EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C. 38

- by -

Klaus Werner
("Werner")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE NO.: 96/663

DATE OF HEARING: March 10, 1997

DATE OF DECISION: March 22, 1997

DECISION

OVERVIEW

The appeal is by Klaus Werner ("Werner") pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") against Determination No. CDET 004363 of the Director of Employment Standards (the "Director"), a decision dated October 18, 1996. In the Determination, Lida M. Morante ("Morante") is found to be owed wages and vacation pay.

APPEARANCES

William Bull	For the Director
absent	The appellant
absent	The complainant

ISSUES TO BE DECIDED

At issue is the rate of pay at which wages were earned by Morante. The appeal argues that the agreed rate of pay was $500 plus room and board.

At issue are three matters of fact. When did Morante begin working for Werner? How many weeks was she employed? What days, and what hours in each day, did Morante work in those weeks? The appellant says that Morante did not work 37 weeks but only 23 weeks, and no more than 20 hours in any of the weeks.

An oral hearing was set in the appeal, but neither party attended the hearing. Has the appeal been abandoned? If it has not been abandoned, in what manner should the Tribunal now proceed?

FACTS

Lida M. Morante is a foreign worker. Klaus Werner and his wife Lucina Gallardo Werner wanted to help Morante, who they consider 'family'. Morante is the sister of Mrs. Werner's brother-in-law.

On learning that Morante's work as a nanny in Hong Kong was coming to an end, Klaus Werner offered her employment as live-in caregiver. Werner had that offer validated by Employment and Immigration Canada authorities on October 20, 1994. Canadian immigration authorities in Hong

Kong then approved her application to work in Canada and to travel to Canada. She arrived at the home of the Werners on February 8, 1995.

According to Morante she began work immediately. According to the Werners, their agreement with Morante called for her to begin work on April 1, 1995 at $500 a month plus room and board. The Determination sets the start of employment at February 8, 1995 and I see no reason to alter that, the appellant presenting me with no hard evidence that is to the contrary. On the other hand, I find it unlikely, a job being offered by Werner, and Morante travelling to Canada for that job, that she would not begin work soon after arriving for that work.

There is disagreement on the number of hours worked in each week, once work started, and whether the work was continuous until Morante quit her employment on October 21, 1995. Morante says she often worked more than 8 hours in a day, and that she worked 7 days a week. The Werners say that she never worked more than 20 hours in a week, "mostly from Monday to Friday". They also say that she worked for a Rick Parson for part of June. The Determination sets the hours of work at 8 per day, Monday to Friday, for 37 weeks and I see no reason to alter that conclusion. The employer did not keep the records that are required by the *Act*, Section 28, and is now unable to present any hard evidence in support of its assertion that Morante worked less than a 40 hour work week and less than 37 weeks.

The only record of the employment relationship is a T4 which indicates that Morante was paid $3,000 before deductions. In the Determination, that amount and $2,775.00 for room and board, is deducted from the total amount of wages and vacation pay which is found earned, $10,004.80, leaving a remainder of $4,519.89. The rate of pay which is used in the calculations is the minimum wage rate of the *Act*.

The Facts in Respect to the Scheduled Hearing

The Tribunal by letter of February 10, 1997, notified the parties of the hearing set in the appeal for March 10, 1997. A few days before the hearing, the appellant contacted the Tribunal and advised the Tribunal that he could not attend for reason of illness. Through the office of the Tribunal's Registrar, Werner was told, that given that he had no proof of his illness, the hearing would have to go ahead as scheduled. He did not object to that. Late in the morning of the day of the hearing, Werner faxed a doctor's confirmation that he had Hepatitis A.

On arriving for the scheduled hearing, set for 1 p.m. in Chilliwack, I met the Director's delegate, Mr. William Bull, but no one representing either the appellant or the complainant. I waited 20 minutes for the appellant and in that time no one arrived. I returned to Vancouver and it was then I learned of what happened to Mr. Werner.

ANALYSIS

The appeal has not been abandoned. The appellant was seriously ill, and I conclude, would have been at the scheduled hearing but for that.

Section 107 of the *Act* does not require the Tribunal to hold an oral hearing. There is a need in these employment standards matters to act expeditiously. With that in mind, I have examined the written submissions of the parties, in particular that of the appellant, with a view to deciding whether a hearing is necessary in this case. It is my conclusion that a hearing would serve no useful purpose. The issues raised by the appeal all turn on the facts with one exception, Morante's rate of pay, a matter clearly covered by the *Act.* Anything of real assistance in terms of knowing the facts of the case can be expected to have been submitted with the Tribunal's call for written submissions, as the parties are advised that the appeal may be decided on that basis. I am satisfied that the parties have been given an opportunity to submit all relevant evidence and that that which is before me is all of the evidence that they have to submit.

The Director's delegate has reached certain conclusions in terms of how many weeks were worked by Morante for the Werners, how many hours were worked in a day and how many days were worked in each week. Those conclusions are reached in the absence of any meaningful records of Morante's employment, the employer not keeping records. I note further, that the Determination favours neither the complainant, nor the employer, substantial claims by each having been rejected. Given no convincing evidence that the Determination is wrong, I find that there is neither reason to vary, nor reason to cancel, that decision.

The Werners wanted to help Morante, and they attempted to do so. Werner's offer of a job was the basis of her being allowed into Canada to work and certain consequences flow from that, one of which is application of the *Act.* Having offered Morante work as they did, they were obligated to provide her with the work, if for no other reason than section 8 of the *Act.* That section is as follows:

> 8 *An employer must not induce, influence or persuade a person to become an employee, or to work or to be available for work by misrepresenting*
> *(a)* ***the availability of a position****,*
> *(b) the type of work,*
> *(c) the wages, or*
> *(d) the conditions of employment.* (my emphasis.)

Moreover, the minimum standards of the *Act* apply. The appellant argues that the agreed rate of pay was $500 plus room and board. That may be, but I need not decide that for even if such agreement were to exist, it can have no force or effect. An employee simply may not enter into an agreement which provides for less than the minimum standards of the *Act.* Section 4 is of importance:

> *The requirements of the Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect subject to sections 43, 49, 61 and 69.*

Sections 43, 49, 61 and 69 refer to employees covered by collective agreements. Morante did not enjoy the benefits of a collective agreement. The Director's delegate is correct in setting the rate of pay as the minimum required by the *Act.*

In summary, the appellant's offer of employment to Morante was validated by Employment and Immigration Canada, and that led to Morante being allowed into Canada to work. Morante began work and worked until October 21, 1995 but there are no records of that employment beyond a T4. The Director has determined that Morante worked 8 hours a day, 5 days a week, for 37 weeks, and has found that Morante is owed wages and vacation pay at minimum wage rates. I confirm that Determination, the appellant failing to show that the decision is wrong in some way.

ORDER

I order, pursuant to Section 115 of the *Act*, that Determination # CDET 004363 be confirmed.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal

LDC:lc