



An appeal

- by -

Betthar Holdings Ltd. and Arbutus RV & Marine Sales Ltd. Companies
Associated Pursuant to Section 95 of the Employment Standards Act
("Arbutus")

- 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: April D. Katz

FILE No.: 2001/363

DATE OF HEARING: August 29, 2001

DATE OF DECISION: September 18, 2001

Arbutus does not dispute the finding that Richardson worked the hours he claimed.

On September 2, 1998 Arbutus wrote a MEMO, which was distributed with staff cheques on September 8, 1998. The MEMO stated “Effective immediately, no overtime will be approved without written consent of Management.” Richardson’s supervisor had asked him to work overtime before the MEMO and did so afterwards. Richardson did not know if the overtime he worked had been documented with written authorization.

No commissioned sales people have ever received written authority for overtime. At the hearing Arbutus argues that if the commissioned sales people did not organize their hours to cover the daylight hours customers were likely to be on the lot then the lot should have closed. The manager at the location where Richardson worked made a written statement that he authorized Richardson to work the hours claimed. The manager is no longer employed by Arbutus.

The Director’s Determination found Arbutus owed \$11,152.27 plus interest to Jason Richardson for overtime hours worked, vacation pay and statutory holiday pay.

ANALYSIS

The onus is on the appellant in an appeal of a Determination to show on a balance of probabilities that the Determination ought to be varied or cancelled. To be successful the evidence from the appellant must demonstrate some error in the Determination, either in the facts accepted, or the factual conclusions reached or in the Director’s analysis of the applicable law.

Section 35 of the *Employment Standards Act* sets out when overtime occurs.

- s. 35 An employer must pay overtime wages in accordance with section 40 and 41 if the employer requires or, directly or indirectly, allows an employee to work
 - (a) over 8 hours a day or 40 hours a week,

Arbutus had hourly employees who worked in the maintenance shop for whom written approval for overtime was periodically completed. Arbutus did not have the same management approach to sales staff. Arbutus’s evidence was that sales staff could arrange their own hours and come and go as they pleased.

This practice of allowing the sales staff to come and go meant that a manager had to be present when on sales staff were on duty and the lot was open. Richardson’s manager did not want to fill all the time when no sales staff wanted to work. Richardson’s manager would ask Richardson to stay longer because he knew Richardson was anxious to make money. Richardson did not feel he had a choice about working overtime.

I find that by asking Richardson to work longer hours Arbutus was ‘directly or indirectly’ allowing an employee to work over 8 hours a day or 40 hours a week.

Arbutus did not dispute that its sales manager approved Richardson’s hours. There is no dispute that Richardson’s manager was Arbutus’s employee and had authority over Richardson. This being the case there is not doubt that Richardson worked the hours asked of him by his employer. I find that the evidence supports the conclusion in the Determination that Richardson worked overtime. The failure to complete the written authorization was a management failure and did not mean the overtime was not approved by Arbutus.

CONCLUSION

Arbutus has not discharged the onus of proof required to set aside the Determination. The Determination is confirmed.

ORDER

Pursuant to section 115 of the *Act*, the Determination dated May 1, 2001 is confirmed.

April D. Katz
Adjudicator
Employment Standards Tribunal