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 -

Normita Guidote
("Guidote" or the "Employee")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE NO.:   98/240

HEARING DATE: September 4, 1998

DECISION DATE: October 17, 1998

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DECISION

APPEARANCES

Ms. Normita Guidote   on behalf of the Employee

Ms. Florinda Amistad   on behalf of the Employer

OVERVIEW

This is an appeal by the Guidote pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director of Employment Standards (the "Director") issued on March 25, 1998 which determined that Florinda Amistad ("Amistad" or the "Employer") was not liable for unpaid wages, overtime wages, unauthorized deductions, statutory holiday pay and vacation pay to Guidote.   She argues s appeal that she is entitled to in excess of $37,000.00.

The Determination noted that Amistad employed Guidote as a domestic between June 14, 1995 and September 14, 1996. The basic elements of Guidote's claim are evident from the Determination:

- Amistad required her to work between 8:00 a.m. and 11:00 p.m. without breaks;
- Amistad paid her by cheque each month but required that Guidote pay back all but $400.00 of these amounts every month;
- Guidote did not receive statutory holiday pay; and
- Guidote did not receive vacation pay.

ANALYSIS

The burden rests with the appellant to show that the Determination is wrong.

Guidote claims that Amistad required her to work between 8:00 a.m. and 11:00 p.m. without breaks. Neither Guidote nor Amistad kept records of hours worked, leaving the delegate with the unenviable task of trying to establish hours worked from other sources. The delegate interviewed witnesses, suggested by Guidote, but found that these individual did not have direct knowledge of the hours worked (except with respect to a few dates between June 14, 1995 and September 14, 1996).   The delegate also interviewed the Employer whose statement contradicted Guidote's on many points, including her alleged duties. The delegate also reviewed the work schedules of Amistad and her husband, Joseph Amistad, both nurses, which indicated that their hours of work "for the most part ... did not overlap".   Amistad testified at the hearing that she and her husband took care of the children and domestic chores when they were off work and that Guidote was free to go to her room or do whatever she wanted to do.   She further explained that Guidote worked 38

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hours per week doing baby sitting (daily), dish washing and kitchen upkeep (daily), laundry (three loads per week), light vacuuming (major vacuuming done by Amistad's husband once a week), mopping kitchen (once per week),

washrooms (once per week), dusting (once per week), and cooking (limited to boiling, frying or heating left overs, as Amistad's husband did most of the cooking).

There was little evidence before me to support Guidote's assertion that she, in fact, worked 15 hours per day as she claimed. There was, as already mentioned, no documentation to support the claim, and at the hearing, her testimony did not address--in any credible manner--what duties she performed during those long hours. Both Amistad and Guidote are articulate, well educated and able to assert themselves in the English language. However, Guidote's statements were invariably couched in hypothetical terms: for example, "*if* Joseph came home, he *might* ...*" At the hearing, I encouraged Guidote--several times and to no avail--to be more direct in her testimony. Overall, I find her testimony evasive and vague and, whenever there is a conflict between her testimony and that of Amistad, I prefer that of the latter.

The pay cheques for Guidote's entire period of employment, which was admitted into evidence at the hearing, indicated that Amistad paid Guidote on a monthly basis. Guidote argues that Amistad required her to pay back--in cash--amounts in excess of $400.00 each month and says that this assertion is supported by deposits and withdrawals from her bank deposit book. In my view, the withdrawals are not evidence of anything but the--undisputed--fact that withdrawals from Guidote account occurred and of her alleged payments to Amistad. I am not persuaded that there in any pattern in the withdrawals that support such a contention.

However, Guidote's monthly pay cheques, for the period between August 1995 and June 1996 indicates that her net pay was $656.51 per month. The pay cheques dated July 30 and August 30, 1996 was $752.63. The Employer did not deny that she paid Guidote on the basis of $6.50 per hour until June 1996 as opposed to $7.00 which was the minimum wage in effect from October 1995. In other words, there may an amount owing to Guidote. Based on the material before me, I am not able to determine the exact amount owing, and I refer this issue back to the Director.

Guidote says that she worked on statutory holidays. The Employer denies this. In the course of her investigation, the delegate reviewed Amistad's work schedules and found that they confirmed that Amistad had those days off. Amistad says that Guidote had the statutory holidays off with pay. In the circumstances, I accept Amistad's testimony.

Guidote says that she worked during her vacation and, therefore, is entitled to vacation pay. The Employer denies this. Amistad says that Guidote had two weeks off with pay in December 1995. Amistad's schedule appears to confirm that she had the time off. In the circumstances, I accept Amistad's testimony on this point.

Except as mentioned above, I am not prepared to disturb the Determination.

ORDER

Except to the extent of the determination of an amount owing to Guidote on account of the Employer's failure to pay minimum wages between June 14, 1995 and June 30, 1996, pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated March 25,
1998 be confirmed.

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Ib Skov Petersen
Adjudicator
Employment Standards Tribunal