

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 -

Julieta Bato and Allen Klarreich, a partnership operating as Jani King Commercial
Janitorial Services, and Bato Enterprises Ltd.
(the "Appellant")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: E. Casey McCabe

FILE No: 1999/595

DATE OF HEARING: December 2, 1999

DATE OF DECISION: December 14, 1999

DECISION

APPEARANCES:

Julieta Bato	for the employers
Barbara Keith	for herself
John Hartmann	for the Director of Employment Standards

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Julieta Bato on behalf of Julieta Bato and Allen Klarreich, a partnership operating as Jani King Commercial Janitorial Services, and Bato Enterprises Ltd. from a Determination dated September 10, 1999 which found the employers liable in the amount of \$807.06 for unpaid wages.

ISSUE(S) TO BE DECIDED

Did Barbara Keith work for the named employers and if so are wages owing?

FACTS

The events giving rise to Barbara Keith’s complaint occurred in September and October 1995. At that time Julieta Bato and Allen Klarreich were operating a home and office cleaning business. The evidence indicates that Bato and Klarreich had entered a specific franchise license agreement with an investment company which granted Bato and Klarreich the right to use the trade name “Jani King” during the course of their janitorial business. The business operated by Bato and Klarreich performed cleaning contracts for commercial enterprises, professional offices and private homes. Not all of the work that was performed by Bato and Klarreich was derived from the contractual relationship with the Jani King franchisor. The evidence indicates that some contracts, particularly contracts to clean private homes, were contracts that were secured by Bato and Klarreich outside of the Jani King business relationship.

The complainant, Barbara Keith, commenced employment with Bato and Klarreich on September 14, 1995. She had answered an order for cleaning persons that had been placed with the Vancouver South Employment Centre. That ad indicated that the employer was Jani King and gave an address that was currently being used by Bato and Klarreich as the office base for their business. The complainant testified that she was interviewed primarily by Allen Klarreich on September 14 and was hired to start that evening. She testified that she was given three addresses to report to that evening to commence her cleaning duties. Those addresses were an auto glass centre, a salon and a professional office. The complainant’s testimony indicated that besides these businesses, and other commercial offices or professional offices she also performed cleaning

duties in private residences. When she filed her initial complaint she provided the investigating officer with the dates that she had worked and the number of hours she had worked on those dates.

At the hearing she provided further particulars of that work mainly in response to the employer's appeal. The further evidence that was given included the time spent at each of the business establishments or private homes that she worked at during the period in question.

The complainant testified that she worked on September 14, 16, 17, 18, 20, 23, 24, and 30 for a total of 47 hours at straight time and 5.5 hours at time and a half. She further testified that she worked on October 1, 3, 4, 6, 7, 8, 10, and 14, 1995 for a total of 37 hours at straight time with two hours at time and a half and one hour at double time. The complainant's evidence is significant because it was the best evidence that the Director's Delegate had upon which to base his findings in the Determination dated September 10, 1999. Although the Delegate did not have the benefit of the particularization of the hours worked at each location during his investigation he was, nevertheless, provided with the dates and the hours worked. That is significant because despite diligent attempts by the Director's Delegate to obtain payroll information from Julieta Bato and Allen Klarreich the employers did not provide the relevant information until the hearing of this matter.

Julieta Bato in her appeal on behalf of the employers does not challenge the Delegate's interpretation of the *Act*. Rather, she challenges certain facts upon which the Determination was based. Specifically, she challenges the hours that were claimed for work performed on September 14, 23, 24, and 30 along with work performed on October 6, 1995. To support the employer's case Julieta Bato sought to introduce at the appeal stage time cards for the complainant which showed the work that had been performed under the Jani King contracts in September and October, 1995. Those records were brought to the hearing. By letter dated October 4, 1999 in the employer's appeal submission certain other records which were entitled Vancouver South Account Report for September 1995 and October 1995 were presented.

The employer took the position that the complainant had not worked any hours on September 14 and 24, 1995. The employer also challenged the September 23 and 30 claims by the complainant on the basis that the complainant had worked only two hours on each of those days and not the full hours as claimed. Likewise the employer challenged the claim for September 30, 1995 on the basis that the complainant had worked only two hours and not the 6.75 hours that had been claimed. Finally the employer challenged the complainant's claim for work on October 6 stating that she had worked only two hours that day and not the eleven as claimed.

In advancing its case against the work performed or allegedly not performed on September 23, 24, and 30 along with the work on October 6, 1995 the employer seems to be distinguishing between contracts that were performed under the Jani King franchise agreement and work that was performed outside of those contracts i.e. the work in the private residences. I am not prepared to accept that distinction. In a Determination dated March 5, 1997 Julieta Bato and Allen Klarreich, a partnership operating as Jani King Commercial Janitorial Services was determined to be a business, trade or undertaking in association pursuant to Section 95 of the *Employment Standards Act* with Bato Enterprises Ltd. That decision was confirmed on appeal (See BCEST #D317/97) The Director's Delegate in the Determination dated September 10, 1999 relied on the fact that the previous association under Section 95 had been made and not challenged in the appeal. The appeal

of the March 5, 1997 Determination was based on a quantum of wages that had been awarded not on the finding under Section 95 that the employers were associated.

There was no evidence lead in the hearing today that would cause me to review or disturb the finding in the March 5, 1997 Determination. Therefore I am not prepared to distinguish the work that was performed under the Jani King contracts from work that was performed under contracts secured outside of the Jani King franchise. The complainant testified and I accept that Julieta Bato and Allen Klarreich at all relevant times directed her in the duties, tasks and places of employment.

The employer challenged the Determination on the basis that it had taken four years for the matter to be brought directly to the employer's attention. Julieta Bato further argued that she had not seen the notation of dates and hours worked that had been submitted by the complainant as the basis of her complaint. The employers argued that due to the length of time it had taken to process the claim and their allegation that they had not seen the file material that substantiated the claim the claim should be dismissed.

In response to that argument Mr. Hartman testified that the Director's Delegate had forwarded to the employers at the address where the complainant reported for her initial interview the full packet of file materials upon which it relied to make its determination.

The Director's Delegate presented evidence that those packages had been mailed on September 24, 1996 to #109-3453 East 49th Avenue, Vancouver, B.C. address. On September 26, 1996 that envelope was returned to the Employment Standards Branch with a notation that the addressee had moved to an unknown address. The efforts made by the Director's Delegate to serve the demand for records on the employers are set out at the bottom of page two and the top of page three of the Determination dated September 10, 1999. In short, a June 10, 1996 letter outlining the details of Keith's complaint was sent to Mr. Allen Klarreich at #109-3453 East 49th Avenue, Vancouver, B.C. There was no response. On September 19, 1996 a demand for records was sent to the same address. It was returned on September 26, 1996 with the notation that the addressee had moved. Likewise, on October 29, 1996 an similar packet, containing a demand for employer records was forwarded to the same address and was returned on November 2, 1996 marked that the addressee had moved. However, in her testimony, Julieta Bato conceded that the times that these documents were mailed they had been forwarded to the current address.

After further investigation a Corporate Determination was issued on October 23, 1998 to Allen Klarreich doing business as Jani King with the address of 4564 Dawson Street, Burnaby, B.C. which was the registered address of the holding company which granted the franchise license agreements. That Determination was picked up but the card remained unsigned.

On November 3, 1998 the Regional Manager of the Employment Standards Branch received a phone call from Allen Klarreich regarding the October 23, 1998 Corporate Determination. Pursuant to that phone call it was determined that the style of cause was in error and the Determination was subsequently cancelled. However, subsequent demands for records were served upon Julieta Bato and Allen Klarreich at an address in Richmond, B.C. Subsequently, Julieta Bato and Allen Klarreich both had conversations with the Director's Delegate regarding

the complainant. In one of those conversations Julieta Bato demanded to know why the demand for records had been sent to Allen Klarreich as the complainant had not been working for Mr. Klarreich but rather had been working for Bato Enterprises Ltd. I take from this evidence which was not contradicted at the hearing that Julieta Bato and Allen Klarreich were well aware of the demand for records that had been made by the Director's Delegate. I do not accept that the employers were not aware of the complainant's claim until they received the Determination dated September 10, 1999.

The Tribunal has an established policy regarding the introduction of new evidence at the appeal stage. That policy limits the introduction of such evidence where the evidence was available but not produced during the investigative stage. (See *Kaiser Stables Ltd.* BCEST #D058/97). I am not prepared to diverge from that policy. I am not prepared to accept that the time cards and the account reports for September and October 1995 diminish the complainant's claim.

Finally, the employer argues that the demand for records is defective because the dates shown on the demand for records seeks information for a period which is longer than the period for which the wage claims are being made. For example, the demand for records dated September 19, 1996 seeks records for the period of September 1, 1995 to October 31, 1995. Mr. Hartman explained that the records for broader periods are demanded in order that the investigator may satisfy him or herself that there have been no payments made after the date of termination or alternatively whether payments have been made for any pre-employment work or expenses. Finally, the evidence indicates that the complainant did receive one payment of \$50.00 in cash. The Director's Delegate has deducted that payment in his calculation. For the reasons that I have stated in this award the employer's appeal must fail.

ORDER

I confirm the Determination of the Director dated September 10, 1999.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal