

**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  
(“Folch”)

- of a Determination issued by -

The Director Of Employment Standards  
(the “Director”)

**ADJUDICATOR:** Mark Thompson

**FILE NO.:** 2000/111, 2000/112

**DATE OF HEARING:** July 19, 2000

**DATE OF DECISION:** August 18, 2000

**DECISION**

**APPEARANCES**

John Smyth	for Elena Folch
Peter Lawless	for Micaela Granados
Sharon Charboneau	for the Director of Employment Standards

**OVERVIEW**

Elena Folch (“Folch”) appealed two Determinations issued by a delegate of the Director of Employment Standards (the “Director”) on February 1, 2000 pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”). One Determination (Tribunal File No. 2000/111) found that Folch and Jose Luis Andrade (“Andrade”) had violated a number of sections of the Act in connection with the employment of Micaela Granados (“Granados”) as a domestic worker. The Determination found that Folch and Andrade owed Granados a total of \$39,963.73 for unpaid wages, overtime wages, vacation pay, statutory holiday pay and interest. The second Determination (Tribunal File No. 2000/112, the “Penalty Determination”) imposed a penalty of \$500 on Andrade and Folch because they had failed to keep payroll records as required by the *Act*.

Folch appealed the Determinations on the grounds that the first Determination overstated the number of hours Granados worked for them. Folch also argued that payment for room and board should be deducted from any wages owed to Granados. The basis of her appeal of the Penalty Determination was that no records were kept because she and Andrade were not aware that Granados was an employee.

This case followed on an earlier proceeding involving the same parties. In a Determination issued in June 1998 (the “Original Determination”), the Director’s delegate found that Granados was an employee under the *Act*, and imposed a penalty on Folch and Andrade for failing to produce records of employment in response to a demand for them. The Original Determination did not contain any findings about the number of hours Granados worked or other specifics of the employment relationship. Folch and Andrade appealed the Original Determination. The Tribunal dealt with the appeal in BC EST #D108/99. In that decision, the adjudicator found that Granados was an employee under the *Act*, although he cancelled the penalty. The Decision did not address the amount of work Granados performed for Folch and Andrade. Those issues are the subjects of this Decision.

Folch, Granados and the Director’s delegate appeared at the hearing of the Tribunal. Granados testified with the assistance of an interpreter.

**ISSUE TO BE DECIDED**

The issues to be decided in this case are: what work did Granados perform for Folch and Andrade and did the Director's delegate exercise his discretion properly in imposing the penalty Determination.

**FACTS**

Folch and Andrade employed Granados from December 30, 1986 through January 27, 1997. It was common ground between the parties that Granados had worked for Folch as a domestic in Mexico and then for Folch and Andrade after their marriage. Folch and Andrade immigrated to Canada in 1986, and Granados entered the country later that year.

After she left their employment Granados filed a complaint under the *Act* against Folch and Andrade. Folch and Andrade maintained that Granados was not an employee, but a family friend who lived with them and shared housekeeping work. In the Original Determination, issued on June 8, 1998, a delegate of the Director found that Granados was an employee under the *Act* and imposed a penalty of \$500 on Folch and Andrade for failing to produce employment records after a demand.

Folch and Andrade appealed that determination, and in BC EST #D108/99, the adjudicator found that Granados had been an employee under the *Act*. The hours Granados had worked and other conditions of employment were not the subject of the Original Determination or the appeal. The adjudicator did cancel the Original Determination on the grounds that the penalty had been imposed improperly.

The Director's delegate then investigated a complaint by Granados with respect to the number of hours she worked and other conditions of employment. She issued a Determination on February 1, 2000 citing a large number of violations of the *Act* and calculating the wages owed for work performed during the twenty-four months prior to Granados's termination of employment.

Folch's appeal of that Determination was the major part of this proceeding. Andrade, who was identified as Folch's former husband, did not appeal. In the case before me, Folch accepted that Granados had been her employee. Her evidence and argument was confined to the number of hours Granados worked while she was an employee and the circumstances of her room and board.

