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 -

Amber Computer Systems Inc.
("Amber", the "Appellant" or the "Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	Ib S. Petersen
FILE No.:	1999/397
DATE OF HEARING:	November 25, 1999 and December 9, 1999 December 17, 1999
DATE OF DECISION:	May 30, 2000

DECISION

APPEARANCES

Mr. Dave Robinson ("Robinson")	on behalf of the Employer
Mr. Gordon Kao	on behalf of himself ("Kao", the "Complainant" or the "Employee")
Mr. Ted Sorenson	on behalf of himself ("Sorenson", the "Complainant or the "Employee")
Ms. Martha Rans	on behalf of the Director

OVERVIEW

I would first like to apologize to the parties for the delay in the making of this decision. I appreciate their patience.

This is an appeal by the Employer 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 2, 1999. The Determination concluded that Sorenson and Kao were employed by the Employer from February to October 1997 and that the Employer failed to pay them overtime wages. The Determination awarded them $13,447.99.

Briefly, the conclusions of the Determination may be summarized as follows:

1) The Employer took the position that the Employment Standards Branch (the "Branch") did not have jurisdiction to investigate the complaints because the work in question was performed outside British Columbia. The delegate did not accept the Employer's position with respect to jurisdiction, among others, because Sorenson and Kao, who resided in British Columbia, had an ongoing relationship with the Employer prior to the short term posting and it was contemplated that they would return to the Employer after the completion of the contract. As well, the Employees returned to British Columbia regularly, either to work at Amber or for time off. Finally, on this point, the delegate disagreed that the North American Free Trade Agreement ("NAFTA") barred the Branch from exercising its jurisdiction to deal with the complaints.

2) Amber argued that the Employees were not its employees. Rather, they were employees of Greenheck Corp. ("Greenheck") of Wisconsin, USA. The delegate noted, among other things, that the Employer had represented to various government agencies, including the US immigration authorities, that Sorenson and Kao were its employees and that the Employer had treated them as employees for payroll purposes and statutory deductions.

3) Effective May 26, 1997, the Employees signed employment contracts providing for an annual salary of $62,000 (Sorenson) and $60,000 (Kao). The delegate noted that there

was some disagreement with respect to the rate of pay prior to that date and accepted the rate of US$25.00 per hour, converted and paid in Canadian funds.

4) With respect to overtime wages, the delegate accepted that the Employees often worked up to 12 hours per day without a break but, in any event, deducted 1/2 hour per day for breaks for any day where the Employees worked more than six hours. The Employees were agreeable to that. The Employer, however, was of the view that it had specifically required the Employees to take one meal breaks. The Employer also asserted that the Employees had falsified their time sheets and produced restaurant receipts, with the time of day printed on them, which the Employer claimed showed the time the Employees paid the bill. The Employees stated that the receipts indicated when the first order was entered into the restaurant's electronic ordering system and produced a note from the restaurant to that effect. The delegate concluded that the Complainants were owed overtime wages.

ISSUES

The issues arising out of the Determination and the appeal are, first, whether the Director had the jurisdiction to deal with the complaints, either because the matters are covered by the North American Free Trade Agreement ("NAFTA") or because there is not a "sufficient connection" between the Complainants' employment and the Province of British Columbia such that the Act does not apply. Second, if I agree that the matters are within provincial jurisdiction, the amount of wages owed is in dispute. That dispute centres around the agreed hourly rate and whether or not the Complainants worked the hours claimed.

PRELIMINARY MATTERS

At the outset of the hearing, the Appellant made a request for disclosure of documents and an adjournment. The Appellant had made a request under the *Freedom of Information and Protection of Privacy Act* for the content of the Director's file dealing with the complaints and had just received the documents. The Appellant had a number of concerns: first, that it had not received full disclosure and, second, that it did not have sufficient time to review the material it had received a few days before the hearing date. The Appellant wished to have the entire file made available to it.

Counsel for the Director and the Employees opposed the application for an adjournment. The Director, as well, opposed the disclosure application. Counsel explained that Amber had, in fact, received copies of all documents, except those covered by client-solicitor privilege and had had sufficient time to review the material. The reason for the delay in Amber receiving the documents through the *Freedom of Information* request was that it had not been prepared to pay the fee for the reproduction of the documents mandated by that statute.

I asked Mr. Robinson why the documents he sought were relevant and he told me that he was "not prepared to go into that" and that the "complaints were made in bad faith". In the circumstances, I refused to grant the request for disclosure. I was not satisfied that Amber had met the burden to persuade me that the documents "may be relevant" and should be disclosed

(see, for example, *Jannex Enterprises (1980) Limited*, BCEST #D200/00). The fact that Amber had received the documents late was as a result of its unwillingness to pay the fee required under the *Freedom of Information and Protection of Privacy Act* and it had ample time to retain and instruct counsel to deal with the matters. I note that Amber copied correspondence to its legal advisor. The hearing had already been adjourned once, and I was not prepared to further delay the process.

The morning of the first hearing date, and, in fact, on the morning of each subsequent hearing day, Amber served on the Tribunal a notice that it participated under "duress" and that it had filed an application for judicial review. The notice indicated that the Tribunal should not proceed until the court had dealt with the matter and, among others, was in contempt by proceeding. I indicated that I was not prepared to adjourn the proceedings on the basis that Amber had filed an application in court. Robinson indicated that Amber would participate in the hearing.

FACTS AND ANALYSIS

A hearing was held at the Tribunal's offices on November 27, December 9 and 17, 1999. Robinson and Kathryn Meeks ("Meeks"), the president of Amber, testified on behalf of the Employer. Kao and Sorenson also testified.

I turn first to the jurisdictional issues.

As indicated above, the Appellant questions the jurisdiction of the Branch in two ways. First, a I understand it, the nub of the argument is that Ambers argues that NAFTA precludes the *Act* from applying to any employment outside British Columbia in the USA. NAFTA, and, in particular, the Supplemental Accord on Labour, takes precedence over provincial legislation. This complex legal argument was pursued by the Employer with great vigour at the hearing and in many written submissions. The Employer submitted that the relationship between Amber and the complainants, Sorenson and Kao, was governed by NAFTA simply because the two complainants had worked for Amber's American customer under a so-called "TN1 visa" in Wisconsin, USA, and that the British Columbia *Employment Standards Act* was a non-tariff trade barrier contravening NAFTA.

At the commencement of the hearing, counsel for the Director objected to this ground of appeal being dealt with in the hearing. She argues that NAFTA is entirely within the federal jurisdiction and, therefore, that it is inappropriate for me to hear the Appellant's submissions regarding NAFTA. She argues further that the appropriate approach to the jurisdictional issue was whether there is a "sufficient connection" between the Complainants' employment and British Columbia. She argues that it is inappropriate for me to deal with the issue that Employment Standards Branch is barred from dealing with the complaints because of NAFTA without notice to the Attorneys General under the *Constitution Questions Act*. It was clear that notice had not been given. In fact, the counsel for the Director had expressly brought the issue of notice to the Attorneys General to the attention of the Appellant in a submission to the Tribunal dated August 6, 1999.

At the hearing, I ruled that I would consider the NAFTA issue. If, in my view, there was any merit to this issue I would allow the parties an opportunity to make further submissions. In the circumstances, for the reasons set out below, that will not be necessary.

While I do not agree with the Director that the Tribunal does not have the jurisdiction to deal with the ground of appeal raised by the Appellant, the requirements of Section 8 of the *Constitution Question Act*, requiring notice to the Attorneys General, where the constitutionality of a statute is challenged, is mandatory (*Eaton v. Brandt County Board of Education* (1997), 142 D.L.R. (4th) 385 (S.C.C.)). As I understand the law, the Tribunal may address constitutional issues if it has the jurisdiction over the whole of the matter before it (*Cuddy Chicks v. Ontario (Labour Relations Board)*, <1991> 81 D.L..R. (4th) 121 (S.C.C.). In this case, all of the issues arose out the *Act* and *Regulation*. The Tribunal has broad powers to "decide all questions of fact or law arising in the course of an appeal or review" (Section 107(2)). However, that being said, I am not prepared to allow the Employer to challenge the constitutionality of the *Act* due to failing to give notice pursuant to the *Constitution Question Act* which provides for certain mandatory notice requirements (*Eaton v. Brandt County Board of Education* , above). Even if I have the power to alleviate against the notice requirements, and that point was not specifically argued before me, I am not prepared to do so in the circumstances of this case. There is no evidence of any special circumstances and the nature and *prima facie* merits of the constitutional argument is unclear. It is by no means obvious that NAFTA precludes provincial employment standards legislation from applying to employment outside British Columbia where there is a "sufficient connection" between that employment and the Province. The Director argues, as well, that the Supplemental Accord on Labour, relied upon by the Appellant, had not been adopted in a sufficient number of provinces to acquire force. As the appellant in this matter, Amber has the burden to persuade me that its claim was not frivolous. In the result, I agree with the Director to the extent that the constitutional validity of the *Act* will not be heard at this hearing.

Second, the Employer says that there is not a "sufficient connection" between the Complainants' employment and the Province of British Columbia. The leading case, referred to by both the Director and the Appellant, is *Can-Achieve Consultants Ltd.*, BCEST #D463/97, Reconsideration of BCEST #D099/97. In that decision, following a substantial review of the case law, the Tribunal specifically considered the following factors, page 8 QL version:

> (a) a place of business of the employer is situate in the province;
>
> (b) the residence and usual place of employment of the worker are in the province;
>
> (c) the employment is such that the worker is required to work both in and out of the province; and
>
> (d) the employment of the worker out of the province has immediately followed his employment by the same employer within the province and has lasted less than six months.

In *Can-Achieve*, the Tribunal also recognized that what governs is the Constitution and that the "sufficient connection" test in constitutional law may well embrace fact situations that do not

strictly fall within the factors set out above. However, the Tribunal noted, as well, on a cautionary note, that the test must be "meaningful and must not be watered down" to the point where several jurisdictions are able to assert simultaneous or contradictory statutory rights with respect to the same work dispute. I adopt the principles set out in *Can-Achieve*.

Robinson explained that the Employer believed that the work done by Sorenson and Kao was done "in a foreign country" and, therefore, that the laws of that country applied. The Employer's evidence was that it had a contract, dated January 24, 1997, "to provide development services" for Greenheck Fan Corporation located in Wisconsin, USA. From some of the correspondence it appears that the development services related to the establishment of a computerized sales catalogue. Robinson testified that the contract rate was $45.00 per hour per consultant and, in accordance with the contract, paid to Amber without deductions for state or federal taxes. Amber was responsible for all payroll taxes. The initial contract with Greenheck was for a six month period but was extended at least once. The contract was expressly stated to "be governed by the Laws of the Province of British Columbia, Canada."

The letter from Amber to the United States Immigration and Naturalization Services in respect of the TN1 Visa for Sorenson stated, in part:

> "Mr. Sorenson is a Canadian citizen and will maintain his residence in White Rock, British Columbia and commute between Canada and the United States as required to complete the assignment <for Greenheck>. Mr. Sorenson will be on the payroll of Amber Computer Systems Inc. and will be paid out of this office."

In his cross-examination by counsel for the Director, Robinson said that he agreed with the content of this letter. The purpose was to obtain the TN1 Visa for entry into the United States. In short, Amber represented to United States authorities that Sorenson and Kao were its employees.

According to the contract between Amber and Greenheck, the intent was that the work was to be performed by the former's consultants, Sorenson and Kao, on the basis of 2-3 weeks "on site" in Wisconsin and one week at "home (for family visitation, management of personal affairs)". Sorenson testified that he regarded the assignment to Greenheck as a temporary one and they continued to reside in British Columbia. Robinson told the Tribunal that the intent was that the two complainants would spend most of their time in Wisconsin. He testified that in February 1997, they spent 80% of their work hours there. Overall, they spent more than 50% and less than 85% of their work hours in Wisconsin. Later in the contract period, they spent more time in Canada, at Amber's Surrey location. A summary of travel and work location for Sorenson indicated that he worked a total of 82 days in Canada and 108 in the United States between February 3 and November 14, 1997. As pointed out by the Employer's witnesses, there was a mathematical error, in that the number of days worked in Canada was actually higher, namely 87. The Employer submitted a summary of hours worked on a monthly basis in British Columbia and Wisconsin, respectively, ranging from 47% to 83 (Sorenson) and 53% to 100% (Kao). In other words, on the evidence, the Complainants worked a substantial amount of time in British Columbia. Moreover, both Sorenson and Kao testified that they did--albeit a small amount--work for Amber's other customers, *i.e.*, non-Greenheck related work, between February and November 1997. This appears to be supported by the Employer's own documents. As I

understand the evidence, the Employees performed Greenheck related work at Amber's offices in British Columbia.

It was clear to me that there was some tension between the parties from February 1997 due to the different expectations as to rates of pay and other matters. Robinson testified that there were ongoing negotiations to resolve these matters. After the Complainants had been working on the Greenheck project for some time, Amber, Sorenson and Kao entered into written employment agreements on May 24 and 25, 1997 respectively. At the hearing, there was no dispute that the employment agreements were entered into in British Columbia. These agreements, which were substantially similar, and clearly characterized Sorenson and Kao as employees, were attached to the Determination and provided, *inter alia*:

- In Sorenson's case for a base rate of $62,000 per year and in Kao's for $60,000.
- A minimum 50 hour work week determined on an average monthly basis.
- A "per diem" of $70 to cover out of pocket expenses.
- Overtime pay for hours over 40 and 50 hours per week. Sorenson was entitled to time and one half of hours in excess of 40 in a week and Kao in excess of 50 hours.

"Confidentiality and Trade Secret Agreements", which were part of the package, expressly stated "in consideration of my employment with Amber", provided, *inter alia*:

> "5.9 **Governing Law**: This Agreement has been executed by Amber in the City of Surrey in the Province of British Columbia and delivered to the EMPLOYEE at Amber's place of business in the City of Surrey, in the Province of British Columbia and shall be deemed to be a contract made under the laws of the Province of British Columbia and for all purposes shall be governed by and interpreted in accordance with the laws of the Province of British Columbia without giving effect to principles of conflict of laws."

Other documents in the package making up the employment agreement, initialled by Robinson and the Employees, provided for employer contributions to "Employment Insurance, Canada Pension Plan and other benefits which management will provide from time to time." It was also clear from these documents that Amber regarded the work at the Greenheck project as a "foreign posting."

Robinson agreed that Amber paid travel and living expenses. He said that Amber did not pay for hotel accommodation. After May 25, 1997, Amber paid the complainants a "per diem". He also stated that Amber considered it a "foreign posting" with respect to rates of pay etc. Under the Greenheck contract, Greenheck agreed to pay travel expenses for Amber's consultants to and from its site and agreed, as well, to provide hotel accommodation. I understood that the Employer was reimbursed for these expenses.

Part of the difficulty in ascertaining the Employer's position on key issues is that it took different and conflicting positions, not just over time, but also at the same time, depending, for, example, on who was speaking for the Employer. It appears from the Determination that the Employer took the position that the Complainants were employees of Greenheck. Even if, as suggested by Amber, Greenheck exercised a measure of supervision with respect to the Complainants' work, there is little in the evidence before me to support an argument that the Complainants were employees of Greenheck at the material time. Overwhelmingly, the evidence points in a different direction. The contract between Greenheck and Amber provided that the latter would supply its consultants to work at the former's location. Moreover, the agreement between Amber and the Complainants provided that they were Amber's employees and they are so described in many instances throughout the documents. In those agreements, Sorenson and Kao were described as "professional" and "representatives" of Amber on assignment to Greenheck. In correspondence to the delegate, dated October 27, 1997, Meeks admitted that the Complainants were its employees from February 1997. Some of the testimony from Robinson takes issue with the characterization that Sorenson and Kao were employees during the first four months.

There was an issue of whether or not Sorenson and Kao were employees of Amber or independent contractors prior to the May 24 and 25, 1997 written employment agreements with Amber, the latter being Amber's position: were they employees prior to the Greenheck project in February 1997, and were they employees in February and May? Based on the evidence at the hearing, it appears to me that the parties likely perceived themselves to be independent contractors at least up to the point in time when the Complainants started on the Greenheck project. There was certainly considerable confusion as to the parties' perception of their status in the period February to May. However, as noted an a recent decision of the Tribunal, *City Import Center 1997 Ltd.*, BCEST #D170/00, at page 2, QL version:

> "Deciding whether a person is an employee or not often involve complicated issues of fact. With the statutory purpose in mind, the traditional common law tests assist in filling the definitional void in Section 1. The law is well established. Typically, it involves a consideration of common law tests developed by the courts over time, including such factors as control, ownership of tools, chance of profit, risk of loss and "integration" (see, for example, *Wiebe Door Services Ltd. v. Minister of National Revenue* (1986), 87 D.T.C. 5026 (F.C.A.) and Christie et al. *Employment Law in Canada* (2nd ed.) Toronto and Vancouver: Butterworth). As noted by the Privy Council in *Montreal v. Montreal Locomotive Works*, <1947> 1 D.L.R. 161, the question of employee status can be settled, in many cases, only by examining the whole of the relationship between the parties. In some cases it is possible to decide the issue by considering the question of "whose business is it"."

I approach the employee status issue with the following principles in mind. It is well established that the definitions are to be given a broad and liberal interpretation. 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 (*Machtinger v. HOJ Industries Ltd.*, <1992> 1 S.C.R. 986). Moreover, my interpretation must take into account the purposes of the *Act* (*Interpretation Act*). The Tribunal has on many

occasions confirmed the remedial nature of the *Act*. Even if I accept that the parties had intended the relationship to be an independent contractor relationship, in *Straume v. Point Grey Holdings Ltd.*, <1990> B.C.J. No. 365 (B.C.S.C.), the court noted, at page 3, that "the declared intention and classification of the contract parties may not bind statutory or third parties not party to the contract as against its true nature". While the parties' intent is relevant in an action for wrongful dismissal, *i.e.*, an action founded in contract, and may be a relevant factor before the Tribunal, I do not agree, in view of the remedial nature of the statute, that much weight should be placed on this factor. As well, Section 4 of the *Act* specifically provides that an agreement to waive any of the requirements is of no effect.

The Employer did not in any substantial manner address the test required to establish an independent contractor relationship. Given the onus on the Appellant, that is fatal. Amber claimed that invoices from Sorenson and Kao supported its position. They were paid on the basis on these invoices. Sorenson and Kao denies that they were independent contractors prior to going to Wisconsin and says that they were employees of Amber in 1995 and 1997. They say, among others, that they had derived almost all of their income from Amber. Sorenson testified that he worked exclusively for Amber between July 1995 and November 1997. In cross examination by the Director's counsel, Robinson admitted that Amber exercised at least "rudimentary" supervision over Sorenson and Kao and that it kept track of their hours of work using computer system developed by Kao for Amber, the "job track" system. This system was developed prior to the Greenheck contract. Finally, and not least, the so-called independent contractor agreement relied upon by Amber–headed, ironically, "Employment Terms and Conditions"–stated, for example, that the "place of employment will vary depending upon the current contract" and contained the provision for a "probation period." In my view, there was a longstanding and ongoing relationship between the Employees and Amber prior to the Greenheck project. Based on the evidence at the hearing, and the legal principles set out above, I would have little difficulty in characterizing this relationship as an employment relationship. In any event, even if the relationship was not an employment relationship, for the purposes of the test in *Can-Achieve*, I find that the relationship between the parties was an ongoing and long-lasting one. In my view, that is sufficient, given the flexible nature of the test. I am also, in light of the evidence set out above, of the view that the Complainants were employees of Amber in the period from February to May, 1997.

From my review of the facts in evidence, set out above, and applying the "sufficient connection" test set out in *Can-Achieve*, above, I agree with the delegate's determination that Sorenson and Kao were employees for the purposes of the *Act*. I agree that the *Act* applies. First, Amber's main place of business was in British Columbia. Second, the Employees' residence prior to and during the assignment to the Greenheck project was British Columbia and they returned to the province regularly during their assignment. Third, at the material time, they performed work in Wisconsin and in British Columbia, both in relation to the Greenheck project and, importantly, in relation to other Amber customers. Fourth, the Employees had a longstanding relationship with Amber prior to the Greenheck project, whether viewed as an employment relationship or not. There can be little doubt on the evidence that Sorenson and Kao were employees during the time they worked for Amber in Wisconsin. In the result, I agree with the Determination on this point.

The Complainants testified that the initial hourly rate was US$30.00 but that they eventually settled for US$25.00. In part, at least, this uncertainty flowed from the unresolved issue between the parties at to whether or not they were "contractors" or employees. Robinson testified that Amber would never have agreed to a rate of US$25.00 per hour, particularly if it had to pay overtime. In his view this was more than the value of the contract. There is little doubt in my mind that the lack of certainty–from the Employer's perspective–contributed to the deterioration of the relationship between it and the Employees. Sorenson and Kao believed they were entitled to overtime. In Robinson's view, despite representations to others, for example, to US authorities, Sorenson and Kao were "contractors," at least initially. A flat rate was appropriate in those circumstances. He agreed that Sorenson and Kao became employees after some lengthy negotiations with Amber, between February and May 1997, concerning rates and other terms and conditions of employment. Sorenson and Kao, he explained did not want to become employees and preferred to be "contractors". The reason Amber required the complainants to become employees was that Amber's insurance carrier required it. Meeks also testified that Amber originally sought to establish a "contractual" relationship, *i.e.*, an independent contractor relationship, but abandoned that notion due to insurance and Visa requirements. Eventually, at the end of May, the two signed written employment agreements with Amber.

Robinson testified that he wanted all matters between the parties addressed at the time these written agreements were entered into. He believed that to be the case. Sorenson and Kao did not. Sorenson explained that Robinson told him that "we decided to call the past, the past" but that he did not agree. However, Robinson testified, after a few weeks, the two complainants approached Amber and "wanted shares in the company". Sorenson, as well, felt that he was owed some $13,000 and produced some spreadsheets in support of that claim. Robinson explained that Sorenson told him that he wanted to be paid or he would leave. After some discussion, with Kao present, Robinson testified, that he found "one job not paid for". This was paid. However, in his view, the balance of Sorenson's claim pertained to the previous months, *i.e.*, prior to the May employment agreement. He said that the Employer would pay a bonus at the end of the Greenheck contract "if it made money". The relationship between Amber and the Complainants deteriorated.

In June of 1997, the Employer added another person to the team working for Greenheck and, around that time, entered into negotiations to extend the contract. Shortly after this happened in September 1997, Sorenson and Kao resigned (in October). They remained in Amber's employ until mid November. Subsequently, on October 16, 1997, Greenheck gave 30 days' notice to Amber that it wished to bring the contract to an end. The cancellation appears to be directly linked to the Complainants' resignations earlier in the month and stated:

> "... the knowledge Ted and Gordon have accumulated are essential to our WinCAPS project. We have been very satisfied with Ted and Gordon's work but given you can no longer secure their employment and continue their relationship with Greenheck, we need to discontinue our relationship with Amber."

Following their resignations from Amber, Sorenson and Kao went to work for Greenheck. It is apparent from the evidence that this was a source of considerable bitterness and "hard feelings" on the part of the Employer and gave rise to proceedings in court, among others for breach of fiduciary duties. The Employer expended considerable "energy" on the claim that the complaints

were made in "bad faith" due to what it perceived to be the Employees' misconduct. While I appreciate the Employer's position, these disputes are not within my jurisdiction and I do not propose to deal with them.

While the Employer disputes the delegate's calculations with respect to rates and hours of work, the Employer was not in a position to actually challenge the hours worked by the Complainants. The Employer relied on its "job-track system" and Robinson admitted that he was not in a position to dispute the hours reported (and paid for by Amber). At the material time Amber did not dispute the hours worked and paid on the basis of the invoices submitted. Meeks stated for the record that she does "not wish to submit the original 'job-track' records." As argued by counsel for the Director, it is appropriate to draw an adverse inference from that. Amber's dispute with respect to hours worked boils down to the proposition that Sorenson and Kao lied about the hours worked. This was based on receipts from restaurants which indicated a time close to quitting time and, says Amber, this was the time the restaurant was paid, *i.e.*, at the end of the meal. Sorenson and Kao say that the time indicated on the receipts was the time of the first order and not the time of payment. The Employer made that argument to the delegate, who rejected it, among others based on a letter submitted by Sorenson and Kao from the restaurant in question which confirmed their explanation of the receipts. This letter is attached to the Determination. I am not satisfied that Amber has met the onus upon it to show that the delegate erred in determining the hours worked.

It was clear that there was considerable uncertainty with respect to the agreed hourly rate. With respect to the rate of pay, the delegate stated that she did not accept the Employees' claim to US$30.00 per hour prior to May 1997 when the parties entered into written employment agreements. Rather, she resolved the conflict in the evidence between the parties and based her determination on US$25.00. There was evidence to support that conclusion. A pay slip for March 1997, for Sorenson, indicated an hourly rate of US$25.00. Meeks testified that she provided the pay slip to the delegate. She characterized it as an "interim pay slip" which was "inaccurate." Sorenson did not agree with this. He said that he received the pay slip from the Employer at his request. Meeks explained that the US$25.00 was not the rate agreed but rather was the "sum of everything." I understood her explanation to be that this rate was the maximum approximate rate of pay for all hours when averaged out, *i.e.*, including overtime. After the Complainants and Amber entered into written employment agreements in May, the hourly rate is CN$29.50 according to the pay slips. Meeks admitted that she arrived at an hourly rate of CN$22.99 by "reverse engineering" the pay slips for February, March, April and May, 1997 based on payments of $4,000 per month. These pay slips were not prepared until June 1997. In the circumstances, I attach little weight to these pay slips. Considering all of the evidence before me, I am not prepared to interfere with the delegate's findings on this point. I am not satisfied that the Appellant has met the burden to show that the delegate's determination with respect to wage rates was "manifestly unfair or that there was no rational basis" for the decision (*Heinz Benecken*, BCEST #D101/99).

In the result, the appeal is dismissed.

ORDER

The Determination dated June 2, 1999 is confirmed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal