

Appeals

- by -

Clarke Orchards Contracting Ltd.
("Clarke Orchards")

- 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

ADJUDICATOR: Cindy J. Lombard

FILE No.: 2002/128 and 2002/137

DATE OF DECISION: June 25, 2002

DECISION

OVERVIEW

This is an appeal by the employer/Appellant, Clarke Orchards Contracting Ltd. (“Clarke Orchards”) of the Director of Employment Standards (the “Director”) issued February 14, 2002 and February 26, 2002, which found as follows:

- 1) February 14, 2002: Clarke Orchards owed to its former employee, Julie Dettling (“Dettling”) the sum of \$1,813.53 being overtime wages, statutory holiday pay, vacation pay and interest (“Determination No. 1”)
- 2) February 26, 2002: Clark Orchards was in contravention of Section 28 of the Act in its failure to keep a record of daily hours worked by Dettling (“Determination No. 2”)

ISSUES TO BE DECIDED

1. Was Dettling a farm worker within the meaning of the Act?
2. Was the Delegate of the Director who investigated this matter and rendered the Determinations biased against the employer, Clarke Orchards?
3. Did Clarke Orchards contravene Section 28 of the Act?

The burden of proof is on the Appellant to show that on a balance of probabilities that the Determination ought to be varied or cancelled. The nature of that burden is to show that the Determination is wrong in some material respect. In other words, the Appellant must clearly set out why and how the Determination is wrong.

FACTS AND ANALYSIS

Dettling was employed by Clarke Orchards from April 17, 2001, until July 20, 2001, at a wage of \$9.00 per hour. Clarke Orchards operates Apple Valley Country Garden and Apple Knockers Orchard Café, a restaurant and retail business.

1. Was Dettling a farm worker within the meaning of the Act?

Clarke Orchards asserts in this appeal that Dettling is a farm worker within the meaning of the *Act*. In her letter dated March 6, 2002, Rita Clarke, President of Clarke Orchards, states:

“On telephone correspondence with Ms. Clark Welder, we asked that Mrs. Dettling’s status as a farm worker be acknowledged, and calculations be adjusted as a result, this however did not occur...

Please be advised that for the entire period in question, Ms. Dettling’s duties were all farm related, and that her vehicle was also registered for farm use.”

Dettling, in her correspondence received by the Employment Standards Tribunal office on April 2, 2002, in detail what her duties were.

Section 1 of the *Regulation* to the *Act* define “farm worker” as follows:

“farm worker means a person employed in farming, ranching, orchard or agricultural operation but does not include:

- a) a person employed to process the products of a farming, ranching, orchard or agricultural operation...”

Dettling says that she was hired in an administrative capacity to do paper work, coordinate meetings between Alan Clarke (also a principal of Clarke Orchards and Rita Clarke’s husband) and suppliers of products for the store and fruit stand. She says that she helped hire staff for the store and stocked shelves. Dettling also set up a reservation for the RV park, which was also part of the Clarke’s operation and cleaned the restaurant and campground washrooms. In addition, for approximately four days during her employment, she helped in planting and harvesting the garden.

Rita Clarke gives no details of Dettling’s farm related duties and as such has not satisfied the onus on her to establish on a balance of probabilities either that the Delegate was asked to investigate farm worker status nor that in fact Dettling’s duties were primarily as a farm worker.

2. *Was the Delegate of the Director who investigated this matter and rendered the Determinations biased against the employer, Clarke Orchards?*

Ms. Clarke on behalf of Clarke Orchards states in the Notice of Appeal dated March 6, 2002, that:

“Amanda Clark-Welder, Delegate to the Director of Employment Standards, may not have been impartial on this matter as she has dealt with two other cases related to our establishment. The two other appellants were friends of Ms. Dettling and were also dismissed from our facility. One complaint has since been dropped, the other ruled in favor of the employee...”

The Delegate, Welder, says that she did complete the investigation of a previous complaint and issued a Determination and as well commenced the investigation of a second complaint but in that case was not able to determine that any wages were owing because there were no daily record of hours worked for the period under investigation.

The fact that the Delegate investigated and determined any previous complaint against the Appellant does not give rise to a finding of bias.

Again, the Appellant has not satisfied the onus on it to show on a balance of probabilities that a reasonable person hearing these facts would believe that bias had occurred.

3. *Did Clarke Orchards contravene Section 28 of the Act?*

Section 46 of the *Regulation* provides as follows:

“A person who is required under Section 85(1)(f) of the Act to produce or deliver records to the Director must produce or deliver the records as and when required.”

Section 28(1) of the *Act* requires as follows:

“For each employee, an employer must keep records of the following information:

- d) the hours worked by the employee on each day, regardless of whether the employee is paid on a hourly or other basis;”

Section 28 of the *Regulation* provides for a penalty of \$500.00 for each contravention of any sections, which include both Section 28 and 46 of the *Regulation*:

“28. The penalty for contravening any of the following provisions is \$500.00 for each contravention:

- a) Section 25(2)(c), 27, 28, 29, 37(5) or 48(3) of the *Act*;
- b) Section 3, 13 or 46 of this *Regulation*.”

The facts herein are clear, namely, that the employer did not keep records containing the hours worked by the employees on each day as required by Section 28 of the *Act* and therefore, pursuant to Section 28 of the *regulation*, the fine of \$500.00 for contravention of Section 28 was properly made by the Delegate of the Director.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determinations of these matters: a) dated February 14, 2002, in the amount of \$1,813.53 and b) February 26, 2002, in the amount of \$500.00, plus any interest which has accrued pursuant to Section 88 of the *Act* be confirmed.

Cindy J. Lombard
Adjudicator
Employment Standards Tribunal