

An appeal

- by -

Arbutus Custom Cabinets Ltd.  
("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:** James Wolfgang

**FILE No.:** 2001/456

**DATE OF HEARING:** August 31, 2001

**DATE OF DECISION:** September 28, 2001



## DECISION

### APPEARANCES:

Robert Theriault	representing himself
Kevin Theriault	representing himself
Brian Kelly	representing Arbutus Custom Cabinets Ltd.

### OVERVIEW

This is an appeal by Arbutus Custom Cabinets Ltd. (“Arbutus” or the “Employer”) pursuant to Section 112 of the *Employment Standards Act (the “Act”)* of a Determination issued by the Director of Employment Standards (the “Director”) dated May 23, 2001. The Determination found Arbutus owed Robert Theriault (“Robert”) \$3,444.67 and owed Kevin Theriault (“Kevin”) \$3,307.33 for violations of Sections 40, 44, 58 and 63 of the *Act*.

Arbutus claimed Robert and Kevin Theriault (“Theriaults”) were self-employed sub-contractors.

The Determination applied the Fourfold Test and established a contract of service existed between Arbutus and the Theriaults and found them to be employees of Arbutus.

The Director issued no penalty against Arbutus.

An offer to mediate was rejected by the parties.

The appeal was heard by way of an oral hearing on August 31, 2001. The witnesses who testified were:

- Ronda Petreman           for the Employer
- R. N. Kelly               for the Employer

Evidence was taken under oath from all parties.

### ISSUES TO BE DECIDED

Were the Theriaults employees of Arbutus and, if so, are they entitled to overtime, statutory holidays and vacation pay? Further, if they are employees are they entitled to compensation for length of service?



## FACTS AND ARGUMENT

Arbutus formerly operated as Kelper Industries Ltd. (“Kelper”). It was a joint venture between Brian Kelly (“Kelly”) operating Kelly Contracting and Robert Perry (“Perry”) operating Paradise West Cabinets and Millwork. They did custom cabinet contracts. Kelly claims he was a salesperson who had no skills as a cabinetmaker and Perry was the cabinetmaker in the business. Kelper had a contract to build and install cabinets in a dental office. The contract was too large for them, as Kelper did not have the equipment or expertise to perform the work. Kelly claims he personally had nothing to do with the hiring of the Theriaults, Kelly claims Perry sub-contracted to Robert, who operated a business named Roberts Renovation & Repairs, to do the cabinetwork. When Perry introduced Robert to Kelly he presented a business card for Roberts Renovation & Repairs and had a photo album showing the type of cabinets they had built and installed. The Theriaults were paid by cheque personally as Roberts Renovations & Repairs had no business bank account.

According to Robert, Perry introduced him to Brian Kelly and it was Kelly who hired him. He first worked for Kelly Contracting and Paradise West Cabinets and Millwork finishing off existing contracts before going to work on the dental clinic. He invoiced Brian Kelly from July 1 to 19, 1999 for hours worked; Kelper Industries and Paradise West from July 20 until September 22, 1999, Kelper from September 23 to October 20, 1999 and from then on invoiced Arbutus.

Kevin stated he received a telephone call from his father on August 24, 1999 indicating Kelly and Perry were looking for another employee. He telephoned Kelly and was interviewed by both Kelly and Perry. Following the interview he was hired by Kelly and given a time sheet and told to keep a record of the hours he worked on each job. Kevin’s time sheets show he worked from August 26, 1999 until February 18, 2000.

Kelly claims Perry informed him the Theriaults would be working as sub-contractors on an hourly basis with no deductions for EI, CPP or Income Tax. Both were paid at the rate of \$15.00 per hour. They supplied their own tools and vehicles except on two occasions, the January 13 to 27, 2000 pay period and January 27 to February 9, 2000 when Arbutus paid mileage for the use of their vehicles.

Kevin claims he requested Kelper make deductions for EI, CPP and income tax each month but Kelly indicated, because of problems with the partnership, it would be taken care of in the new year by Arbutus. When he approached Arbutus on January 28, 2000 for a T-4 slip he was told he would not be receiving one and to file his income tax as a sub-contractor. He indicates he went to the Employment Standards Branch (“Branch”) and they advised him to request Arbutus make the necessary deductions again and if they were not deducted to file a complaint.

When Perry left the business, Kelly changed the name to Arbutus. He claims he went to both Theriaults and offered them jobs as employees however they both emphatically refused claiming “they wanted nothing to do with the government and that they wanted to remain as subcontractors”. Arbutus stated they had other employees at the same time as the Theriaults and



it would not have been a problem to make them employees however they continued under the same terms as before.

Arbutus rented shop tools from Robert for \$100.00 per month. According to Kevin, the Blum Drill Mini Press belonged to him not Robert and the rental of \$100.00 per month was for that equipment. Each month's invoice from Robert showed "tool rent \$100.00" or, in one case, "rent on tools for Sept. \$100.00". For the period January 27 to February 18, 2000 the rental indicated \$50.00.

Arbutus stated:

They were paid roughly every two weeks at their request because we were subcontracting out to Roberts Renovation & Repairs several jobs at one time. They wished to be paid for the amount of work they had completed, as Kevin informed us he was in financial difficulties with the government for GST, and was making monthly payments.

Kevin denies he was in difficulty with GST and needed money to make monthly payments to them. He claims he paid off his GST debt in 1995 but admits he did need money for monthly payments and for caring for his family.

Arbutus claims:

Roberts Renovations & Repairs completed their own contracts between July 15/99 to Feb 18/00. Some contracts were completed on the premises of ACC Ltd. Others were completed at their job site..... Robert and Kevin regularly used their cell phones for purchasing materials and setting delivery dates while on ACC Ltd. premises. The supplier for most of their materials was the same supplier used by ACC Ltd. and often the supplier (E Roko) would mention that either Kevin or Robert were in purchasing material for Roberts Renovations & Repairs.

Further, Arbutus stated:

If any work was unacceptable to ACC Ltd. standards or by their own standards then it was redone at RR & Repairs expense.

The Theriaults deny they had other contracts while working for Arbutus, as they were employed full time as their records show.

Arbutus admits it relied heavily on the Theriaults, as Kelly did not have the cutting and installation knowledge or experience. Robert made up the cutting lists for the cabinets using his own style, which was different than that used by Perry. The Theriaults had their own keys to the shop and set their own hours. They kept a record of the hours they worked on each job and were paid at straight time for all hours submitted. Arbutus claim they used time sheets for the purpose



of tracking the hours on each job or contract because, as a new company, they wanted to check their bidding prices.

According to Arbutus, at one point Robert and Kevin approached Kelly asking for a percentage of the profit of a job as well as their regular rate. They were informed there was no profit as Arbutus was just breaking even.

According to the Kelly's, Robert went to R. Kelly, Kelly's father, believing he had money invested in Arbutus, requesting they turn the business over to him or he threatened to bankrupt Arbutus. Kelly's father testified that he and Robert spoke for some time and he believed the problems with Arbutus and Robert had been resolved when the meeting ended.

Robert denies telling R. Kelly that he would bankrupt Arbutus. He claims the reason he went to see him was because Arbutus owed him over one months wages.

Arbutus claim they realized the Theriaults began charging an excessive number of hours to the contracts and Arbutus was losing money. Arbutus offered them a percentage contract on a new job but both Theriaults refused the proposal and immediately left, moving into a shop next door. Kelly claimed he believed Arbutus would continue to use the Theriault's services on a contract basis and, in fact, he assisted them in moving their tools into the new shop.

Both Theriaults claim Arbutus ordered them to leave the premises when they refused to go on a sub-contract basis on February 18, 2000

## **ANALYSIS**

The evidence before the Tribunal varies considerably from the Employer and the Theriaults. The only common ground is the time the Theriaults started work and the date the Theriaults ceased working for Arbutus.

There is evidence Robert issued an invoice to Arbutus on a bi-weekly basis from October 20, 1999 until February 18, 2000, which listed the total hours worked and on a monthly basis billed \$100.00 for tools. Prior to that he had invoiced Brian Kelly, Kelper Industries and Paradise West.

A substantial number of the invoices and time sheets of both Theriaults indicate they were working a considerable amount of overtime. There was no record of any complaint to Arbutus from the Theriaults about not being paid overtime, statutory holidays or annual vacation pay until after they left Arbutus.

There was no evidence that there was ever any attempt by Robert to have deductions made on his behalf. Kevin claimed that he sought to have deductions made for EI, CPP and Income Tax. This was disputed by Arbutus. Kevin claims he went to the Branch when no deductions were made in January 2000. There is no evidence to indicate there was any complaint to the Branch at that time about overtime, statutory holiday pay or annual vacation pay not being paid.



While the evidence of the Theriaults was that Kelly hired them, I am inclined to believe that Perry hired them, or at least brought them into the company. It makes no difference which partner hired the Theriaults. They were hired and paid by the company. The name changed from Kelly Contracting and Paradise West to Kelper Industries and finally Arbutus however the Theriaults continued to get paid.

Robert brought a very large number of pieces of equipment and tools into the business. Arbutus agreed to pay the insurance for these tools. They were valued at \$20,000.00. Obviously these were not the hand tools normally provided by a tradesman.

From the evidence presented I accept that Arbutus believed the Theriaults to be sub-contractors. The Theriaults were treated differently than their other employees. Arbutus made appropriate deductions for EI, CPP and income tax from their employees and they paid them overtime when it was worked. Neither of those provisions applied to the Theriaults. However it cannot end there. The Determination applied the Fourfold test and concluded the Theriaults were employees and therefore were entitled to a total of \$6,752.00. Notwithstanding the different way in which the Theriaults were treated, they met the test that an employer/employee relationship existed.

There is an obligation on the appellant to prove the Determination erred in fact or in law and on the evidence before me Arbutus has failed to establish the Theriaults were subcontractors.

On that basis I accept the Theriaults were employees within the meaning of the *Act*. I also believe the Theriaults may have intended on working for Kelly Contracting, Paradise West, Kelper Industries, and later for Arbutus on a straight hourly rate to avoid certain obligations. I believe all parties were working on the edge of the *Act* however the obligation is on the employer to ensure there are no violations. Arbutus must bare the brunt of that responsibility. The Determination correctly found the Theriaults to be employees and are entitled to the amounts awarded for overtime, statutory holidays and vacation pay.

In respect to the issue of compensation in lieu of notice, the evidence given to the delegate by the Theriaults indicated they had been terminated by Arbutus and ordered to leave the premises. The Determination reflected that and awarded the Theriaults pay in lieu of notice. The Determination stated:

Mr. Kelly decided to change the terms of remuneration which was unacceptable to the complainants resulting in their respective terminations of employment.

At the hearing Arbutus confronted Kevin that he had given testimony under oath in another forum that they had not been terminated by Arbutus and ordered to leave the premises. The evidence was the Theriaults indicated they would not work that way and left the shop. This evidence by Arbutus was persuasive and credible. Kevin did not deny the evidence. In reply Kevin stated he could not work as proposed by Arbutus, as he needed a steady paycheque. That may be true however it does not change the fact that Arbutus did not terminate them nor order



them to leave the premises. There is no evidence Kevin made any attempt to be paid advances against the contract to ensure a steady income.

There was no evidence if the Theriaults left while there was still ongoing work on existing contracts under the original terms or whether the only work available was the new contract, which was to be paid on a contract basis. As indicated in other Tribunal decisions, there is both a subjective and objective element to the act of quitting. Subjectively, an employee must form an intention to quit; objectively, that employee must carry out an act that is inconsistent with further employment. Taking all the evidence as a whole, the evidence supported the conclusion that the Theriaults had resigned. Clearly, in this case the Theriaults met the objective element of quitting. Robert rented a shop that very day and moved their tools and equipment to the new shop with the assistance of Kelly.

The incident took place when Arbutus sought to change the way the Theriaults were to be paid in the future. Arbutus believed the Theriaults had begun charging excessive hours against the contracts and the company was losing money. In order to prevent this Arbutus proposed putting the Theriaults on a straight contract basis. Because of the unique employment relationship that existed Arbutus had limited control over the hours claimed by the Theriaults. In a normal employer/employee relationship the employer could closely monitor and control the hours worked by their employees. What we must consider is whether that change was of sufficient magnitude to be viewed as constructive dismissal.

The change to the Theriaults conditions of employment was the method of remuneration. The proposed method was by a percentage of the total contract rather than by the hour. The uncontested evidence of Kelly was the expectation, in his opinion; that the Theriaults would make more money on this system. They would still set their own hours, within reason, as they had been doing. They were not being paid overtime therefore there would be no change in that regard. There was no change in supervision and they had their own keys to the shop. There were no deductions for EI, CPP and income tax under either system, notwithstanding Kevin's claim he wanted deductions made on his behalf.

Robert was familiar with the bidding system used by Arbutus; in fact, he assisted Kelly in preparing bids. He presented no evidence to indicate the change in the method of remuneration would be less beneficial to the Theriaults. The Determination did not deal with constructive dismissal as the evidence to the delegate by the Theriaults indicated they had been terminated. The fact they might not have preferred being paid in that manner, if it was not a substantial change, cannot be used as a ground for claiming pay in lieu of notice. We have insufficient evidence to establish a constructive dismissal took place and therefore I do not find the Theriaults are entitled to pay in lieu of notice. The Determination is varied to that extent.

**ORDER**

In accordance with Section 115 of the *Act* I confirm the Determination by the Director dated May 23, 2001 except for the cancellation of the pay in lieu of notice. The matter is referred back to the Director to confirm the amount owed Robert Theriault plus interest and the amount owed Kevin Theriault plus interest in accordance with Section 88 of the *Act*.

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**James Wolfgang**  
**Adjudicator**  
**Employment Standards Tribunal**