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 -

Elena Folch and Jose Luis Andrade
("Folch", "Andrade" or the "Appellant(s)")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	Ib S. Petersen
FILE NO.:	98/426
DATE OF HEARING:	August 27, 1998, December 8, 1998, January 15 and 21, 1999
DATE OF DECISION:	April 14, 1999

DECISION

APPEARANCES

Mr. John D. Smyth	on behalf of Folch and Andrade
Ms. Lissett Barsallo	on behalf of Micheala Granados ("Granados")
Ms. Sharon Charboneau	on behalf of the Director

OVERVIEW

This is an appeal by Folch and Andrade pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director of Employment Standards (the "Director") issued on June 8, 1998 which determined that the Appellants had contravened Section 46 of the *Employment Standards Regulation* (the "*Regulation*") by "failing to produce or deliver records as and when required". The penalty was $500.

The delegate's findings may briefly be set out as follows.

Granados filed a complaint with the Employment Standards Branch (the "Branch") alleging that she had been employee of Folch and Andrade in Mexico City and Vancouver between 1984 and 1997, that she had worked "up to 7 days per week and up to 15 hours per day on a regular basis", and that she had received no wages. Granados alleged that she was owed regular wages, overtime wages, statutory holiday pay and vacation pay.

On March 11, 1998, the delegate issued a Demand for Employer Records, addressed to the Appellants, forwarded by certified mail, requiring them to "produce an deliver employment records for" Granados. The Demand was issued using the Branch's standard form which states that the records required to be disclosed "include" "all records relating to wages, hours of work, and conditions of employment" and "all records an employer is required to keep" under the *Act* and *Regulation*. The Determination notes:

> "You failed to produce or deliver the records described in this Demand, stating that no payroll records were kept as there was no employment relationship with Ms. Granados. The penalty for this contravention is $500.00 which is imposed under Section 28 of the Employment Standards Regulation."

The delegate defined the issue before her as to whether an employment relationship existed between Granados and Folch and Andrade. She concluded that Granados was, indeed, an employee and that the Appellants had contravened Section 46 of the *Regulation*. In reaching the conclusion that Granados was an employee at the material time, the delegate considered submissions from counsel for Folch and from Andrade. These submissions boiled down to the

proposition that Granados was a friend who had been brought to Canada on "compassionate grounds" and lived with them as a friend or family member. The delegate was of the view that Folch and Andrade had given conflicting versions as to how and why Granados came to Canada in 1986. In particular, the delegate relied upon an immigration document which stated that Granados was to be employed as a domestic by the Appellants. The delegate advised counsel for Folch of this information on May 15, 1998 who, as of the time of the Determination, June 8, 1998, had not responded. Under the heading "finding", the delegate stated:

> "The onus is on Ms. Folch and Mr. Andrade to prove that an employment relationship did not exist with Ms. Granados in Canada. They have failed to do so in that their evidence is in direct contradiction of the evidence contained in the "Record of Landing" provided by federal Immigration officials.
>
> It is determined, on a balance of probabilities, that an employment relationship did exist, and that as the Employer, they were required to keep payroll records and produce them on Demand as per the Employment Standards Act. The Employers' failure to produce payroll records has hindered the investigation into this matter and in the determination of wages owed".

A hearing, with all parties present, was held at the Tribunal's offices in Vancouver in December 1998 and January 1999, allowing the parties to call evidence and make submissions. On those days, the Tribunal provided an interpreter for Granados. As the hearing dates were taken up--for the most part--by evidence, I allowed the parties the opportunity to file written argument. The parties filed substantial written arguments.

ISSUE TO BE DECIDED

As of the time of hearing, nor, indeed up the present time, the delegate has not issued a determination with respect to the merits of Granados claim for wages, overtime, statutory holiday pay and vacation pay. The Appellants argue that the issue is whether Granados is an employee. In view of that position, and the delegate's finding that she was an employee, and the potential prejudice to Granados' position should I find that she was not an employee without notice to her, I adjourned the hearing, initially scheduled for August 27, 1998, to allow for her participation.

In the final submission to the Tribunal, the delegate argued that, in any event, the existence of an employee-employer relationship is irrelevant with respect to the Directors authority to issue a penalty for failure to comply with a Demand for Employer Records.

