

An appeal

- by -

Montgomery Clements and Adelle Clements, carrying on business as
Valley Creek Farm
(the “Clements”)

- of a Determination issued by -

The Director of Employment Standards
(the “Director”)

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Robert E. Groves

FILE No.: 2009A/150

DATE OF DECISION: February 9, 2010

DECISION

SUBMISSIONS

Adelle Clements	on behalf of Montgomery Clements and Adelle Clements, carrying on business as Valley Creek Farm
Ginger Bujdoso	on her own behalf
Reubun Whonnock	on his own behalf
Katherine Wulf	on behalf of the Director of Employment Standards

OVERVIEW

1. Montgomery Clements and Adelle Clements, carrying on business as Valley Creek Farm (the “Clements”) appeal a determination of a delegate (the “Delegate”) of the Director of Employment Standards dated November 3, 2009 (the “Determination”).
2. The matter arose when Ginger Bujdoso (“Bujdoso”) and Reubun Whonnock (“Whonnock”) complained that the Clements had failed to pay them wages and annual vacation pay in respect of work they said they had performed at the Clements’ farm early in 2009.
3. The Delegate conducted a hearing on June 23, 2009, as a result of which she concluded that Bujdoso and Whonnock (collectively, the “Complainants”) were the Clements’ employees for the purposes of the *Employment Standards Act* (the “Act”). She then decided that the Clements had contravened sections 18 and 58 of the *Act* when they failed to pay wages and annual vacation pay owed to the Complainants, in the amount of \$1,075.84, including interest.
4. The Delegate also imposed three administrative penalties of \$500.00 each, owing to the Clements’ failure to pay wages in a timely way pursuant to sections 17 and 18 of the *Act*, and their neglecting to keep proper payroll records under section 28.
5. The total found to be owed was \$2,575.84.
6. I have before me the Delegate’s Determination and Reasons for the Determination, the Clements’ Appeal Form together with their submission and selected documents, a submission from the Delegate and the record the Delegate says was before her at the time the Determination was made, a further submission from the Clements, and a submission from the Complainants.
7. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 17 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. My review of the material before me persuades me that I may decide this appeal on the basis of the written documentation before me without conducting an oral, or for that matter an electronic, hearing.

FACTS

8. The Clements own a farm in Saanich. There is a trailer situated on the farm which the Clements rent to individuals who also perform work on the farm.
9. In January 2009 the Clements advertised the availability of the trailer in the “cottages to rent” section of an area newspaper. The Complainants responded and later signed a document entitled “Farmhand Memorandum of Understanding” (the “Memo”) prepared by the Clements. Among other things, the Memo provided that the rent to be paid by the Complainants would be \$1,000.00 monthly, including a “labour component” identified to consist of at least thirty-five hours per month the Complainants would be expected to spend performing an array of specified farm chores, including egg collection, nest cleaning, the cleaning of chicken coops, weeding, pen cleaning, unloading feed, and moving hay. The Memo further stipulated that the Complainants’ work would be valued at \$10.00 per hour for the purposes of calculating their monthly obligation to pay rent. The minimum monthly amount it was estimated the Complainants would contribute by way of work towards the payment of rent was therefore \$350.00.
10. The Complainants commenced to work for the Clements on January 31, 2009, but their relationship with the Clements appears to have deteriorated sharply thereafter. On March 21, 2009, the Clements told the Complainants to cease work. They also asked them to vacate the trailer, but the Complainants declined. As a result of the eviction proceedings which followed under the *Residential Tenancy Act*, the Complainants were ordered to depart by April 12, 2009. During the time they resided in the trailer, the Complainants paid no rent.
11. The Complainants then filed complaints under the *Act*, alleging that they had worked hours as farm hands for the Clements for which they had not been paid wages.
12. In response, the Clements argued that the matter was a rent dispute. They said it did not fall within the jurisdiction of the Director under the *Act*. They denied they were the Complainants’ employers. In the alternative, the Clements asserted that the Complainants had not worked the hours claimed.
13. The Delegate determined that the Complainants were employees for the purposes of the *Act*. She noted that the Clements had control of the work performed by the Complainants, and that the Memo set out in some detail the tasks the Complainants were, and were not, expected to complete. The Memo also referenced the Complainants’ entitlement to sick and vacation time, the terms under which they might bank their time, and the grounds for termination of their “employment.” The Clements acknowledged that the Complainants had spent time at work on their farm. All of this led the Delegate to conclude that the relationship between the Complainants and the Clements was an employment relationship, and that the dispute over the proper payment for the work performed fell within the purview of the *Act*.
14. As all parties agreed that the Complainants’ obligation to pay rent could be mitigated by the extent to which they performed farm work for the Clements, the Delegate felt obliged to consider sections 4, 20, 21 and 22 of the *Act*. The relevant portions of these sections read as follows:
 4. The requirements of this Act and the regulations are minimum requirements and an agreement to waive any of those requirements...has no effect.
 20. An employer must pay all wages
 - (a) in Canadian currency,
 - (b) by cheque, draft or money order, payable on demand, drawn on a savings institution, or

