



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.: 2001/364

DATE OF HEARING: August 29, 2001

DATE OF DECISION: September 18, 2001

DECISION

APPEARANCES:

Craig Little on behalf of Arbutus RV & Marine Sales Ltd. and Bethar Holdings Ltd.

Jason Richardson on behalf of himself

OVERVIEW

Arbutus RV & Marine Sales Ltd. and Bethar Holdings Ltd. (“Arbutus”) disputes the assessment of a \$150 penalty by the Director of Employment Standards (“Director”). Arbutus had advised the Director that it believed the sales staff were independent contractors and the issue was on appeal to the Tax Court. Arbutus had agreed to abide by the decision of the Tax Court.

ISSUE

The sole issue in this appeal is whether Arbutus has shown the assessment of the penalty should be varied or cancelled.

ARGUMENT

Arbutus argues that there should be no penalty because it was awaiting the outcome of its appeal to the Tax Court to apply to the Employment Standards Complaints.

FACTS

Arbutus disputed the Director’s finding that sales staff were employees within the meaning of the *Employment Standards Act* (the “*Act*”) and did not comply with the *Act*. Arbutus agreed to comply with the *Act* if the Tax Court found the sales staff were employees. This complaint was filed prior to the Tax Court decision. As soon as the Tax Court decision was made confirming that the staff were employees, Arbutus changed its practices and is in compliance with the *Act*.

ANALYSIS

The onus of proving the Director has erred is on the appellant in an appeal to the Tribunal. Arbutus is appealing the Director's decision to assess a penalty. The Director's authority to issue a penalty is set out in section 98 of the *Act*, which provides as follows.

Monetary penalties

- 98 (1) If the director is satisfied that a person has contravened a requirement of this Act or the regulations or a requirement imposed under section 100, the director may impose a penalty on the person in accordance with the prescribed schedule of penalties.
- (2) If a corporation contravenes a requirement of this Act or the regulations, an employee, officer, director or agent of the corporation who authorizes permits or acquiesces in the contravention is also liable to the penalty.
- (3) A person on whom a penalty is imposed under this section must pay the penalty whether or not the person
- (a) has been convicted of an offence under this Act or the Regulation, or
- (b) is also liable to pay a fine for an offence under section 125.
- (4) A penalty imposed under this Part is a debt due to the government and may be collected by the director in the same manner as wages.

Section 28 of the Employment Standards Regulation ("*Regulation*") provides that a penalty of \$500 may be assessed for every breach of section 28 of the *Act* or section 46 of the *Regulation* that requires production of records as and when required.

In *Narang Farms and Processors Ltd.* BC EST #D482/99 the Tribunal set out a three step process for assessing a penalty.

First, the Director must be satisfied that a person has contravened the Act or the Regulation. Second, if that is the case, it is then necessary for the Director to exercise her discretion to determine whether a penalty is appropriate in the circumstances. Third, if the Director is of that view, the penalty must be determined in accordance with the Regulation.

(See also, *Re James Cattle Co. Ltd.*, BC EST #D230/99).

Arbutus's evidence is that it did not believe the sales staff were employees and therefore did not comply with the Act. Now that it accepts the status of the sales staff as employees it is in

compliance. The penalty was assessed for a time when the status of the sales staff was in dispute.

The second step is the exercise of discretion. In dealing with the second step in *Narang Farms* the Tribunal stated that the Director must exercise her discretion reasonably.

The Director's authority . . . is discretionary: the Director "may" impose a penalty. The use of the word "may"--as opposed to "shall"-- indicates discretion and a legislative intent that not all infractions or contraventions be subject to a penalty. It is well established that the Director acts in a variety of capacities or functions in carrying out her statutory mandate: administrative, executive, quasi-judicial or legislative. In the case of a penalty determination, the Director is not adjudicating a dispute between two parties, an employer and an employee, rather the Director is one of the parties. As such, the Director is exercising a power more akin to an administrative rather than an adjudicative function. The Tribunal has had occasion to deal with appropriate standard for the Director's exercise of discretionary power in the context of an administrative function in a number of cases. . . .

It is not adequate to simply state that the person has contravened a specific provision of the *Act* or *Regulation*. This means that the Director must set out--however briefly--the reasons why the Director decided to exercise her discretion in the circumstances. The reasons are not required to be elaborate. It is sufficient that they explain why the Director, in the circumstances, decided to impose a penalty, for example, a second infraction of the same provision, an earlier warning, or the nature of the contravention. In this case, the Determination makes reference to a second contravention of the same Section. In my view, this is sufficient.

The Director knew from prior complaints that Arbutus did not accept the status of the sales staff as employees. Arbutus had committed itself to complying if the Tax Court agreed with the Director. The issue is a question of law before the court. In view of the previous complaints and assessments of penalties it was reasonable for Arbutus to conclude that the Director considered the staff within the Act and that it was required to comply regardless of the Tax Court's ruling.

The Determination did not provide any evidence of previous determinations and directions to Arbutus. The basis of the penalty is that the Delegate had previous dealings with the employer but no evidence of which positions in the company were involved and if sales staff were in issue on previous occasions. I cannot assess if the complaints were recent. The Director will have that information to assist her in determining if a penalty is appropriate..

CONCLUSION

Based on the evidence presented I conclude that the appellant has shown that Arbutus intended to be in compliance with the *Act*.

The evidence in support of the penalty was not available at the hearing but will be available to the Director. I refer the matter back for the Director to consider all the facts and determine if a penalty is reasonable in all of the circumstances.

ORDER

Pursuant to section 115 of the Act, I order that the Determination in this matter, dated May 1, 2001 be referred back to the Director.

April D. Katz
Adjudicator
Employment Standards Tribunal