

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

Bruce H. Smith

(“Smith”)

- of a Determination issued by -

The Director Of Employment Standards
(the “Director”)

ADJUDICATOR: Lorna Pawluk

FILE NO.: 97/610

DATE OF DECISION: November 24, 1997

DECISION

OVERVIEW

This is an appeal by Smith pursuant to Section 112 of the *Employment Standards Act* (the “Act” against a Determination issued on July 22, 1997 by the Director of Employment Standards (“the Director”).

The Director’s delegate determined that Smith, a resident caretaker with Stroshin Apartments Ltd. was not owed wages for work performed in excess of his normal hours of work or for unpaid vacation or statutory holiday pay. It was also determined that since Smith had received one month’s written notice of termination he was not entitled to termination pay.

ISSUE TO BE DECIDED

The issue is whether Smith is entitled to be paid for unpaid overtime, or unpaid vacation or statutory holiday pay, or termination pay.

FACTS

Smith was employed as a resident caretaker with Stroshin Apartments Ltd. On January 14, 1997, he received a letter from Wassa Stroshin, on January 14, 1997, terminating his employment as of February 15, 1997 for just cause and advising him to vacate his apartment by that date. Smith filed a complaint with the Employment Standards Branch, claiming that he had worked in excess of the 40 hours per week (8 hours a day, 5 days a week with Saturday and Sunday off) provided for in the Caretaker Agreement. He also claimed expenses for building supplies, unpaid vacation and statutory holiday pay and termination pay of 1 week in lieu of notice. Following an investigation, the Director’s delegate dismissed the complaint. The Determination under appeal here was issued on July 22, 1997.

Mr. Smith appeals, claiming that Wassa Stroshin continually broke the contract by contacting him outside the 40 hours a week specified in the contract. He said she would contact him as late as 9 p.m. He also said she required him to work all weekends and “did not even allow me to go to church on Sundays”. He claims that he purchased all cleaning supplies for the building out of his own pocket and that these sums remain unpaid. He said his wife presented the bills to Wassa but “she (Wassa Stroshin) threw them in her (Mrs. Smith’s) face.” He also claims she did not pay him for extra work, although she promised to do so. He also said that the work was outside the scope of the contract which required him to perform janitorial and caretaking duties only; he claims to have performed plumbing, electrical, extermination work on major

projects. In support, he submitted two handwritten diaries listing work done on a particular date.

In reply, Alex Stroshin said that Smith did not raise the issue of overtime prior to termination, or seek authorization of overtime and no overtime was authorized by the employer. Further it is argued that Smith was always paid for extra work; there were four such occasions and records show he had been fully paid. The employer said it was unaware that Smith had purchased supplies and had not authorized such purchases. They also point out that he was given one month's notice of termination as required by section 63 of the *Act*. Finally, it is argued that Smith, as the appellant, bears the onus of showing that the original determination is wrong and has not done so. This Tribunal is asked to dismiss the appeal.

ANALYSIS

After considering the Determination, the evidence submitted by both parties, in particular the diaries submitted by Smith and the submissions made on behalf of both parties, I have decided to confirm the Determination. It was correctly pointed out that these proceedings are not in the nature of a rehearing, but rather a more narrow appeal where the appellant is called upon to show that the Determination was incorrect. He has not done so here. Instead, he reargues the case which was put before and rejected by the Employment Standards Officer. Thus the appeal is dismissed on this ground. Nevertheless, I would also add that the evidence does not substantiate the claims made by Smith and rather shows that the Employment Standards Officer was correct in determining that there are no additional sums owing to Smith under the Caretaker Agreement. I agree that diaries simply list the tasks performed on a particular day and do not establish the amount of time spent on each task; thus, they do not establish Smith's claim to overtime. Similarly, the claim for expenses is unsubstantiated. Ideally, the claim for expenses should be accompanied by receipts; an explanation of how those supplies were used; and why they could not be purchased in the usual way; however, evidence short of this may be sufficient to establish a claim. However, we are presented with no evidence other than Smith's general statements. Similarly, there is no evidence to suggest that vacation or statutory holiday pay remains owing to Smith.

ORDER

Pursuant to Section 115 of the *Act*, I confirm the Determination dated July 22, 1997.

Lorna Pawluk
Adjudicator
Employment Standards Tribunal