In her complaint, Granados stated that she worked approximately 15 hours per day Monday through Friday and 10 to 11 hours per day Saturday and Sunday. She provided details on her work schedule throughout each day, beginning with the preparation of breakfast for Andrade in the morning through dishwashing and kitchen cleanup in the evening. The total hours worked, according to Granados, was approximately 85 per week. The delegate did not accept Granados's summary of her duties, on the following grounds: no children lived in the home; the residence was not large; two cats lived there which did not require extensive care; the home contained home appliances normal for a

Canadian residence; Granados's age (73-75 years) at the time; Folch and Andrade did not entertain often; and the duties described did not seem to require the time allotted. After reviewing all the evidence available, including sworn testimony from the first hearing, the delegate concluded that Granados had worked an average of 6 hours per day in a split shift Monday through Saturday and 4 hours on Sunday for the 24 months prior to her resignation. The parties acknowledged that Granados had not received any vacation or statutory holidays during her period of employment.

Evidence presented to the Tribunal regarding Granados's work was parallel to the conclusions of the Director's delegate in her Determination. Stated briefly, Folch's case was that the delegate had overestimated the time Granados required to complete her duties, and that a maximum of 15 hours per week was a more reasonable estimate of the time she worked.

Folch described the residence in which she, Andrade and Granados lived. It was a small townhouse, with two bedrooms and a den with three bathrooms. Granados used one bedroom and the adjacent bathroom. The house had a washer, dryer, dishwasher, a built-in vacuum cleaner and various kitchen appliances. The couple had no children, but three cats lived with them. Granados did housekeeping and cared for the cats. Both parties agreed that Granados did not speak English and seldom left the house except on Sundays.

Folch testified as to the list of duties Granados had prepared for the Director's delegate. She acknowledged that Granados did some work every day, but most of this was looking after her own needs, not that of herself and Andrade. According to Folch, Granados did not prepare Andrade's breakfast. He poured a bowl of cereal himself. Folch does not eat breakfast, so Granados prepared coffee for two persons. Andrade prepared his own sandwich for lunch. In her complaint, Granados stated that she spent an hour each day knitting. Folch stated that Granados knitted various items that were given as gifts. Folch did not believe that Granados cleaned the bathrooms daily.

Folch denied that Granados made her bed or cleaned the bedroom daily. Folch did not believe that it was necessary to dust every day in Vancouver, which is not a dirty city. Granados took out the garbage once a week, but Folch and Andrade also performed that task. Folch stated that she prepared the evening meal most of the time, a task she enjoyed as she had run a restaurant and given cooking lessons. Granados assisted her in the preparation, and all three persons cleaned the table and the kitchen. Folch estimated that the cleanup could be finished in 20 minutes. Andrade did any work outside of the home, washing the car, working in the garden, cleaning the garage, washing the windows from the outside, etc.

According to Folch, Granados prepared a stew for the cats every two weeks. The stew included shredded chicken and vegetables. Granados froze the stew and defrosted portions each day. Granados also cleaned the cats' litter tray as necessary, a minor task, Folch stated. All three persons helped care for the cats.

Folch and Andrade were employed or in school most of the time in question, so they were out of the house Monday through Friday. Folch stated that Granados did not perform any

work in the house on the weekends. Sunday mornings she went to church and shopping with friends and returned about 4:00 p. m. In addition, Folch and Andrade were on vacation between 1 and 1.5 months each year, so Granados was alone in the house. For two weeks, Folch's nephew stayed with them, but he cleaned up after himself. The only instructions Folch gave Granados about work were to accept delivery of parcels or other items and to soak beans to be used in preparing an evening meal.

In support of her appeal, Folch presented written statements from friends who had observed that she and Andrade were tidy people and treated Granados as a member of the family.

Granados testified that she worked most of the day from Monday to Friday. Folch told her what jobs were to be done and complained if the work was not done properly. Granados said that she arose about 6:00 a.m. each weekday, bathed and then prepared Andrade's breakfast. She stated that Andrade ate eggs and leftovers for breakfast on occasion, not only cereal. While he was eating, Granados made him a sandwich for lunch. After he left, she had her own breakfast, cleaned the kitchen and took care of the cats. Then Folch got up, and Granados prepared coffee for her. When Folch left the house, Granados made the beds, cleaned the cat litter and cleaned the floor. She emptied the trash from the house into a container in the garage. She cleaned the bathrooms daily, scrubbing both the tub and the toilet. Neither Folch nor Andrade cleaned the bathrooms.