- (c) by deposit to the credit of an employee's account in a savings institution, if authorized by the employee in writing or by a collective agreement.

21.(1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.

22.(4) An employer may honour an employee's written assignment of wages to meet a credit obligation.

15. The Delegate appears to have decided that since the Memo did not provide that the Complainants would be paid at least minimum wages, together with annual vacation pay, for the work they performed, it contravened section 4. It therefore had no effect, and so it could not constitute the Complainants' written assignment of wages to meet their rent obligation. Having drawn this conclusion, the Delegate determined that the Clements had no right to withhold the wages the Complainants had earned, and that they would have to pursue the Complainants for the unpaid rent making use of the other legal avenues which might be available to them.
16. It then fell to the Delegate to decide what amount of wages was owed to the Complainants. As the Clements did not believe that the Complainants were their employees, they had maintained no payroll records. Ms. Bujdoso had kept a diary containing what she said were her records of the hours she and Mr. Whonnock had worked for the Clements. The Delegate found the records noted in Ms. Bujdoso's diary to be unreliable, for several reasons. The other evidence of the Complainants' hours of work consisted principally of their testimony at the hearing. The Delegate found Mr. Whonnock to be a forthright witness. Based on his statements concerning the tasks he and Ms. Bujdoso performed, and the other evidence made available, the Delegate concluded that the Complainants must have worked two hours each on their first day at the farm, and one hour each per day thereafter from February 1, 2009 to March 21, 2009.

ISSUE

17. Is there a basis for my deciding that the Determination must be varied or cancelled, or that the matter must be referred back to the Director for consideration afresh?

ANALYSIS

18. The appellate jurisdiction of the Tribunal is set out in section 112(1) of the *Act*, which reads:
- 112(1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
- (a) the director erred in law;
 - (b) the director failed to observe the principles of natural justice in making the determination;
 - (c) evidence has become available that was not available at the time the determination was being made.
19. Section 115(1) of the *Act* should also be noted. It says this:
- 115(1) After considering whether the grounds for appeal have been met, the tribunal may, by order,
- (a) confirm, vary or cancel the determination under appeal, or
 - (b) refer the matter back to the director.

