Employment Standards TRIBUNAL

An appeal

- by -

Aurel Miat
(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.: 2001/282

DATE OF HEARING: June 25, 2001

DATE OF DECISION: July 9, 2001

DECISION

SUBMISSIONS:

Mr. Don Leung — on behalf of the Employer

Mr. Aurel Miat — 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 Miat was owed $406.35 by the Employer on account of vacation pay. The employer, as I understood it, had paid this amount.

Miat had complained, among others, that the Employer, who had employed him as a resident caretaker, had him work around the clock, seven days a week, had failed to pay agreed amounts for certain "extra work," and had terminated him without just cause. The delegate awarded him vacation pay on some the "extra work" he had done for the Employer. The delegate found that there was insufficient evidence to substantiate Miat's claim for overtime pay and statutory holiday pay; he concluded that Miat, who had been employed between November 1, 1996 and January 31, 1999, had been given 30 days' notice and was, therefore, not entitled to additional compensation for length of service; and he did not agree with Miat that the Employer had agreed to pay the amounts claimed for certain "extra work."

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.

There are two matters before me in this appeal: (1) Mias says he is entitled to overtime wages because he worked seven days a week and, therefore, did not have 32 consecutive hours free from work per week as required by Section 36 (one of the sections in Part 4 that does apply to resident caretakers); and (2) Miat says that he is entitled to be paid the agreed rate for certain "extra work" he did for the Employer. At the hearing, Miat stated that these two issues were the only grounds of appeal for me to deal with.

This case essentially turns on credibility. On the question of the credibility, 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."

On that test, considering all of the evidence, I prefer Leung's evidence over Miat's where the is a conflict.

I turn first to the claim for overtime wages. Considering all of the evidence before me, I do not accept Miat's testimony that he in fact worked around the clock, seven days a week as claimed. In my view, he exaggerated his hours of work. I find it difficult to accept that, if, as he says, he worked around the clock, seven days a week, when would the "extra work," for which he was paid separately, be performed. I note, as did the delegate, that Miat did not keep track of his hours of work. His evidence boils down to the bald assertion, bolstered by a document he says is prepared by the Employer (but which the Employer denies), that he worked seven days a week, 24 hours a day. His testimony with respect to his hours of work lacked any particularity and detail. In the result, I agree with the delegate's assessment, namely that there is insufficient evidence to support Miat's claim.

Miat's claim for money on account of "extra work" similarly turns on credibility. Miat asserted that the Employer agreed to pay him certain amounts for "extra work" he did around the building, painting etc. He presented the Employer with a number of invoices detailing the work done by him on various apartments and the rate he says the Employer had agreed to pay. In some cases, the Employer says it agreed and paid, in other cases, the Employer says it did not agree to the pay the amounts and did not pay. Miat was unable to provide particulars as to how, when and where the amounts claimed by him were agreed to by the Employer. He was, in my opinion, unable to substantiate what the agreement was with the Employer. In fact, the document he sought to rely on as an agreement with the Employer (which on its face was prepared in June 1998) provided for different rates for the work than what Miat claimed he was entitled to. He sought to explain that discrepancy by explaining that these were "average" rates that could be exceeded if the amount of work demanded it. However, it does not make sense for the Employer to enter into such an agreement if the rates could be exceeded. His claim boils down to a bald assertion that the Employer agreed to pay the amounts. I do not accept Miat's version of the events and dismiss this aspect of the appeal as well.

Miat also claims for some improvements he had done to the apartment he lived in as a resident caretaker. This claim was not presented to the Employer until Miat's termination. Quite aside from the question of whether or not I have the jurisdiction to decide this matter, or whether that claim ought to be pursued in the courts, it is clear that the matter falls outside the two year limitation period for claims under the *Act* (Section 80).

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