

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.: 2010A/49

DATE OF DECISION: June 24, 2010

DECISION

SUBMISSIONS

Adelle Clements	on behalf of Montgomery Clements and Adelle Clements, carrying on business as Valley Creek Farm
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”) appealed a determination of a delegate of the Director of Employment Standards (the “Director”) dated November 3, 2009 (the “Determination”), arising from complaints filed by Ginger Bujdoso (“Bujdoso”) and Reubun Whonnock (“Whonnock”) alleging that the Clements owed them wages for work they had performed at the Clements’ farm in Saanich earlier in the year.
2. On February 9, 2010, the Tribunal issued my decision BC EST # D018/10 (the “Original Decision”). It confirmed that Bujdoso and Whonnock (collectively, the “Complainants”) were employees to whom the Clements owed wages, and that the Clements were liable to pay the administrative penalties identified in the Determination. It cancelled the Delegate’s calculation of the wages owed, however, and referred that matter back to the Director for consideration afresh.
3. The Director has revisited the matter referred back and has delivered a report regarding the calculation of the wages owed to the Complainants. The Clements have delivered material in reply.
4. It now falls to me to determine the aspect of the appeal which challenges the amount of wages owed to the Complainants.

FACTS

5. The relevant facts leading to the referral back are set out in detail in the Original Decision.
6. Early in 2009, the Clements rented a trailer on their property to the Complainants pursuant to a Memorandum of Understanding (the “Memo”) which provided that the rent to be paid by the Complainants would consist, in part, of a payment in kind in the form of a value attributed to various chores they would perform around the farm each month.
7. The relationship between the Complainants and the Clements deteriorated almost immediately, and as a result of eviction proceedings taken by the Clements under the *Residential Tenancy Act*, the Complainants were ordered out of the trailer in April 2009. During the time they resided in the trailer, the Complainants paid no rent.
8. The Complainants later filed complaints under the *Employment Standards Act* (the “Act”) claiming that the Clements had failed to pay them wages and annual vacation pay in respect of farm work they had performed while residing in the Clements’ trailer.

9. The Clements responded with the assertion that the Complainants were not employees for the purposes of the *Act*, and that the matter to be decided was a rent dispute. In the alternative, the Clements submitted that if the Complainants were found to be employees, and that the dispute did, indeed, fall to be determined under the *Act*, they disagreed with the Complainants' calculation of the hours they said they had worked on the farm.
10. Following a hearing, the Director determined that the Complainants were employees, and that the Clements owed them wages. The Director also imposed three administrative penalties.
11. On appeal, I decided in the Original Decision that the Determination should, for the most part, be confirmed, but that there were sound reasons why the calculation of the wages owed to the Complainants should be referred back to the Director. The principal reason for this was that new evidence was tendered during the appeal process which suggested to the Director that the amount of wages declared to be owed in the Determination was incorrect.
12. I decided that the new evidence did not satisfy the requirements of section 112(1)(c) of the *Act* because it did not appear that it was unavailable at the time the Determination was made. In addition, I noted that the validity of the evidence was contested by the Complainants in their submissions on the appeal, and it appeared that it might contradict other evidence on which the Director had relied when issuing the Determination. Given that it is the Director to whom the *Act* assigns the responsibility for finding the salient facts, I decided that in the circumstances the prudent course was to refer the question of the proper calculation of the wages owed back to the Director for further consideration.
13. After the referral back, the Director reviewed the evidence accumulated in these proceedings, and determined that the sum of \$332.80 was owed to each Complainant for wages and vacation pay. The Director advised the parties of this finding and invited further submissions. The Director advises that the Complainants responded they did not dispute the sums as calculated. Notwithstanding an invitation from the Tribunal, the Complainants have delivered no further submission for my consideration.
14. The Clements appear to have taken no serious issue with the numbers calculated by the Director on the referral back. In correspondence forwarded to the Director, they state that the Director's estimate of the amount of work the Complainants' did, although higher than the Clements' estimate, "is not a major cause of concern."
15. The real points of concern for the Clements continue to relate to their obligation to pay wages to the Complainants at all, particularly as the Complainants do not ever appear to have paid any rent while they resided in the trailer. In a written submission to the Director attaching testimonials as to their good character and the practice followed with other tenants, the Clements have again sought to argue, as they had done in the proceedings which led to the Original Decision, that the work/rent exchange arrangement they entered into pursuant to the Memo constituted an assignment of wages to meet a credit obligation for the purposes of section 22(4) of the *Act*.
16. The Clements have also made reference to a cheque for \$300.00 which, it is stated, Adelle Clements gave to the Complainants shortly before she directed them to cease work. A copy of the cheque is attached to the Clements' submission. It is made out to Whonnock and appears to have been negotiated by him. Nowhere in their submissions on the referral back do the Clements clearly state what the payment was for. In the material generated during the proceedings leading to the Determination, and on appeal, however, the Clements made reference to the fact that the \$300.00 was intended to be a loan to the Complainants to assist them to obtain insurance on their vehicle.

17. Finally, the Clements have alleged that the Complainants stole sums deposited into a drop box by purchasers collecting eggs from the chicken coop on the farm on the “honour system.” There were merely oblique references to money being missing in the record prior to the proceedings on the referral back. Now, the Clements have provided more details supporting their suspicions, and they imply that the Complainants are responsible.

18. For these reasons, the Clements argue that the Complainants have received more money from them than any wage amounts which may be found to be due.

19. In her submission to the Tribunal on the referral back, Adelle Clements also says this:

I am disappointed that...(*the Director*)...only reviewed the evidence with regard to the wages owed to the complainants and did not address what I consider the more material problems of the case; namely that the complainants are trying to do anything they can do to try to get money. This is a problem that appears to be quite widespread, as I was told when these hearings first began that the person who tried to help this type of individual always loses and it would be best just to pay them off and avoid the further expense of fines and hassle. It is a means for homeless people to get both accommodation and money.

...

To me the concentration on “hours worked” is a red herring. The principle is my major concern. Is it against the law to try to help people better their situation by allowing rent exchange? If so, this must been (*sic.*) made public. Newspapers should realize that and ads showing reduction of rent for tasks performed should be made aware that the ad is illegal. Homeless organizations should be made aware of the problem. Citizens must be warned.

I do not blame the complainants for trying to get money in anyway they can – this is human need for survival. I do criticize the Labour Department for not realizing the scam for what it is. (*italics added*)

20. In reply, the Director makes no reference to the \$300.00 cheque, or to the allegations of theft. Instead, the Director states that while the Clements have expressed continuing dissatisfaction concerning the finding that the Complainants were their employees, the Clements’ submission “does not advance further argument or evidence with regards to the wages.”

ISSUE

21. Should the Director’s calculation of the wages owed to the Complainants be confirmed, cancelled, or varied, or should the matter be referred back to the Director for consideration afresh?

ANALYSIS

22. The difficulty I have with the Clements’ submissions delivered on the referral back is that they do not speak, directly, to the sole issue I asked the Director to address. The issue I asked the Director to resolve on the referral back was the calculation of the amounts owed to the Complainants for wages.

23. Rather than deal with that issue in any comprehensive manner, the Clements seek to re-argue their point that their arrangement with the Complainants was a rental agreement, not a contract of employment. In the alternative, they assert that the Complainants are not entitled to the wages they seek because the Memo constituted a written assignment of their wages to meet a credit obligation, namely, the rent they owed while they occupied the trailer.

24. I understand that the Clements might be perplexed that the Tribunal has construed the manner in which they organized their dealings with the Complainants in a way that fails to achieve the ends they sought. However, the legal effect of that relationship was determined in the Original Decision, and should not be re-visited again now, absent exceptional circumstances the existence of which I do not discern to be present upon a review of the Clements' submissions on the referral back.
25. One of the reasons for the Tribunal's reluctance to permit re-argument on issues previously decided is to be found in section 2 of the *Act*, which sets out the various purposes of the legislation. In the circumstances of this case, section 2(d) is especially noteworthy. It says that a purpose of the *Act* is:
- ...to provide fair and efficient procedures for resolving disputes over the application and interpretation of this *Act*...
26. In my opinion, it would undermine the realization of the twin goals of fairness to the parties and efficiency in the processing of complaints, if appellants were at liberty to re-argue issues that the Tribunal has already determined against them in the decision referring a different question back to the Director for consideration afresh. It follows that I must decline to consider those issues anew in these proceedings that arise purely to decide the issue posed on the referral back.
27. The issue that is properly before me relates solely to the correct calculation of the wages the Clements owe to the Complainants. Upon review of the evidence and submissions on the referral back, the Director has determined that the Clements owe the sum of \$332.80, and interest, to each of the Complainants. That is a finding of fact that the Tribunal has very limited power to disturb at any time, and *a fortiori* in circumstances such as those present here, where the Complainants take no issue with the Director's finding, and the Clements state that the Director's estimate of the hours worked by the Complainants "is not a major cause of concern."
28. On the referral back, however, the Clements appear to raise two other issues which I infer they seek to employ to persuade me that the Complainants should not receive the wages the Director has determined are owed. They allude to their delivering a cheque for \$300.00 payable to Whonnock to the Complainants shortly before they directed the Complainants to cease work on the farm. They also state that "honour system" money for the purchase of eggs from their farm has gone missing, and they insinuate that the Complainants are guilty of taking it.
29. Neither of these allegations is in my view sufficient to demonstrate that the Director's calculation of the wages owed to the Complainants is in error.
30. Both allegations, properly construed, constitute the basis for civil claims that the Clements may wish to see vindicated in proceedings commenced in another forum. They do not, however, constitute factors which the *Act* permits me to employ by way of set-off, so as to reduce the amounts the Director has calculated are owed to the Complainants for wages. The reason for this appears in the language of section 21(1) of the *Act*, alluded to in the Original Decision, which reads:
- 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**. (*emphasis added*)

31. Section 21(1) establishes an absolute bar to deductions, subject to certain permissible exceptions (see *Health Employers Association of BC v. BC Nurses' Union* 2005 BCCA 343 at paragraph 65). Claims in debt, or for conversion, are not exceptions that are permitted under the statute.
32. It follows that I see no reason to disturb the Director's determination of the amounts owed to the Complainants by the Clements for wages.

ORDER

33. Pursuant to section 115(1)(a) of the *Act*, I order that the Director's determination on referral back that the sum of \$332.80, plus accrued interest, is owed by the Clements to each of the Complainants for wages be confirmed.

Robert E. Groves
Member
Employment Standards Tribunal