



An appeal

- by -

Arbutus Bay Estates Ltd. operating as Arbutus Bay Deer Farms

- 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: John M. Orr

FILE No.: 2001/324

DATE OF HEARING: August 24, 2001

DATE OF DECISION: August 30, 2001

The findings of the Director's delegate that Roberts worked for Arbutus for a period of 4 weeks in April 2000 is not disputed. The issues surrounding his work and wages became clouded because Roberts "overstayed" in the accommodation provided on the farm and proceedings had to be instituted to have him removed. The determination found that Roberts was owed \$10.00. In arriving at this amount the delegate charged back against the employer the sum of \$50.00 that had been deducted from his first pay-cheque for his damage deposit and a charge for propane. Arbutus also claims that the delegate has included 10 hours of work that was unauthorised by the employer. It is not necessary for me to decide all of these issues, as it is clear on the documentation that Roberts provided written authorisation for the deduction of the damage deposit from his first cheque. This amounted to a written assignment for the \$50.00 to be applied to the damage deposit. As this amount in and of itself exceeds the \$10.00 found owing I will cancel the determination in so far as Mr Roberts is concerned. Although not necessary, I would have found that the propane payment was an advance on his pay and was therefore also subject to deduction.

The situation is more complicated in Grant's case because of evidentiary inconsistencies. Arbutus claims that Grant did not work at the times that he claims and even then did not work well. The facts briefly put are as follows. Grant attended for an interview on the Wednesday before he was hired. He stayed around the farm watching the nature of the work and assessing the work situation. At the end of a few hours he was offered a position and he accepted it. He was initially to arrive on the farm on the Saturday and commence work on the Sunday. As it turned out he did not make it on the Saturday and arrived late on the Sunday. Most of Sunday's work had been completed although he may have watched for a while and may have held a gate open.

Grant has claimed for 2 hours work on the Wednesday, interview day, and 1 hour on the Sunday. I do not agree that these were working hours. Although he may have done some assistance on both occasions it was prior to the commencement of his employment contract and the delegate was correct in not including these amounts in the wages found to be owing.

The employment contract called for Grant to work 5.5 hours per day. The employer's claim that Grant only worked 11 hours in total is unreasonable and overly punitive. It is clear that the employer was most dissatisfied with the lack of effort put into the job by Grant but there are remedies open to employers in such a situation. However, it is not open to the employer to assess *ex post facto* a guesstimate of what work was done and how many hours it might take to perform the guesstimated work and then only pay for that amount of time. So long as the employee is allowed to continue in his employment he is entitled to be paid for his scheduled hours of work unless the employer is on site and suspends the employee or otherwise relieves him of his duties.

At the same time, the hours claimed by Grant over and above his contracted hours are either inflated or were clearly not authorised in light of the employer's dissatisfaction with his work performance during the basic hours he was supposed to work.

One exception to Grant's regular schedule of work occurred on his first day. He started work on the Monday. His employer left him prescribed work to do but when she returned the next day she

expressed dismay that it had not been done. Grant agreed that he had used much of the day getting moved in to his accommodation and he apologised and agreed to make-up those hours on another day. They were never made up. He had only done one job that first day that normally involved .5 hours. As a “farm worker” he is exempt from Part 4 of the *Act* in regard to minimum daily hours to be paid.

I conclude therefore that Grant was entitled to be paid .5 hours on that first day but on each successive day Tuesday through Friday he is entitled to be paid his contracted hours (no matter what the employer thought of his work ethic or no matter how little he actually achieved). The total hours on those 4 days would amount to 22 hours (4 x 5.5). The employer agrees that Grant worked 1.5 hours on the Sunday so his total hours for the week were 24 hours (.5 + 22 + 1.5). His rate of pay was \$10.00 per hour and therefore his gross wages were \$240.00. As Grant worked 6 days in total he is entitled to vacation pay of 4% of his total earnings, which amounts to an additional \$9.60 for a total wage of \$249.60.

It is not disputed that Grant was paid \$171.44 leaving a balance owing before interest of \$78.16.

As this is an appeal from a determination of the Director the onus is on the appellant to satisfy me that the determination is wrong. In a case such as this where the evidence is so conflicting it would be easy to decide the matter simply on the basis of this onus. However, in my opinion, it behoves me to endeavour to resolve the fundamental issue in this case despite the unreliability of much of the evidence. I am satisfied that Arbutus has persuaded me in regards to Roberts and to some extent in regards to Grant that the determination should be varied. In Robert’s case such portion of the determination that relates to him is cancelled. In Grant’s case I am satisfied that he did not work all of the hours claimed and that the determination should be varied to show that he is owed the sum of \$78.16 plus interest from June 20th, 2000 (48 hours after termination).

ORDER

I order, under section 115 of the *Act*, that the Determination is varied to delete any finding of wages owing to Robin Roberts and to vary the amount owing to David Grant to \$78.16 plus interest from June 20th, 2000.

John M. Orr
Adjudicator
Employment Standards Tribunal