookkeeping using her computer and software, however, he would not be paid while he did this.

Ms. McLeod said that Mr. Patel did not work on May 1 and 2, 2001, because he left on April 30, 2001.

She said that when Mr. Patel later asked to be paid for his work, he submitted his hours and they totalled 108 hours, excluding the week he spent practicing Canadian tax bookkeeping. So she calculated what he was owed by multiplying those hours by \$8.00. She was prepared to pay him 127 hours to include the time he spent practicing. This totalled \$1014.00 at a rate of \$8.00 per hour. So she guesstimated that, after deductions, she would owe him approximately \$800.00 and gave him a check for that amount, on the basis that she would calculate the correct amount and pay him the balance, later.

Accordingly, she was shocked when she later discovered he was claiming that he worked 155 hours. She did not know where the 155 hours came from. She said it was not possible that he worked 155 hours.

Ms. McLeod admitted that the handwritten notation of "\$1410.50" on one of the copies of Mr. Patel's worksheets was her handwriting. She was unable to explain why it was noted on that document. She denied that she wrote a check to Mr. Patel in that amount.

With respect to Mr. Patel's claim for overtime, she said that she had not agreed to pay him overtime, but she would not dispute his claim for it.

*Mr. Patel's Response at hearing*

Mr. Patel agreed that he was initially hired on a contract basis and the contract price was the amount he was to be paid for the contract. He was not to be paid an hourly rate.

Mr. Patel agreed that he had had a discussion with Ms. McLeod in the last week of April in which she told him his work was not up to speed. He agreed that at that time, they severed the relationship and agreed that he could come to the office to practice.

Mr. Patel said that he worked until May 2, 2001, and stopped coming in because of the bus strike. He points to the Employer's check for \$800.00, which is dated May 3, 2001, in support. He said on May 1 and 2, 2001, he was working on a bookkeeping job that Ms. McLeod assigned to him.

Mr. Patel denied that he and Ms. McLeod had ever discussed paying him an hourly rate of \$8.00 per hour. When asked why he did not accept the offer of work from Drake Office Overload, Mr. Patel explained that the offer of work from Drake Office Overload was to be paid at the rate of \$13.00 per hour, but it was very temporary work. It was not an offer of on-going work.

Mr. Patel agreed that he was not to be paid for the week he spent practicing Canadian tax bookkeeping, nor is he saying that he should be paid for that week. He said that the "108 hours" was the amount of time worked to April 25, 2001, excluding the week of practicing. He agreed that he was not to be paid for April 26 to 30, 2001. However, he maintains that he should be paid for the time he worked on May 1 and 2, 2001. Accordingly, he should be paid 108 plus 11 hours for the hours he worked on May 1 and 2, 2001, or 119 hours.

## DECISION

I have carefully considered all of the written and oral evidence. The parties are at odds about almost everything. Although they contend that agreement was reached at the outset with respect to the wage rate to be paid to Mr. Patel, they disagree with respect to what was that wage rate. Additionally, they disagree with respect to the number of hours Mr. Patel worked for the Employer. Mr. Patel was not paid at all until May 2, 2001. There is no independent evidence in support of the claim of either party with respect to what was agreed upon concerning Mr. Patel's hourly rate.

There are inconsistencies in the evidence of both parties. For instance, Ms. McLeod can provide no explanation for why she placed a handwritten notation on Mr. Patel's worksheets stating "\$1,410.50". That is the amount that Mr. Patel's claim for wages of \$13.00 per hour would be based on the 108.5 hours Ms. McLeod asserted he worked in April, 2001. This would tend to suggest that they discussed an hourly rate of \$13.00 per hour on May 2nd, 2001 when they discussed what he was owed. That, however, does not in and of itself establish that Ms. McLeod agreed to pay him \$13.00 an hour at that time.

On the other hand, Mr. Patel has varied his claim with respect to the number of hours he says he worked and the length of his employment with the Employer. According to the Delegate, he initially claimed that he worked 108.5 hours. He later claimed that he worked 155 hours. At the hearing, after hearing the Employer's evidence, he acknowledged for the first time that his employment was severed on or about April 25, 2001, and he agreed that he was not to be paid for time he spent practicing Canadian income tax accounting using the Employer's equipment from April 26 to 30, 2001. However, he maintained that he should be paid for the time he worked prior to April 26, 2001, as well as the time he worked on May 1 and 2, 2001. Previously, he contended that he was entitled to be paid throughout the period from April 5, 2001 to May 2, 2001.

Mr. Patel provided no explanation of why, after his employment was severed on April 25, 2001, he should have been paid for any work after that time, and in particular for any work on May 1 and 2, 2001. There was no evidence that he was rehired for those days.

Additionally, Mr. Patel's claim for 155 hours is based on the assumption that he should be paid for every minute he was at the Employer's premises, including the time he spent practicing after his employment was severed, some of which latter time he calculated at overtime rates. He provided no explanation to



justify his claim to be paid without break or interruption from his arrival at to his departure from the Employer's premises each day, rather than the 8 hours a day he said were his hours of work. (Ms. McLeod, on the other hand, said he was to work a 7 ½ hour day with a half hour lunch break.)

This case turns on the credibility of the parties. I adopt the following comments of the B.C. Court of Appeal in *Faryna v. Chorna*, [1952] 2 D.L.R. 354, at 356 – 8:

. . . The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of a story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses and of those shrewd persons adept in the half-lie and of long and successful experience in combined skilful exaggeration with partial suppression of the truth . . . .

In the circumstances, while I find neither party is wholly credible, I find that Ms. McLeod is the more credible witness. Her evidence has been more consistent than Mr. Patel's. Her lack of explanation for the handwritten note on Mr. Patel's worksheet is not conclusive of an agreement between the parties that he would be paid \$13.00 an hour. It is also consistent with an explanation that on May 2, 2001, the parties discussed whether or not there was an agreement to pay him \$13.00 an hour and what the total amount of wages owed would amount to based on 108.5 hours worked. In any event, it is evident that the parties were not agreed at the conclusion of that meeting with respect to precisely what amount Mr. Patel was to be paid.

In the final analysis, I conclude that Mr. Patel has not established on a balance of probabilities that there was ever an agreement that he would be paid \$13.00 per hour. Nor has he established on a balance of probabilities that he worked the number of hours he claims to have worked for the Employer.

As a result, I have concluded that the Delegate was correct in finding that Mr. Patel had not established his case. Accordingly, this appeal is dismissed.

## **ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determination is confirmed.

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**Alison Narod**  
**Adjudicator**  
**Employment Standards Tribunal**