Each day, Folch told her what to prepare for dinner. Early in the afternoon Granados began meal preparation, including making tortillas using a small hand device. Some Mexican style meals took a long time to prepare, and Granados cooked them. In any case, Granados cooked and served the evening meals and cleaned the dining room and kitchen afterwards. She did not use the dishwasher. Folch used it when there were guests for dinner. Folch occasionally prepared dinner for the three persons, but these were simple meals Granados testified that each Tuesday she changed the linens and cleaned the bathroom. Wednesdays she vacuumed the house, and Thursdays she cleaned the silver. Fridays she washed and ironed. She dusted every day except Sunday for up to three hours, because her employers had many small objects in the house. Every four days, she fixed a stew for the cats, using a whole chicken. She washed the cats' dishes after they had eaten and cleaned their litter frequently. Granados stated that she was the only person who cared for the cats, but admitted that she played with the cats, and one slept with her. Folch rarely fed the cats. Granados sprayed the houseplants with water and watered the plants on the balconies and in front of the house.

Granados denied that Folch and Andrade shared the housework with her. Andrade did clean the garage, and both he and Folch worked in the garden, although Granados swept the garage. Andrade and Folch shopped for the household. He put the groceries and supplies away in the garage, and Granados helped him.

Granados stated that knitting was part of her job. She spent 2 to 3 hours per day knitting items for Folch, including a shawl, four table covers and a large bed cover. Folch paid for the wool used in the knitting and instructed her what to make.

On Saturdays, Folch and Andrade got up late and did their own beds. Sunday, Granados took care of the cats and then left for church. She returned about 2:00 p.m. and did some work later in the day. Folch and Andrade prepared their own meals on the weekends.

Granados estimated that she worked 10 hours per day Monday to Friday and 7 hours on Saturdays. Sunday she worked only at night. During the time in question, she was over 73 years old and admitted that she did not work as rapidly as she had when she was younger.

Both parties agreed that Granados received \$30 per week during most of her period of employment. According to Folch, this was Granados's pocket money. Folch paid her medical and dental expenses, plus toothpaste and clothing. In 1994, Folch and Andrade had financial difficulties. They arranged for Granados to receive Income Assistance. The total from Income Assistance was \$771 per month. Folch had Granados sign the cheque and deposited it to her own bank account. The remainder of the money, approximately \$640 per month, was used to defray household expenses. The adjudicator in the 1999 decision stated that Folch prepared Granados's application for Income Assistance and failed to mention that other persons were living in the same household as Granados, a false statement. Folch stated that Granados continued to receive Income Assistance until she left the household.

## **ANALYSIS**

The basis of Folch's argument regarding the amount of work Granados performed was that her estimates were unreasonable. It was not credible that she worked 85 hours a week in the circumstances described. Application of the 4-hour minimum in the *Act* would not be fair to the employer. Moreover, Granados's evidence that she spent three hours each day preparing breakfast and cleaning the kitchen was an example of her exaggeration of the work she performed. Much of the housework was her own, preparation of her meals, cleaning and the like. Folch proposed that \$325 per month be deducted from any wages owed to compensate for the room and board Granados received. Since Folch and Andrade did not believe that Granados was an employee, they did not even consider a contract with her covering room and board.

Granados's counsel argued that she worked at least as many hours as the Director's delegate found in her Determination. The deduction for room and board is permissive under the *Act* and only can be deducted after an agreement between the employee and her employer. Moreover, during the period in question, Granados received Income Assistance, which Folch took from her, except for the \$30 weekly payment.

The delegate admitted that it was difficult to quantify Granados's hours of work. She was unsophisticated and did not know her rights. The number of hours in the Determination was the minimum under the circumstances.

The applicant in these proceedings, Folch in this case, bears the onus of demonstrating that the Determination was incorrect. After reviewing the evidence before me concerning Granados's hours of work, I conclude that Folch did not meet her onus.

Taken at face value, Granados's original estimate of the hours she worked was excessive, but understandable under the circumstances of her life. She had few contacts outside of the home. She did the housework as necessary and set her own pace for these duties and had few, if any, other activities to occupy her time. While it probably was possible that she could have accomplished her duties more quickly, she filled her days with these tasks, including knitting. I accept that Folch instructed her on what work was to be done, but was not able to estimate how many hours were required to carry out these tasks, as she was not in the home herself. The Director's delegate, faced with a difficult task, reduced the hours in the Determination substantially, acknowledging that part of the time Granados spent in the house was meeting her own needs. Folch did not provide any basis for an alternate calculation except the requirements of Section 34(2) of the *Act*. The evidence Folch presented to the Tribunal essentially repeated the information available to the Director's delegate when she issued the Determination.

I preferred Granados's description of her duties to Folch's. It simply was not credible that a couple, both of whom were employed, would divide household duties when a woman who had been their domestic worker in Mexico and occupied that position in Canada, was living in the household. I follow the judgment of the adjudicator in BC EST 108/99 in declining to put much weight on the written statements of Folch's friends. Not only is their objectivity in doubt, but also their opportunity to observe Granados's work was admittedly limited.

Folch argued that the amount of wages owed should be reduced by \$325 per month to compensate for room and board. Neither the law nor the evidence supports such a conclusion. Section 14 of the *Act* requires that an employer of a domestic worker must provide a copy of the employment contract, which must include any charges for room and board. Folch acknowledged that no contract existed in this case. The maximum amount currently permitted by the *Employment Standard Regulation* is \$325 per month. Again, Folch provided no evidence to support this claim that \$325 was a reasonable amount to deduct. Finally, Folch assisted Granados in completing a false application for Income Assistance and then took the money for her own use throughout the period in question. In effect, Granados was paying her own room and board through the Income Assistance program.

The Penalty Determination imposed a penalty of \$500 on Folch and Andrade because they had contravened Section 28 of the *Act* by failing to keep proper payroll records. Folch appealed this Determination on the grounds that the circumstances were unusual and that the same issue was raised in the Original Determination, which was overturned by the Tribunal.

The Original Determination found that Folch and Andrade had violated Section 46 of the *Employment Standard Regulation* by failing to produce employment records as required. In the Tribunal Decision BC EST #D108/99, the adjudicator found that the Record of

Landing, a key document in the Director's case to prove that Granados was an employee was not a "payroll record," under Section 28 of the *Act*. At p. 9 of that decision, the Adjudicator stated:

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.

The penalty in the Determination under appeal used the rationale of the adjudicator in the previous decision suggested, imposed a penalty for failing to keep records.

The Adjudicator in BC EST #D108/99 outlined the Tribunal's view of appeals of penalties at p. 7. Briefly stated, the Director must first conclude that a person has contravened the *Act* or the *Regulation*. Secondly, the Director may exercise her discretion to determine whether a penalty is appropriate in all of the circumstances, and finally the penalty must conform to the *Regulation*.

The only argument presented by Folch in this case was that the Director had not exercised her discretion properly. In *Re Narang Farms and processors Ltd.* BC EST #D482/98, the adjudicator observed that the Tribunal would not interfere with the Director's discretion unless it can be shown that the exercise was an abuse of power, the Director construed the limits of her authority, there was a procedural irregularity or the decision was unreasonable. The same principles were reiterated in *Re Gourdrean*, BC EST #D066/98.

These conditions set a high threshold for overturning a decision of the Director to impose a penalty. Sections 98 and 115 of the *Act* do not give the Tribunal the authority to substitute its judgment for that of the Director except in accord with these principles.

In this case, none of the above conditions for reversing the Director's discretion was met. There was no abuse of power. The Director acted within her authority, and no procedural irregularity occurred. Under the circumstances, the decision was not unreasonable. Numerous sections of the *Act* were violated for a prolonged period of time. The imbalance of power between the employer and the employee in this case was unusually great.

## **ORDER**

For these reasons, the two Determinations of February 1, 2000 are confirmed, pursuant to Section 115 of the *Act*. Folch and Andrade owe Granados \$39,963.73, plus interest



accrued under Section 88 of the *Act* since the date of the Determination. In addition, Folch and Andrade must pay a penalty of \$500.

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**Mark Thompson**  
**Adjudicator**  
**Employment Standards Tribunal**