The issues, as I see them, therefore, are as follows:

1. the Directors authority to issue and enforce a Demand for Employer Records, regardless of employer status; and

2. Ms. Granados employee status for the purposes of the *Act*.

BACKGROUND

The following facts provide a useful backdrop for my decision:

1. Granados was an employee of Folch and--later--Andrade in Mexico City from 1976, working first one--later--two days a week, and--finally--moved in with them. She worked as a housekeeper.

2. In 1986 the Appellants moved to Canada. Granados moved in with friends of the Appellants in Mexico.

3. In December 1986, Granados joined Folch and Andrade in Canada. After some time, during which she lived with a friend of the Appellants, she moved in with them.

4. Granados did cooking, cleaning and other house keeping chores while living with the Appellants.

5. The Record of Landing, issued by the federal immigration authorities, indicated that Granados came to Canada as a "domestic" and that she "will work with: (Andrade) Jose Luis. (Andrade, Nee Folch), Elena".

6. Folch and Andrade gave Granados $30 per week during most of the time she was living with them.

7. Between 1994 and 1997, Granados received income assistance from the Ministry of Social Services. These funds were deposited into a bank account held jointly by Granados and Folch. The application for assistance was filed out by Folch and signed by Granados.

8. Granados left the Appellants' home in January 1997. Granados requested the assistance of the Vancouver Police Department when she moved out.

9. Subsequently, Granados filed a complaint with the Branch.

10. A Demand for Employer Records, issued on March 11, 1998, was mailed to Folch and Andrade by Certified Mail.

11. On March 16, 1998, counsel for Folch denied that Granados was an employee.

12. On April 28, 1998, a meeting between the parties was held at the delegate's office. At the meeting, Folch provided Granados passport and other documents but not the Record of Landing which she denied having in her possession.

13. With Granados' written authorization, the delegate obtained a copy of the Records of Landing from Immigration Canada.

14. The delegate wrote to Folch's counsel on May 15, 1998 and June 1, 1998, requesting a response to the information set out in the Record of Landing. She also contacted him by telephone. However, she had not received a response as of the date of the issuance of the Determination.

15. On June 8, 1998, the delegate issued the Determination.

ANALYSIS AND DECISION

1. The Director's Authority to Enforce Demand for Employer Records

The delegate argues that Section 98(1) provides the Director with the discretionary authority to impose a penalty when satisfied that "a person" has contravened a requirement of the *Act*. The Director is not required to decide first whether a person is an employer before ordering disclosure and production of documents. Provided the demand is *bona fide* and not arbitrary, the Director may demand "any record relevant to the investigation" and documents which assist in establishing the relationship are relevant (Section 85(1)(c) and (f); *Lowe*, BC EST #D502/98). The delegate also argues that the determination must include reasons for the exercise of the discretion and those reasons were stated in the Determination. In this case the delegate argued, in her final submission:

> "(T)he evidence confirms, on the balance of probability, that Appellant Folch withheld the Record of Landing from the Delegate throughout the investigation. The demand issued was bona fide, not arbitrary, and the Appellants are persons as defined in Section 46. They are not exempt from liability."

The Appellants deny having the immigration document in their possession at the time the request was made. Folch testified that she believed that the document, which had been issued some 12 years earlier, had been appended to Granados' application for citizenship some years earlier. The Record of Landing, introduced into evidence at the hearing, was not produced by the Appellants but obtained from the Immigration Canada.

Section 85 of the *Act* reads:

> 85. (1) For the purposes of ensuring compliance with this Act and the regulations, the director may do one or more of the following:

> (c) inspect any records that may be relevant to an investigation under this Part;
>
> (f) require a person to produce, or deliver to a place specified by the director, any records for inspection under paragraph (c).

The *Regulation* also provides:

> 46. (1) A person who is required under section 85(1)(f) of the *Act* to produce or deliver records must produce or deliver the records as and when required.

