Employment Standards TRIBUNAL

An appeal

- by -

Romeo Matibag
(the "Employee")

- 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:	Ib S. Petersen
FILE No.:	2001/17
DATE OF HEARING:	April 3, 2001
DATE OF DECISION:	May 23, 2001

DECISION

SUBMISSIONS:

Mr. Rober DeWolfe	on behalf of the Employer
Mr. Romeo Matibag	on behalf of himself

OVERVIEW

This matter arises out of an appeal by the Employee pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director issued on December 13, 2000. The Determination concluded that Matibag was not owed anything by the Employer on account of wages.

FACTS AND ANALYSIS

The Employee appeals the determination. The Employee, as the appellant, has the burden to persuade me that the Determination is wrong. The Employee has not, in my opinion, discharged that burden. In large measure, the issues on appeal are of a factual nature.

The issue before the delegate was broadly speaking whether Matibag was an employee and whether he had been compensated for all hours worked. With respect to the first issue, the delegate concluded that Matibag was an employee for the purposes of the *Act*.

Matibag worked for the Employer, the owner of an apartment building, The Balmoral in Vancouver, B.C. (the "Employer"), from November 1997 to February 2000 as a janitor. His rate of pay was $12.00 per hour at the time of the termination of his employment. He had worked under a series of contracts which provided that his hours of work were generally 7 hours per day, six days a week. As well, Matibag was paid twice a month, every 15th and 30th or 31st. There was no dispute at the hearing about these basic facts.

At the hearing Matibag argued that I should deal with the termination of his employment, *i.e.*, whether or not the Employer had just cause for the termination. From the Determination that does not appear to have been an issue before the delegate. The Employer stated that this issue was not raised before the delegate. There is nothing in the appeal to suggest that the matter of the termination was raised before the delegate as part of the complaint and that he failed to turn his mind to this aspect. As I ruled at the hearing, I do not intend to deal with the issue of Matibag's termination. In any event, on my review of the material before me there is nothing to substantiate that Matibag was terminated because he complained to the Employer about his wages. The termination occurred almost a year after Matibag had raised his wage complaint with the Employer. As well, the Employer stated that Matibag was a good employee and the

reason for his termination was a change to a resident manager. In the result, as I indicated at the hearing, and the issue of employee status not being appealed, the only issue before me is whether or not Matibag was paid for all hours worked.

As mentioned above, Matibag worked for the Employer under a series of contracts, three in total. I understand from the determination that these contracts ran from November 1, 1997 to February 29, 2000. The main change in these contracts was the hourly rate payable by the Employer. Under the first contract, the rate was $9.75, under the second, it was $11.00 and under the last, it was $12.00. According to a document submitted with the appeal, a memorandum from the employer summarizing the terms of Matibag's employment, he was paid a salary for 168 hours per month at the hourly rate. In addition, I understand that there were additional benefits added to Matibag's remuneration. In short, the issue before me boils down to whether or not Matibag worked in excess of 168 hours per month and, if so, was he paid for those hours.

The nub of Matibag's complaint is that he was not paid all hours worked. Matibag says that he was not properly paid for the first approximately one and a half year he worked for the Employer. After he discovered the error, he discussed it with the Employer and corrections were made. In the result, from July 1, 1999, he was paid correctly. The delegate considered the 2 year limitation period under Section 80 of the *Act* and determined that the relevant period for his purposes was March 1, 1998 to February 29, 2000. Matibag told the delegate, and this was not disputed at the hearing, that he usually took a 1/2 hour lunch break each day and that he, therefore, in effect, worked 6 and 1/2 hours per day. On my calculation this would come add up to 39 hours per week.

According to the Determination, Matibag also told the delegate that he did not keep records of his daily hours. There is some dispute about this. At the hearing, Matibag explained that he kept and handed in to the Employer records of when he added chlorine to the pool. The employer admitted that it did not keep daily hours because of the contract which stated the hours to be worked each day. Ms. Matibag, who testified at the hearing for her husband, on the other hand claimed to have kept track of Matibag's hours on a calendar. According to the determination, Matibag told the delegate that he was unaware of his wife keeping these records of his hours. This was not disputed at the hearing. The delegate dealt with Ms. Matibag's records as follows:

> "... In an interview with the officer, on March 28, 2000, the complainant stated that he did not have daily records. Later in the investigation, July, 2000, the officer was informed that [Ms.] Matibag had kept record of hours worked for her husband on various calendars. The original calendars were produced and a photocopy was sent to the employer for their reference. Peter Hickey, the chair of the strata council, expressed considerable doubt as to the accuracy of the records. The complainant told the officer that he was unaware of the records kept by his wife.

> It is noted that [Ms.] Matibag stated that the records she kept were recorded on each Friday, not each day. The complainant told the officer that he was unaware that these records were being kept. Therefore, it is apparent that the complainant could not have communicated to [Ms.] Matibag the actual hours he worked. Further, the complainant told the officer that he usually had a one-half hour meal break each day. These breaks are not recorded on any of the days on the calendars.
>
> In view of all of the above, the officer is not satisfied that the records kept by [Ms.] Matibag are accurate, and therefore, they are not sufficient to use as evidence in this case."

The delegate was of the view that there was insufficient evidence to continue the investigation and dismissed the claim for the payment of additional wages and overtime.

In all of the circumstances, I agree with the delegate that the records kept by Ms. Matibag are wholly unreliable for the reasons stated. As well, I agree with the Employer's argument at the hearing that the records are contrived. Ms. Matibag suggested that the reason, she stopped keeping track of hours worked after July 1, 1999, was that the Employer at that time agreed to pay properly. If that were the case, given her expressions of frustration over the Employer's alleged intransigence in dealing with her husband's complaint of improperly calculated wages over several months, I would have expected her to continue the practice of keeping hourly records, particularly as a memorandum submitted by Matibag--and attached to the appeal--indicated that the Employer after July 1, 1999 agreed to pay the $12.00 rate to hours in excess of 168 per month. On the question of the credibility of Ms. Matibag's records and her testimony in that regard, I adopt the words of the B.C. Court of Appeal in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, at 357:

> ".... the best test of the truth of the story of a witness ... must be its harmony with preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in the place and in those conditions."

To me, these records appear, as argued by the Employer, to have been written to back up her husbands appeal and not at the material time. To reiterate, I find these records to be wholly unreliable.

In my view, Matibag's appeal turns on whether he can show on the balance of probabilities that the delegate erred in rejecting the claim that he worked in excess of the 168 hours per month. Matibag was unable, in his testimony, to point to specific dates of where he worked and was not paid. All he was arguing, at the end of the day, was that he was underpaid because some months have more days than others and that he, therefore, logically, must have been underpaid. If, in fact, he worked 7 hours per day, six days a week, it follows that he would be entitled to at least 2 hours of overtime per week because he would have been working 42 hours per week (see Sections 35 and 40). However, Matibag stated to the delegate that he only worked 6 and 1/2

hours per day which, as mentioned above, comes to 39 hours per week and he is, therefore, not entitled to overtime wages. I also add that the Employer's scheme--as it appears from the memorandum mentioned above--of paying Matibag $12.00 per hour for hours in excess of 168 in a month could result in a situation where overtime is payable.

I recognize and am cognizant of the difficulties for Matibag in presenting his case before the Tribunal. It is not any easier when the case is presented though an interpreter. However, the parties appearing before the Tribunal are often unrepresented and the Tribunal is able to adjust its process accordingly. Among others, the Tribunal provides to the parties a brief explanation of its hearings. At the hearing, Matibag never moved beyond generalities in his testimony with respect to the key issue, hours worked. He spent most of the time discussing the circumstances of the termination of his employment. He appeared disorganized and unprepared for the hearing. For example, he sought to introduce documents that (while they may or may not have been submitted to the delegate) were "new" to the Employer and had not been provided to the Tribunal before the hearing as clearly stated on the hearing notice sent to the parties. While I have some sympathy for Matibag, I must decide this case on the evidence before me and in accordance with fundamental principles of natural justice. In brief, in my view, Matibag has failed to show that he worked in excess of the hours he was paid for.

In short, I am of the view that the Employee has not discharged the burden on the appeal and it is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated December 13, 2000, be confirmed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal