

An appeal

- by -

Bethar 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.: 2001/829

DATE OF DECISION: December 27, 2001

DECISION

APPEARANCES

Craig Little	on behalf of Arbutus RV & Marine Sales Ltd. and Bethar Holdings Ltd.
Ian MacNeill	on behalf of Director Employment Standards

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”). The Determination referred to previous findings involving Arbutus without any reference to the number or the dates.

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. The Tax court ruled in July 2000 that the people working for Arbutus were employees.

The matter was referred back to the Director to provide more information about the timing of the previous complaints. The Director’s report indicates that 12 complaints were filed between 1995 and 2001 and that this is the first monetary penalty imposed.

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 the complaint arose around an employment period from October 1997 to August 1999 and the Tax Court ruling did not take place until July 2000. Arbutus thereafter considered the sales representatives employees but not before and there should be no penalty because it was awaiting the outcome of its appeal to the Tax Court.

The Director’s position is that she and her delegates must assess whether a person is an employee with every complaint. The issue is not a new one that is outside the normal assessment of a delegate. On 12 occasions this assessment has been made about Arbutus because Arbutus has failed to learn from previous dealings with the Director. If a penalty is the only way to bring an employer into compliance then the penalty is appropriate.

FACTS

Between 1995 and 2001 the Director received 12 complaints against Arbutus. In each instance Arbutus advised the Director's delegate that sales staff were not employees within the meaning of the *Employment Standards Act*. The Director proceeded to a Determination on March 4 1999 and a zero penalty was imposed as a first offence. In each of the 12 complaints Arbutus paid employee wages to the complainants. 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 was set out in the previous decision on this matter .

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 ESE #D230/99).

Arbutus's evidence is that it did not believe the sales staff were employees and therefore did not comply with the Act. The Director's position is that on each previous complaint Arbutus was told that the sales representatives were employees under the *Act*. In each case Arbutus ultimately paid wage adjustments to bring it under the *Act*.

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 continued to pay the wages when challenged but refused to comply with the *Act*.

Arbutus points out that the complaint concerned an employment period prior to the Tax Court ruling. The employment ended in August 1999 and the Director's Determination imposing a zero penalty was made in March of the same year.

The imposition of a penalty in these circumstances appears reasonable in these circumstances. Arbutus could have corrected the non compliance after the Determination was issued and chose not to do so.

CONCLUSION

Based on the evidence presented I find there is no basis on which to cancel or vary the Determination dated May 1, 2001 is confirmed.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination in this matter, dated May 1, 2001 is confirmed.

April D. Katz
Adjudicator
Employment Standards Tribunal