I agree generally with the legal principles advances by the delegate with respect to the Director's authority to issue and enforce a demand for records. However, I would go one step further. I agree with my colleague in *Jack Verburg operating as Sicamus Bobcat and Excavating*, BC EST #D418/98, at page 4, where he states with respect to Section 85(1)(c) and (f):

> "There are two matters of note in the above provision. First the authority to inspect applies to *any* records that *may* be relevant. A determination of relevance of records sought by the Director to be inspected does not have to be established before inspection is allowed. And most certainly, it does not depend on the perception of the person to whom the demand is made of the relevance of the records sought to be inspected. Second, the authority to require production is associated with "an investigation under part 10 of the *Act*. An investigation under the *Act* does not depend either on a complaint or proof of a contravention of the *Act.*

The Adjudicator continued:

> ... A demand must be *bona fide* and not arbitrary, but assuming it is validly issued, Section 46 of the *Regulation* imposes a statutory duty on a person to whom a demand has been issued ...

Briefly put, a person need not be an employer to be required to comply with a demand. Folch and Andrade are "persons" and, therefore, were clearly obligated to produce or deliver records, properly demanded by the Director or her delegate, in their possession or control.

In *Narang Farms and Processors Ltd.*, BC EST #D482/98, at page 2, the penalty process is summarized as follows:

> "In my view, penalty determinations involve a three-step process. First, the Director must be satisfied that a person has contravened the *Act* or the *Regulation*. Second, if that is the case, it is then necessary for the Director to exercise her discretion to determine

> whether a penalty is appropriate in the circumstances. Third, if the Director is of that view, the penalty must be determined in accordance with the *Regulation*."

On balance, I am satisfied that Appellants may have contravened Section 85 of the *Act* and Section 46 of the *Regulation* in failing to produce the Record of Landing. The Demand was issued was sufficiently broad--using the Branch's standard form--stating that the records required to be disclosed "include" "all records relating to wages, hours of work, and conditions of employment" and "all records an employer is required to keep" under the *Act* and *Regulation*. In the circumstances of this case, the Record of Landing is a document relating to "conditions of employment". It is relevant with respect to the issue of employee status.

Folch's evidence is that she took this document into her possession at the time Granados arrived in Canada, or shortly thereafter, together with her passport and other documents, but that at the time of the demand the Record of Landing was no longer in her possession. According to Folch: "when we applied for citizenship, they kept the Record of landing". Folch agreed that she "always kept everybody's documents". These other documents were turned over to the delegate at a meeting between the parties at the delegate's office. It is clear from the Determination that the delegate did not believe Folch. In my view, she was entitled to exercise that judgement. Having heard Folch's testimony, I also find it difficult to accept that this document was not in her possession when the demand was made. In my view, it is more probable than not that she simply did not wish to disclose this document because it, everything else being equal, pointed to Granados being an employee, and Folch and Andrade being her employers. In my view, Folch's testimony with respect to the origin of the Document--and, in fact, the circumstances of Granados obtaining her immigrant status in Canada--was vague and evasive. I adopt the words of the B.C. Court of Appeal in *Faryna v. Chorny*, (1952) 2 D.L.R. 354, at 357, cited by Granados:

> ".... 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."

Folch and Andrade's explanation for characterizing Granados as a "domestic" who "will work with" them, came down to this: it was the only way they could get her into the country, given her age, education and other factors considered by Immigration Canada. In cross examination by the delegate, the proposition was put to Folch that she "told Immigration whatever they wanted to hear". She answered it was "the only way" and "it was not true". In other words, they now agree that they were prepared to make untrue statements to a branch of the federal government when it was--in their view--convenient to do so. Similarly, Folch prepared Granados application for social assistance and did not indicate that other persons than Granados were living in the household. This was clearly not true. Granados English was poor and she may not have understood what she signed. However, Folch is well-educated, sophisticated and able to handle herself in English. I would find it difficult to accept that she did not know or understand the implications of filling the form out incorrectly. On Folch's testimony this was done to obtain

money for the household which, at the time, was in financial difficulties. In my view, this speaks volumes as to their credibility.

