Employment Standards TRIBUNAL

An appeal

- by -

Arbutus Environmental Services Ltd.

- 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.: 2000/788

DATE OF DECISION: February 14, 2001

DECISION

OVERVIEW

This is an appeal by Arbutus Environmental Services Ltd. ("Arbutus") pursuant to Section 112 of the Employment Standards Act (the "*Act*") from a Determination (File No.89947) dated October 13, 2000 by the Director of Employment Standards (the "Director").

Morrice Ball ("Ball") worked for Arbutus from January 1998 to October 1999. Mr Ball was paid as an employee from January 1998 to March 1998. Thereafter Mr Ball was paid as a sub contractor. The Director determined that Mr Ball was not a sub contractor and was in fact an employee and therefore entitled to benefits under the *Act* such as overtime wages, statutory holiday pay, and vacation pay.

Arbutus appeals this decision on the grounds that the Director was wrong in law in finding an employer/employee relationship between the parties. Arbutus submits that the parties had entered into an agreement or contract that clearly stipulated that Mr Ball was a contractor and not an employee. Arbutus submits that the relationship the parties have created for themselves should be definitive of their legal relationship.

ISSUE TO BE DECIDED

The issue to be decided on this appeal is whether the Director made an error of law in finding that Mr Ball was an employee and not a contractor.

ANALYSIS

The relevant definitions contained in the *Act* are as follows:

> *"**employee**" includes*
>
> *(a) a person, including a deceased 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) salaries, commissions or money, paid or payable by an employer to an employee for work,*
>
> ***"work"** means the labour or services an employee performs is for an employer whether in the employee's residence or elsewhere*

Arbutus submits that "a careful and objective consideration of these definitions reveals that they are so tautological, circular and wide as to be meaningless". It is submitted that applying these definitions "it is virtually inconceivable to find any relationship between two people for compensation in exchange for any effort or information on any kind, to be other than an employment relationship".

However, it is the responsibility of the Director and of this Tribunal to interpret the legislation in a logical and consistent manner. As noted by the Tribunal in *Re: National Courier Service,* BCEST #D521/98:

> None of these definitions are particularly helpful to business people, employers, employees or this Tribunal. However, the bad drafting of the Act does not remove the responsibility from the Tribunal to applying these definitions in as logical a manner as possible no matter how wide a net it casts."

Arbutus submitted to the Director and again to the Tribunal in the appeal that the change in status for Mr Ball from employee to contractor was a matter of mutual agreement and that this agreement should be respected. It is submitted that because the definitions are so wide as to be meaningless that "the relationship the parties have created for themselves should be definitive of their legal relationship."

Arbutus has submitted some further evidence to support the existence of a mutual understanding that the working relationship was in the nature of a sub contract and not employment but in my opinion the intentions of the parties are not definitive of their legal relationship. This same issue was discussed in *Re: Thursday's Sports Plus Ltd.*, BCEST #D146/97. In *Thursdays* an aerobics instructor had specifically agreed with her employer that her work status would be changed from employee to independent contractor. The Tribunal found that section 4 of the *Act* applies to the defining of the employer/employee relationship and that the parties cannot agree to waive the provisions of the *Act* and treat the relationship as an independent contract "to allow such would defeat the very purpose of the act to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment. Therefore the intentions of the parties, although they can be taken into consideration in considering the substantive nature of the relationship, are not decisive of the issue." See also *Castlegar Taxi* (1988) 58 B.C.L.R. (2d) 341.

The appeal in this case turned on the foregoing argument - that the intention of the parties should be determinative. As noted above I am not persuaded that this is the law. I cannot find that the Director made any error in looking beyond the apparent agreement of the parties to the actual working relationship and in the manner in which that relationship was analysed.

The onus is on the appellant to satisfy the Tribunal that the determination is wrong. In this appeal Arbutus has not made any other submissions dealing with the factors as analysed by the Director. I conclude therefore that the determination should be confirmed.

ORDER

I order, under Section 115 of the *Act*, that the Determination be confirmed.

John M. Orr

John M. Orr
Adjudicator
Employment Standards Tribunal

JMO/bls