20. The Clements' Appeal Form indicates that they are challenging the Determination on the basis of section 112(1)(b). They say that the Delegate failed to observe the principles of natural justice in making the Determination.
21. A challenge to a determination on the basis that there has been a failure to observe the principles of natural justice raises a concern that the procedure followed by the Delegate was in some respect unfair. Here, the Clements' allegation relates to the fact that Ms. Bujdoso produced a diary in which she said she had recorded particulars of the hours she and Mr. Whonnock had spent at work on the farm, and the activities that had occupied them. The Clements say that they had no real opportunity to examine the diary and so, I infer, they assert that they were denied an opportunity to fully respond to the case put forward by the Complainants.
22. In my opinion, the Clements' challenge on natural justice grounds lacks substance, primarily because the Delegate made it clear that she found the notations in the diary unreliable, and she based her decision on other evidence. Moreover, there is no indication in the record that the Clements could not have examined the diary had they asked to do so, particularly at the hearing the Delegate conducted.
23. That is not the end of the matter, however. In order to do justice to the parties to an appeal, most of whom will be unrepresented by legal counsel, it is the practice of the Tribunal to seek to discern the true basis for a challenge to a determination, regardless of the particular box an appellant may have checked off on an Appeal Form (see *Triple S Transmission Inc.* BC EST # D141/03). Here, the Clements raise issues which are more properly to be characterized as alleged errors of law on the part of the Delegate, which engages section 112(1)(a) of the *Act*.
24. The Clements argue that the Delegate erred in deciding that they were employers under the *Act* and that the agreement they had with the Complainants was an employment contract. They submit that the Memo, properly construed, is a tenancy agreement, which contains terms the performance of which might have enabled the Complainants to reduce their obligation to pay rent.
25. The answer to the question whether the Clements employed the Complainants must be formulated having regard to the relevant definitions contained in section 1 of the *Act*. They are:
- “employee” includes
- (a) 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...
- “employer” includes a person
- (a) who has or had control or direction of an employee, or
- (b) who is or was responsible, directly or indirectly, for the employment of an employee
- “wages” includes
- (a) ...money...payable by an employer to an employee for work
- “work” means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.
26. The Delegate also found portions of the definition of “farm worker” in the *Employment Standards Regulation* to be of assistance in determining the status of the Complainants. The parts of that definition to which the Delegate referred say this:

“farm worker” means a person employed in a farming, ranching, orchard or agricultural operation and whose principal employment responsibilities consist of

- (a) growing, raising, keeping, cultivating, propagating, harvesting or slaughtering the product of a farming, ranching, orchard or agricultural operation,
- (b) clearing, draining, irrigating or cultivating land...

27. The *Act* takes an expansive approach when it comes to determining whether a particular arrangement is one of employment. This is because the *Act* is benefits-conferring legislation, and so an interpretation of its language that extends its protections to as many persons as possible is favoured over one that does not (see *Bero Investments Ltd.* BC EST # D035/06).
28. It is trite to say that the existence of an employment relationship does not depend exclusively, or even at all at times, on the intentions of one or both of the parties. It is sufficient to establish the relationship as one of employment for the purposes of the *Act* that work normally performed in an employment relationship is performed, and allowed to be performed, by one person for another (see *Hantula* BC EST #D 277/97).
29. Here, there can be no doubt but that the Complainants provided labour for the Clements of the sort called for in the Memo. The Memo described the tasks to be performed. They are the sort of tasks that fall easily within the description of work activities one might expect to be performed on a farm. The Memo describes the activities as “work.” It contains provisions specifically covering issues of sick time, vacation time, and banked labour. It specifies the grounds on which the Complainants’ “employment” might be “terminated.”
30. On these facts, I am not persuaded that the Clements have demonstrated that the Delegate erred in concluding that the Complainants were the Clements’ employees for the purposes of the *Act*.
31. If, as I believe the Delegate was right to conclude, the Complainants were employed by the Clements, they were entitled to be paid wages for their work.
32. Section 21 of the *Act* prohibits an employer from withholding wages from an employee for any purpose, with some limited exceptions such as deductions for CPP, EI, and income tax. There is no statutory exception relating to the payment of rent.
33. In order, then, for the withholding of the Complainants’ wages by the Clements to be lawful, the Memo must qualify as a written assignment of wages to meet a credit obligation pursuant to section 22(4) of the *Act*. Any other type of agreement that derogates from the mandatory language of section 21 will not pass muster due to section 4, which provides that any agreement that purports to waive the minimum standards of protection contained within the *Act* has no effect.
34. Previous decisions of the Tribunal have held that assignments permitted by section 22(4) must be clear and unequivocal (see *National Cheese Company (Western) Limited* BC EST # D419/98, and *Honey Pot Enterprises Ltd.* BC EST # D103/06). There must be no doubt that it is a written assignment of wages to meet a credit obligation which is intended. Determining whether a particular arrangement is in fact an assignment under section 22(4), then, is essentially an exercise in contractual interpretation.
35. In my opinion, the Memo, properly construed, does not constitute such an assignment. Rather, it represents an agreement to compensate the Complainants in the form of residential accommodation in the trailer in return for the stipulated number of hours of work the Complainants were to provide on the farm each month, thereby reducing their monthly obligation to pay rent. The Memo does not authorize a deduction from the Complainants’ wages. It assigns nothing. Indeed, it contemplates that for the work the

Complainants performed there would be no wages paid in the form required by section 20 of the *Act*. Instead, the Complainants would receive compensation for that work “in kind.” None of the parties understood that the Memo documented an arrangement where the value of rent would be deducted from wages payable to the Complainants, or that it constituted an assignment of the type contemplated by section 22(4).

36. No such assignment having been provided, in my view, it was not permissible for the Clements to pay the Complainants’ wages “in kind,” in the form of accommodation for which they would not be obliged to pay rent. The reason for this is that remuneration “in kind” is a form of payment for work that the *Act* prohibits because it does not constitute a payment of “wages” as that word is defined in section 1 (see *Maple Beach Bed And Breakfast Inc.* BC EST # D135/04).
37. Since the Clements’ withholding payment of the Complainants’ “wages” cannot be justified under section 22(4) of the *Act*, it follows that the Delegate was correct when she determined that the Clements owed the Complainants wages for their work.
38. In my view, a difficulty has arisen on the appeal regarding the Delegate’s calculation of the wages owed to the Complainants. In her submission, the Delegate notes that the Clements have tendered evidence on appeal that was not before her when she made the Determination. Parts of that evidence have convinced the Delegate that some of her findings concerning the hours the Complainants worked for the Clements were in error, and that the Complainants are entitled to sums for wages that are lower than those identified in the Determination. The Delegate asks that the Determination be varied to account for this new calculation.
39. In the circumstances of this case, I decline to do so. There are two reasons for this. First, the information provided by the Clements on this appeal on which the Delegate has grounded her revised calculation of the wages owed to the Complainants is evidence it appears the Clements could, with reasonable diligence, have presented to the Delegate at the time of the original hearing. It therefore fails the test for “new evidence” referred to in section 112(1)(c) of the *Act*. Second, the Complainants in their submission on appeal argue strenuously that the Delegate’s calculation of their hours of work is incorrect. Regarding this point, I note that there is evidence from which it might be inferred that the Clements accepted at least some of the hours the Complainants reported they had worked, notwithstanding they believed they were inflated. However, it is unclear to me whether, and if so to what extent, the Delegate has taken that into account in either her original, or her revised calculation.
40. The regime under which complaints are dealt with currently pursuant to the *Act* contemplates that it will be the Director and his delegates who are responsible for determining the necessary facts. It is for this reason that errors of fact on the part of a delegate are generally not reviewable on appeal. Having said that, I am troubled that if I were to accede to the Delegate’s invitation to vary the calculation of wages owed that appears in the Determination I would be making a finding of fact based principally on evidence that should have been considered by the Delegate at the hearing, evidence which to an extent contradicts other evidence on which the Delegate relied in making her Determination, and evidence which the Complainants have not been able to test on cross examination. In the circumstances, I believe that in order to do justice to the parties, I must remit the matter of the calculation of the amount of wages owed to the Complainants back to the Director for consideration afresh.

ORDER

41. Pursuant to section 115 of the *Act*, I order that
- those parts of the Determination which find that there was an employment relationship between the Clements and the Complainants, and that the Clements owe wages to the Complainants, be confirmed;
 - the part of the Determination which calculates the wages owed by the Clements to the Complainants be cancelled, and the matter of the calculation of those wages be referred back to the Director for consideration afresh;
 - the imposition of the three administrative penalties by the Delegate in the Determination be confirmed.

Robert E. Groves
Member
Employment Standards Tribunal