

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act* R.S.B.C. 1996, C.113

- by -

Arbutus Bay Estates Ltd.

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** Frank Falzon

**FILE No.:** 1999/726

**DATE OF DECISION:** February 26, 2000

## **DECISION**

### **OVERVIEW**

Arbutus Bay Estates Ltd. (“Arbutus”) has appealed the November 3, 1999 Determination of the Director of Employment Standards ordering Arbutus to pay Mr. Jonathon Lyster \$3526.19 for various alleged breaches of the *Employment Standards Act* (“the Act”) relating to vacation pay, hours worked on statutory holidays and “lieu days” for statutory holidays.

Two issues are central in this dispute. The threshold question is whether Mr. Lyster was, between October, 1994 and October 1996, an “employee” so as to be eligible for the protections of the Act, or an “independent contractor” falling outside the Act. If he was not an employee within the meaning of the Act, there is no basis for the Determination. If he was an employee, a second issue arises as to whether or to what extent Mr. Lyster worked without being accorded the minimum standards under the Act in ss. 16, 44, 46(1), 46(2) and 58(3) of the Act.

### **ISSUE**

Based on the fashion in which this matter proceeded, as described below, the narrow issue before me is what order I should make in order to accommodate the parties’ agreement that this matter should be remitted to the Director for reinvestigation.

### **ANALYSIS**

The complaint in this matter was made November 27, 1996. Nearly three years elapsed before the Determination was issued. Based on the information before me, it appears that Arbutus was contacted in March, 1997 by letter notifying its principal of the complaint and requesting certain records. The same month Arbutus responded advising that an employers’ records of hours did not exist because the relationship was that of independent contractor, and requesting a copy of the complaint. It appears that there was no further contact between the Branch and Arbutus until the November 3, 1999 Determination was issued.

Arbutus appealed the Determination. In support of its appeal, it filed materials including a sworn Affidavit dated November 26, 1999 which proffers a great deal of information that was not before the Director, both on the issue of “employee” and the issue of “hours worked”. I do not propose to comment on the weight and ultimate legal effect to be given to this information. There is no doubt, however, that it is relevant information that was not before the Director’s delegate when he issued the Determination under appeal. Indeed, a core complaint of Arbutus is that its side was not effectively heard during the three year investigation.

The Tribunal set the appeal hearing for February 25, 2000 in Victoria. The Director’s delegate (not the author of the Determination under appeal) attended, along with the parties. Prior to the commencement of the hearing, the Panel raised with the Director’s delegate two issues: first, whether this dispute might be amenable to a negotiated resolution, and second, whether, in light

of the investigation and the new information, it would be appropriate for this matter to be remitted to the Director for further investigation rather than having this Panel conduct what would, in the circumstances, amount to a hearing *de novo*.

The Panel adjourned to give the parties an opportunity to resolve the matter by consensus with the Director's assistance. At the end of that period, the Panel reconvened and was advised by the Director's delegate that while a consensus had not been achieved, he felt that in all the circumstances, including the information tendered on appeal, it would be appropriate for this matter to be reinvestigated, particularly given the fact-intensive nature of determinations of "employee" versus "independent contractor", the need to determine if more records are available, and the unique nature of the relationship in this case. Pending such reinvestigation, the Determination under appeal would be effectively "stayed" as against Arbutus. Both Arbutus and Mr. Lyster expressly agreed with the course of action suggested by the Director. Based on the statements made at the hearing, it was agreed that the Director's delegate would meet personally with both parties and prepare a new decision within 4-6 weeks.

The only issue outstanding as a result of this agreement was the best way to execute this procedural consensus. In my view, having considered the options, the most effective way to proceed is to rely on s. 114(2) of the *Act* which provides as follows:

114(2) Before considering an appeal, the tribunal may

(a) refer the matter back to the director for further investigation...

In *Re Bell* (BCEST #D097/98), the Tribunal described the use of this provision as follows:

.... the present circumstances are ideally suited for an Order under s. 114(2)(a). Among other things, that sub-section is clearly intended to permit a reference back to the Director in cases where the tribunal concludes, before considering the appeal, that further investigation is warranted based on new and significant factual allegations which, if accepted, might reasonably impact on the Determinations and issues under appeal...

A further factor commending a reference back to the Director under s. 114(2)(a) is that to embark on these appeals now would effectively require the Tribunal to conduct these hearings as appeals *de novo*. This Tribunal has previously stated that it is loathe to engage in such hearings. This reluctance is based in part on recognizing significant advantages to the parties, the Director and this Tribunal where the Director has had an opportunity to investigate and consider the questions under appeal. All those advantages would be realized by a further investigation in this matter...

As in *Bell*, no hearing has yet been conducted and no evidence has been heard. I agree with the judgment of the Director and the parties that, in all the circumstances before me, further investigation is warranted. Legally, an order under s. 114(2)(a) of the *Act* is the most straightforward legal mechanism to achieve this result.

**ORDER**

I conclude that the appropriate disposition is to refer this matter back to the Director under s. 114(2)(a) of the *Act* for further investigation, and in particular for fresh conclusions on the factual and legal questions arising on the complaint. To avoid any misunderstanding by the parties, a reinvestigation is just that – a fresh re-examination of the complaint, based on the best evidence available after consultation with the parties. Nothing in this decision, or in the decision to re-investigate, fetters the Director’s delegate in any way in arriving at the decision he considers to be in accordance with the evidence and the law. I confirm the Director’s submission that pending the completion of his investigation, the existing Determination is, practically speaking, “stayed” unless and until it is replaced with a fresh Determination.

Having made this order, it follows that this appeal is adjourned until the Director has had a fair opportunity to investigate further and issue a fresh Determination. For certainty, I set a period of 90 days as being a reasonable time for those efforts to complete, one way or the other.

To avoid uncertainty, I specifically request the Director to notify the Tribunal in writing no later than **April 14, 2000** regarding the results of the new Determination. Should the Determination be in favour of the complaint, Arbutus will be contacted regarding whether it wishes to continue with its appeal, and a new submissions schedule and hearing date will be set. If the Determination is in favour of Arbutus, the appeal will be dismissed and Mr. Lyster will then have his remedies available to him under the Act should he choose to exercise them.

For the record, I confirm that if this matter comes back before the Tribunal, I am prepared to hear this matter but am not seized of it as no hearing has yet been held.

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**Frank A.V. Falzon**  
**Adjudicator**  
**Employment Standards Tribunal**