

**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 -

Dr. Patrick Nesbitt Inc.  
operating Monument Medical  
("Nesbitt" or the "Employer")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Ib S. Petersen

**FILE No.:** 98/656

**DATE OF DECISION:** December 8, 1998

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**DECISION**

**APPEARANCES/SUBMISSIONS**

Dr. Patrick Nesbitt	on behalf of the Employer
Ms. Samantha Kemsley	on behalf of herself
Mr. Marc Hale	on behalf of the Director

**OVERVIEW**

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director’s delegate issued on September 25, 1998. The Director’s delegate found that the Ms. Kemsley (“Kemsley” or the “Employee”) was an employee of the Employer and that the Employer had failed to pay her wages for April 8, 9 and 14, 1998 contrary to Section 18(1) of the *Act*. There was no agreement between the Employer and the Employee with respect to the wage rate and the delegate, therefore, awarded Kemsley 12 hours at minimum wage, for a total of \$88.31. The Employer appeals the Determination.

**FACTS AND ANALYSIS**

The Employer’s position, according to the Determination, was that Kemsley was an “independent sub-contractor” hired by another physician in the office. While on a first glance, the appeal seems to deny that Kemsley was an employee, on a closer reading, that is not the case. In fact, the appeal acknowledges that she “was a part-time High School Student hired for a specific purpose”. It is clear from the appeal that she worked in the office. Moreover, the appeal does not actually deny that Kemsley worked the days and the hours for which pay was awarded. Patrick admits that he instructed her to keep a record of her hours. He complains that he did not receive this record. Having considered all the circumstances, I am not persuaded that the appeal with respect to the amount awarded can succeed.

With respect to the “\$0.00” penalty, the Tribunal stated in *Narang Farms and Processors Ltd.*, BCEST #D482/98, at page 2:

“In my view, penalty determinations involve a three-step process. 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*.”

In my view, the Employer contravened the *Act*.

I now turn to the second element, the delegate must exercise his discretion within “well established legal principles”. In other words, the delegate must exercise his discretion for *bona fide* reasons, must not be arbitrary and must not base his decision on irrelevant considerations.” Section 81(1)(a) of the *Act* requires the Director to give reasons for the Determination to any person named in it (*Randy Chamberlin*, BCEST #D374/97). Given that the power to impose a penalty is discretionary and is not exercised for every contravention, the Determination must contain reasons which explain why the Director, or her delegate, has elected to exercise that power in the circumstances. 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 operative part of the penalty Determination simply states in generic terms:

“In this instance, the Director is of the view that a penalty will create a disincentive against repeat of a contravention of Section 18(1) and that such a disincentive is needed to promote compliance with the *Act*.”

In my view, this is not sufficient. The Determination does not explain why a penalty in the circumstances will create a disincentive. In the result, I set aside the “\$0.00” penalty.

## **ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated September 25, 1998 be varied as follows:

1. that the amount owed by the Employer to Kemsley is \$88.31;

2. that this amount be paid out to her together with such interest as may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance;
3. that the penalty Determination be cancelled.

**Ib Skov Petersen**  
**Adjudicator**  
**Employment Standards Tribunal**