Section 81(1)(a) of the *Act* requires the Director to give reasons for the Determination to any person named in it (*Randy Chamberlin*, BC EST #D374/97). The reason for penalty--stated in the Determination--was that the Appellants did not produce *"payroll records"* because "none were kept" as Granados was not an employee. Under the heading "findings", the delegate stated:

> "It is determined, on a balance of probabilities, that an employment relationship did exist, and that as the Employer, *they were required to keep payroll records and produce them* on Demand as per the Employment Standards Act. The Employers' *failure to produce payroll records* has hindered the investigation into this matter and in the determination of wages owed".

While the delegate argued at the hearing that the penalty was imposed because Folch withheld a relevant document, Granados' Record of Landing, that is far from clear from the Determination which speaks to "payroll records"--which the delegate knew the Appellants did not have, given their position that Granados was not an employee. Payroll records include the records of the information required to be kept under Section 28 of the *Act*: the employee's name, address, start of employment, wage rate, hours of work etc. The Record of Landing--while clearly relevant--is not a payroll record. The provision stated to have been contravened is Section 46 of the *Regulation* which requires a person to produce and deliver records "as and when required". The Record of Landing is a record which may be required to be produced and it is not a "defence" that the person to whom a demand is made is not an employer.

The *Act* and *Regulation* distinguish between an obligation to "keep" records and an obligation to "produce" them. Provided that person is an employer, that person may have contravened Section 28 of the *Act*, the obligation to keep records, and may also have contravened Section 46 of the *Regulation*. As noted in *Dhillon Investments Ltd. operating as Da Tandoor Restaurant*, BC EST #D298/98: "An employer may be in breach of one or both of these requirements". However, this does not mean that an employer who fails to "keep" records is automatically in breach of the obligation to "produce" or "deliver". In my view, an employer who does not keep the records cannot, obviously and logically, produce those records and may be penalized for failure to keep those records, but not for the failure to produce them unless, in the circumstances, the employer conduct itself in a manner that warrants the imposition of a penalty separate and apart from the failure to keep those records. The penalty for failure to "produce" records must relate to the production of records.

I have several concerns about the penalty Determination in this case which--ultimately--lead me to conclude that the Determination cannot stand.

First, the stated reason for the imposition of the penalty is that Folch and Andrade, as employers, failed to produce "payroll records". As mentioned above, I do not accept that the Record of Landing is a payroll record. If the penalty is based on the finding that Folch and Andrade are employers, as is the case here, then the delegate could have imposed a penalty for failing to

"keep" records but not, in my view, for the failure to produce the records which cannot be produced because they were not kept. In this case, the delegate knew--before issuing the penalty Determination--that Folch and Andrade did not have the payroll records because they did not keep those records. Despite the words used in the Determination-- "payroll records"--it is clear from the correspondence that the document sought by the delegate was the Record of Landing and information--in fact, a response--related to this document. Arguably, therefore, the penalty was imposed in respect of conduct related to the production of records for which the delegate would be entitled to impose a penalty. Nevertheless, it is a requirement that the Determination clearly sets out the basis for the penalty. If, as I now argued, the basis for the penalty was the failure to produce the record of Landing, the Determination could simply have stated that. In this case, the Determination did not clearly state the reason for the penalty.

Second, the finding that Folch and Andrade are employers appears to be based on the delegate's view that they were under an obligation to prove that an employer-employee relationship did not exist, though the delegate goes on to say that she has "determined, on a balance of probabilities, that an employment relationship did exist". At the very least, the reasoning is not clear. In my view, there is no onus on the part of an alleged "employer" to prove that there is not an employment relationship. I do not agree with the delegate's statement that "the onus is on Ms. Folch and Mr. Andrade to prove that an employment relationship did not exist with Ms. Granados in Canada". The delegate must establish that an employment relationship exists if that is a necessary element of the determination (which it need not be). I hasten to add that the delegate could certainly arrive at the conclusions, she did, *i.e.*, that there was an employment relationship between Folch and Andrade and Granados, based on the facts before her and referred to in the Determination. The issue of employee status was fully canvassed before me. As will be seen below, I agree with her conclusions with respect to "employee" status. However, the Determination did not clearly state the reason for the penalty.

The Director's authority under Section 79(3) of the *Act* is discretionary: the Director "may" impose a penalty. Given that the power to impose a penalty is discretionary and is not exercised for every contravention, the Determination must contain reasons which explain why the Director, or her delegate, has elected to exercise that power in the circumstances. It is not adequate to simply state that the person has contravened a specific provision of the *Act* or *Regulation*. This means that the Director must set out--however briefly--the reasons why the Director decided to exercise her discretion in the circumstances. The reasons are not required to be elaborate. It is sufficient that they explain why the Director, in the circumstances, decided to impose a penalty, for example, a second infraction of the same provision, an earlier warning, or the nature of the contravention. In this case, the Appellants do not argue that there was insufficient reason for the exercise of the Director's discretion and, thus, the imposition of the penalty and I make no decision in that regard.

Section 98 of the *Act* provides the Director's delegate with the discretion to impose a penalty in accordance with the prescribed schedule. Section 28 of the *Employment Standards Regulation* (the "*Regulation*") establishes a penalty of $500.00 for each contravention of Section 28 of the *Act* and Section 46 of the *Regulation*. The Director, or her delegate, has no discretion to determine the amount of the penalty once she, or her delegate, has determined that a

contravention of 28 of the *Act* or Section 46 of the *Regulation* has occurred (see Section 28 of the *Regulation*). There is nothing in Section 28 of the *Regulation* which limits the authority of the Director's delegate to impose penalties only where contravention are made knowingly. The amount of the penalty was not an issue.

In brief, the Determination failed to clearly state the reason for the penalty and, in the result, I have decided to cancel it.

2. "Employee" Status

If I am wrong with respect to my conclusions set out above, and in any event, I turn to the issue of "employee" status.

The Appellants note, both in their submission and final reply, that the parties agreed that the hearing would determine "employee" status. The Appellants submission, page 1, reads:

> "The Appellants' understanding is that, by agreement of all parties, the employment issue is to be decided by applying the test and standards applicable to a determination on the merits."

Their reply states, at pages 3 and 4:

> "... The within hearing was initially adjourned to allow for full participation of the Complainant. The Appellants' understanding was that the parties had agreed to a full hearing on the employment issue in order to avoid potential problems with *res judicata*. An extensive set of hearings were held in which evidence going far beyond that available to the Director's Delegate when she rendered her penalty determination was introduced. Should the matter be decided purely on the standards applicable to Regulation 46, the agreement of the parties would be defeated and the entire matter could well have to be reheard."

Neither the delegate nor the Granados take issue with--or dispute--this characterization. In any event, the issue of employee status is relevant in the circumstances of this case because the delegate considered it necessary to make the determination that Granados was an employee. As is evident from the above, it is not necessary to hold a person to be an employer to enforce a demand for records.

The key issue in this case, from the parties standpoint, is whether Granados was an employee of the Employers. In my view, the standard to be applied is one of "correctness" similar to other determinations on the merit.

It is useful to set out the statutory provisions and basic principles which governs the determination of "employee" status under the *Act*.

"Employee" is defined in the *Act*. Section 1 provides, *inter alia*:

> "employee" includes
>
> (a) person ... receiving or entitled to wages for work performed for another;
>
> (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee ..."

"Work" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere (Section 1).

An "employer" and a "domestic" is also defined in Section 1 of the *Act*:

> "employer" includes a person
>
> (a) who has or had control or direction of an employee; and
>
> (b) who is or was responsible, directly or indirectly, for the employment of an employee.
>
> "Domestic" means a person who;
>
> (a) is employed at an employer's private residence to provide cooking, cleaning, child care or other services, and
>
> (b) resides at the employer's private residence;

The Appellants contend that these definitions should be given a "reasonable interpretation". As I read their submission, they say that the definitions are circular. The also say that the "term 'employed' connotes the existence of an agreement that services are to be exchanged for remuneration". The delegate argues that I must take a broad and purposive approach in determining employee status. The advocate for Granados agrees generally with the delegate and refers to a number of cases where the courts or the Tribunal have dealt with employee versus independent contractor. In my view, the latter is not particularly helpful because they generally deal with the characterization of a relationship, is it one or the other, as opposed to whether the relationships exists at all.

I agree that the definitions are problematic and their application to individual circumstances may not be straightforward. They do, however, provide some guidance. First, it is well established that these definitions are to be given a broad and liberal interpretation. Second, my interpretation must take into account the purposes of the *Act*. The Tribunal has on many occasions confirmed the remedial nature of the *Act*. It is well established that the basic purpose of the *Act* is the protection of employees through minimum standards of employment and that an interpretation which extends that protection is to be preferred over one which does not (see, for

example, *Machtinger v. HOJ Industries Ltd*., (1992) 1 S.C.R. 986). As well, Section 4 of the *Act* specifically provides that an agreement to waive any of the requirements is of no effect.

Section 2 provides:

> 2. The purposes of this *Act* are as follows:
>
> > (a) to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment;
> >
> > (b) to promote the fair treatment of employees and employers;
> >
> > (c) to encourage open communication between employers and employees;
> >
> > (d) to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act;
> >
> > (e) to foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia;
> >
> > (f) to contribute in assisting employees to meet work and family responsibilities.

As noted in *Christie et al.*, *above*, at page 2.1-2.2 with respect to the common law tests of "employee" status:

> "In each of these contexts the purpose of characterizing a relationship as employment is quite different from the purpose of the characterization in the action for wrongful dismissal, the traditional common law action in which the two-party relationship that is the subject of this service is elaborated, to say nothing of the purpose of particular statutes in which the term may appear. ... It follows that precedents arising under common law or under a particular statute can be legitimately rejected or modified when the question of "employee" status is asked for a different purpose."

I agree with the delegate and Granados that she was an employee and that her employers were Folch and Andrade.

Folch and Andrade argue that there was no employment relationship in Canada. They do not dispute that she did household chores and work around the house but she did so simply as a member of the household. She was like a friend or family member and they brought her to Canada out of concern for her welfare:

> "The Appellants moved to Canada in 1986. In leaving, they had serious concerns with respect to Ms. Granados' welfare. As far as they knew, she now had no

> employment and no reasonable prospects for employment. She had no relatives on whom she could rely and there were no social welfare programs for senior citizens in Mexico. She had also lost her home by virtue of the Appellants moving away. Both of the Appellants testified that it was for these reasons that they invited Ms. Granados to live with them in Canada."

The Appellants say that they did not "need" a domestic when Granados moved in with them in Mexico and needed it even less in Canada. While they concede that "it is probably correct to say that Ms. Granados would not have been able to come to Canada" unless "as a domestic", they say that the delegate placed undue weight on the Record of Landing in arriving at her conclusion that Granados was an employee. They say that this document "does not reflect their true intentions" and that they had a "good reason" for "being untruthful". When the relationship between Folch and Andrade and Granados is considered as a whole the Appellants submit, she was not an employee for the following reasons:

1. They feel they made it clear to Granados that her employment was terminated when they moved to Canada. They had no discussions with Granados which would suggest that she was an employee.

2. Granados received remuneration in Mexico but not in Canada;

3. Granados claimed to have worked 6 1/2 days a week and up to 15 hours per day for the Appellants. This is not credible given the size of the house and the fact that Folch was away from the home for extended periods and both travelled frequently.

4. Folch and Andrade did their share of the housework.

5. While Granados did not eat with Folch and Andrade, or "was included in social events", they testified that she was welcome to do so.

6. The terms used by Granados to refer to Folch--senora/donia--and Andrade--senor--are simply terms of respect.

7. Witnesses called by Folch and Andrade confirms that the relationship was not one of employment.

8. Folch left an amount for Granados in her will.

The delegate argues that the facts establish that Granados was an employee and, in other words, that the Record of Landing reflected Folch and Andrade's true intentions, i.e., that she was brought into the country as a "domestic" to perform services as such. The delegate, as noted above, says that the evidence is persuasive that Folch intentionally withheld the document from the delegate. She argues that Folch is not a credible witness who, as well, withheld information from the Ministry of Social Services on the application form for income assistance and lied to Immigration Canada. Granados came to Canada as an employee and provided services as an

employee. The delegate argues that, in the circumstances of her previous employment in Mexico, the fact that there were no discussions between Granados and Folch and Andrade as to the term and conditions or continuation of employment does not mean that the relationship did not continue. The responsibility for confirming changes in the relationship rests with the Employer. "The onus falls on the Appellants to clearly demonstrate that the employment relationship no longer existed, and that the Complaint was aware of this fact".

Granados also argue that she was an employee. She resided in the Appellants' residence, performed domestic type work for them similar to work performed by domestics-such as cooking and cleaning, received an amount of money weekly from them and worked under their control and direction. Granados points to the fact that she worked for Folch and/or Andrade for many years before they moved to Canada and that she entered the country as a domestic. Granados point, in particular, to the "power gap" in terms education and social status which makes the kind of relationship suggested by the Appellants improbable.

I agree with the Appellants that the fact that Granados performed household work is not in itself sufficient to find that an employer-employee relationship existed. Members of a household, be it a family or some other kind of household, perform work that contribute to the common welfare of the household. That does not bring the work within the scope of the *Act*. We must examine the whole of the relationship, in the context of the definitions set out in the *Act*, to ascertain whether it is an employment relationship or some other kind of relationship which falls outside the scope of the *Act*.

In the circumstances, and for the reasons set out below, I am of the view, that the relationship was an employer-employee relationship, *i.e.*, Granados was an employee of Folch and Andrade.

First, I agree with the delegate that the Record of Landing is important. The document was made at the time Granados came to Canada. It clearly stated that Granados was coming to Canada to work as a domestic for Folch and Andrade. While the document is not--in itself--conclusive, it is of considerable persuasive value. There certainly is the possibility that the relationship could have changed over the years from an employment relationship. As well, I acknowledge the possibility that the document did not reflect the true intentions of the parties. However, I do not accept that Granados did not come to Canada as a domestic. In fact, the Appellants concede that it is unlikely that she would have been granted entry unless as a domestic. The Record of Landing is a contemporaneous record, *i.e.*, from the time of Granados' entry into the country which require some explanation from the Appellants in the absence of which, he delegate could reasonably conclude that Granados came to Canada to be employed by Folch and Andrade. As mentioned above, I am not persuaded by Folch or Andrade's testimony with respect to the origin of the document. They were, on their own admission, deeply involved in the process of bringing Granados to Canada: they met with officials at the Mexico City embassy and assisted with the preparation of the application. Their evidence as to what transpired at the time was vague and evasive and support the view that they were less than completely candid. I accept that Folch and Andrade brought Granados to Canada as a domestic.

I am not prepared to find, as the Appellants urge me to do, that the delegate, in the circumstances, placed too much weight on the Record of Landing. In fact, the delegate appears to have to taken considerable measures to obtain the Appellants' response to the document. In other words, the Appellants had the opportunity to respond to the document, prior to the issuance of the Determination, and that they chose not to.

Second, as mentioned above, the fact Granados came to Canada as an employee of Folch and Andrade does not necessarily mean that the relationship continued as an employment relationship. I am prepared to accept the possibility that the relationship could have changed into something different. In the circumstances of this case, I am of the view, that the relationship did not change from what it was initially, namely an employment relationship. I am not prepared to find that the there was a continuous employment relationship from the time when Granados was initially employed by Folch. In any event, that is not important for my purposes: I am only concerned about the relationship in Canada. In that regard I consider what is the thrust of the Appellants' argument: that they invited Granados to come and live with them as a friend or family member for "compassionate reasons". When looking at the relationship as a whole, on the balance of probabilities, this explanation is not credible.

It is not in dispute that Granados did housework, *i.e.*, laundry, cleaning, cooking, doing dishes, feeding the cats etc., the amount and the nature of the housework is. This is the same kind of work she did for the Appellants in Mexico, though the Appellants suggest that life in Mexico was quite different. The Appellants argue that Granados simply did her "fair share" of the housework as a member of the household. I understood Folch testimony to be that each of the members of the household did one third of the housework. Andrade's testimony on this point was somewhat different: he said that the Appellants and Granados did not do one third of the work each, but that the Appellants did a "substantial amount" when they came home in the evening, and "most of the work" on week-ends. Granados stated that she did the most of the housework, especially during the week. This makes sense, particularly if Folch and Andrade were away from the house at work. Andrade's explained that his contribution was that he did lots of work outside the house that Granados and Folch could no do. This does not mean that I accept all the evidence supplied by Granados with respect to her work and her duties. There was little detailed evidence as to what she actually did. I find it difficult to accept that a regular house would require housework of 6 1/2 days per week and up to 15 hours per day, even if the inhabitants are very untidy, particularly when both of the employers worked outside the house most of the time and I make no decision in that regard. In my view, in the circumstances of this case where no determination on the merits of Granados' claim has been issued, that is better left to the Director.

Granados testified that she worked under the control and direction of Folch. She felt that she was not free to "come and go"--she "had to do what the lady told her to do". "Folch told her what to do" and Granados was "under her orders". This evidence was supported by the testimony of some of the witnesses for Folch and Andrade. Claudette Flemming agreed that Folch and Andrade were "masters of the house" and that she "presumed that Granados was taking instructions from Folch". Another witness, Ludmilla Jaqielliez, was asked--in direct examination--if Granados was a servant or domestic and answered "not in those terms". In cross

examination by the delegate she agreed that she "did not know if there was an employment relationship" as "she didn't know the details". She did state--in cross examination by Granados--that the Appellants and Granados were not "living apart" and that they treated Granados like a "family member" and, therefore, in her opinion, that she was not a "domestic". I do not place much weight on the testimony of the Appellants' "independent witnesses". They are friends of the Appellants and, more importantly, they did not live at the house and can, therefore, only offer "snapshots" of the relatively few occasions when they were there. I accept that Granados worked under Folch's control and direction, and I accept that Granados provided "work" for Folch and Andrade in the sense that she provided labour or services for them.

While I am sceptical with respect to Granados' "power gap argument", there is some merit in considering this aspect of the relationship because it goes to the heart of the explanation offered by Folch and Andrade. First, based on the evidence of the parties there was little in common between Granados and Folch. It was clear that there was considerable differences in social background and education. Although Folch professed to her feelings of "love" for Granados, it was not clear what these feelings were based on. According to Folch and Andrade, Granados was not a friendly sort of person. Second, in the hearing, Granados spontaneously referred to Folch and Andrade as "la senora"--the lady--and "el senor"--the gentleman-- which I understood to be expressions of subordination: expressions used by an employee in Mexico towards an employer. The Appellants argued that these terms were simply used as expressions of respect. I found that telling as to the nature of the relationship. Third, similarly, Granados did not participate to any great extent in social functions with Folch and Andrade and their friends and acquaintances. This was explained by them as a function of her relatively poor English and that she was not "friendly". In my view, it is more probable than not, in the circumstances, that this reflects the true nature of the relationship, namely that it was an employment relationship. Likewise, if the relationship had been that of a friend or family one would have expected Granados to have participated in trips etc. In fact, over the 10 years, Granados went on relatively few trips with Folch and Andrade.

One aspect of control is the fact that Folch kept Granados' passport and other documents, controlled her bank affairs (was instrumental in setting up the account, made deposits and withdrawals), that she dealt with all government affairs on Granados' behalf, including applying for social assistance and citizenship. While Granados and Folch had a joint bank account, into which social assistance cheques were deposited, Folch was the one who made withdrawals form the account. She considered it income to the "family" which at the time was in a "bad economic situation". She agreed that she did not have a specific agreement to do this. She spent the money on "family affairs" and gave the rest to Granados.

Folch and Andrade gave Granados $30.00 each week (except for a period when Folch mother was in Vancouver, when they gave her $40.00 each week). This could be regarded as remuneration for her services. In any event, the fact that Folch and Andrade did not pay her, does not, in my view, mean that she was not an employee. The *Act* does not require actual payment of wages in order to be an employee, it is sufficient that the person is "entitled" to wages.

While there was no discussion between the parties with respect to the terms and conditions of employment when Granados came to Canada--Granados admitted that and Folch was quite clear on that point--in view of the long employment relationship in Mexico, the Record of Landing indicating an employment relationship from the time she came to Canada, and in the context of the relationship as it developed in Canada, this is not necessarily mean that there is no employment relationship.

In all of the circumstances, I am of the view that Granados was an employee of Folch and Andrade.

Nevertheless, due my to concerns with respect to the reasons for the penalty, I am persuaded to uphold the appeal and cancel the Determination.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated June 8, 1998 be cancelled.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal