Employment Standards TRIBUNAL

An appeal

- by -

537370 B.C. Ltd. operating as Ponderosa Motor Inn

- 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 (as amended)

TRIBUNAL MEMBER: Robert Groves

FILE No.: 2005A/196

DATE OF DECISION: January 24, 2006

DECISION

OVERVIEW

1. This is an appeal by 537370 B.C. Ltd. operating as the Ponderosa Motor Inn ("Ponderosa") pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") against a determination (the "Determination") issued by a delegate of the Director of Employment Standards (the "Delegate") on October 27, 2005. In the Determination, the Delegate found that Ponderosa had contravened Sections 17, 18, 40, 46, and 58 of the *Act*, and, with the addition of interest, that the sum of $7,236.49 should be paid to the complainants, Luisa Pilcik and Zdrauko Pilcik, for wages. Pursuant to Section 98 of the *Act*, and Section 29 of the *Employment Standards Regulation* (the "*Regulation*"), the Delegate also imposed five administrative penalties, each for $500.00, in respect of the contraventions identified. The total amount found to be payable by Ponderosa was $9,736.49.

2. Ponderosa filed its appeal with the Tribunal on November 9, 2005, enclosing a submission prepared by its counsel. On November 14, 2005 the Tribunal wrote to the Delegate, requesting that she forward the record considered by her at the time the Determination was made, and inviting submissions. On November 30, 2005, the Tribunal received the record from the Delegate, and a written submission.

3. On December 7, 2005, the Tribunal invited Ponderosa and the complainants to respond to the Delegate's Submission. On December 14, 2005, the Tribunal received correspondence from counsel for Ponderosa advising that no further submission would be forthcoming. The Tribunal received no submission from the complainants.

4. On December 22, 2005, the Tribunal informed the parties that the appeal would be determined on the basis of the written submissions received from the parties.

FACTS

5. Ponderosa operates a motel in Golden, British Columbia. The Delegate found that the complainants were employed by Ponderosa to manage the motel from June 23, 2004 until September 5, 2004.

6. In the proceedings before the Delegate, Ponderosa argued that the complainants had agreed to incorporate a limited company, which was then to have entered into a management contract with Ponderosa by the terms of which the complainants would be characterized as independent contractors. No such management contract was ever finalized, nor did the complainants form a limited company. The complainants maintained that they were hired as employees, at an hourly rate of pay. The Delegate concluded that the complainants were, indeed, employees pursuant to the *Act*.

7. On appeal, Ponderosa does not quarrel with the Delegate's finding that the complainants were employees, rather than independent contractors. Nor does Ponderosa take issue with the amount of wages found to be payable.

8. Instead, Ponderosa limits its appeal to a challenge based on the assertion that the Delegate erred in law when she imposed the five administrative penalties. In support of its position, Ponderosa argues that no penalties are warranted because it did not knowingly, intentionally, or even negligently, breach the provisions of the *Act*. It bases this assertion on the fact that it anticipated it would be contracting for

management services with a limited company incorporated by the complainants, and not with the employees directly. If Ponderosa was culpable, it says, it was in allowing the complainants to commence work at its business premises without the limited company, and the management contract, firmly in place. It attributes its permitting this state of affairs to continue to the trust it reposed in the complainants, misplaced as it turned out, to follow through with the incorporation of the limited company, as they had promised they would. In these circumstances, Ponderosa insists it was unlawful for the Delegate to have imposed the penalties.

ISSUE

9. Did the Delegate err in law when she imposed five administrative penalties totalling $2,500.00 on Ponderosa?

ANALYSIS

10. The requirement for the imposition of an administrative penalty where there has been a contravention of the *Act* flows from Section 98 of the *Act*, and in particular, subsections (1) and (1.1), which read:

> 98 (1) In accordance with the regulations, a person in respect of whom the director makes a determination and imposes a requirement under section 79 is subject to a monetary penalty prescribed by the regulations.
>
> (1.1) A penalty imposed under this section is in addition to and not instead of any requirement imposed under section 79.

11. Section 29(1)(a) of the *Regulation* is also engaged. It reads:

> 29 (1) Subject to section 81 of the Act and any right of appeal under Part 13 of the Act, a person who contravenes a provision of the Act or this regulation, as found by the director in a determination made under the Act, must pay the following administrative penalty:
>
> (a) if the person contravenes a provision that has not been previously contravened by that person, or that has not been contravened by that person in the 3 year period preceding the contravention, a fine of $500

12. Under the provisions of the *Act* and the *Regulation* which were in existence prior to November 30, 2002, the Director was entitled to exercise a discretion whether to impose an administrative penalty where a contravention of the *Act* was found to have occurred. Legislative amendments to the *Act* and the *Regulation* on that date eliminated that discretion. Thereafter, the imposition of penalties for contraventions of the *Act* were made mandatory.

13. Since the advent of the 2002 amendments, it has been argued in appeals which have come before the Tribunal that the imposition of a mandatory administrative penalty for each contravention of the *Act* can lead to unfair results, as for example in the not unusual situation where an employer is found to have contravened the *Act* in multiple ways, yet the source of those contraventions is but a single employee, and therefore but a single employment relationship. The perceived unfairness is augmented in situations such as the case before me on this appeal, where Ponderosa believed at all material times that the complainants were not, in fact, employees under the *Act* at all, but rather independent contractors.

14. In *Kopchuk* BC EST #D049/05, the Tribunal examined in detail the history of, and policy reasons behind, the penalty provisions set out in the *Act* and *Regulation*, and confirmed that they are:

- part of a larger scheme to regulate employment relationships in the non-union sector, with a view to ensuring the attainment of minimum employment standards for employees in British Columbia;

- generally consistent with the purposes of the *Act* set out in Section 2, and in particular with the purpose of providing fair and efficient procedures for the settlement of disputes over the application and interpretation of the provisions of the legislative scheme;

- justifiable in order to deter employers from contravening the *Act* and *Regulation*, and to encourage the settlement of complaints, because an employer who settles before the making of a determination, and the finding of contraventions, will not be subject to them;

- incapable of being ignored, or interpreted so as to permit the Tribunal to substitute its view of the legislative intent based solely on individual judgments about what is "fair" or "logical".

15. *Kopchuk* further established that, absent circumstances amounting to bad faith or abuse of process, the Tribunal may only cancel a penalty provided for in the *Act* and *Regulation* if it decides that the contravention which underlies it cannot be supported and must be set aside pursuant to one of the grounds of appeal referred to in Section 112 of the *Act*. The decision also discussed with care the possible application in this context of the principle developed in *R. v. Kienapple* [1975] 1 SCR 729 which holds that the law should prohibit multiple sanctions in respect of the same matter, doubted that the principle applied in the circumstances of the administrative penalty regime set out in the *Act* and *Regulation*, and in any event determined that on the facts before the Tribunal in that case, the principle was not engaged.

16. Having regard to this jurisprudence, I have concluded that Ponderosa's appeal cannot succeed. Once the Delegate determined that the complainants were employees, and not independent contractors, and that contraventions of the *Act* had occurred (all of which Ponderosa does not dispute on this appeal), the assessment of administrative penalties became mandatory. As the contraventions in this case can be said to be discrete, that is, they relate to separate obligations under the *Act*, designed to serve distinct policy goals, an administrative penalty imposed in respect of each one of them is not, in my opinion, a violation of the *Kienapple* principle, should it apply in these circumstances.

17. It follows that even if I were convinced that Ponderosa acted innocently, a matter on which I make no comment, such a conclusion would provide no support for an argument that the Delegate erred in law when she imposed the administrative penalties in the circumstances of this case.

ORDER

18. Pursuant to Section 115(1)(a) of the *Act*, I order that the Determination be confirmed.

Robert Groves
Member
Employment Standards Tribunal