

**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

Pousada Holdings Ltd. operating  
The Kelowna Q Club  
("Pousada")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

ADJUDICATOR: Alfred C. Kempf

FILE NO.: 97/729

DATE OF DECISION: January 28, 1998

## DECISION

### OVERVIEW

This is an appeal by Pousada, pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against Determination of the Director of Employment Standards (the "Director") issued on September 10, 1997. In this appeal the employer claims that it did not contravene sections 18, 21, 40 and 58 of the Act and therefore a penalty should not have been imposed.

This appeal is being dealt with on the basis of written submissions.

### ISSUE TO BE DECIDED

Is the penalty Determination valid in law? It should also be noted that Pousada, in its appeal, submits that it did not contravene the sections of the *Act*. I do not consider that this issue is before me since the contraventions were dealt with by Decision (*Pousada Holdings Ltd. Operating The Kelowna Q Club*) BC EST #D289/97 and this is not an application for reconsideration.

### FACTS

A Determination was issued on February 12, 1997 against Pousada relating to four employees Melanie Atkinson ("Atkinson"), Nicole Brown ("Brown"), Dean Sayers ("Sayers"), and Rhonda Crowe (Crowe"). The Determination dealt with hours of work and overtime pay, illegal deductions, annual vacation pay, severance pay and timely payment of wages.

Pousada appealed to the Tribunal and the Determination was upheld other than with respect to the employee Crowe, in which case it was varied but not cancelled.

A few months later on September 10, 1997, a penalty Determination was issued. This Determination stated that since Pousada had contravened "a specified provision of a Part of the Employment Standards Act or a of a part of the Employment Standards Regulation, this is (sic) penalty in the amount of \$0.00 for these contraventions". The Determination set out no reason for the penalty other than the fact of the contravention.

In a memorandum to the Tribunal by way of submission on Pousada's appeal, the Director provided the following justification for the Penalty:

Pousada ...did repeatedly contravene the ...Act.

Accordingly, the zero penalty Determination required under the ...Act and the ...Regulation, under the circumstances of this case, is more than reasonable.

The Director went on in its submission to state that, despite what the Determination says, Pousada was not going to be penalized for a contravention under section 63 of the *Act*. There is no way of ascertaining this from the Determination itself.

## **ANALYSIS**

Section 98 of the Act provides in part that: "if the Director is satisfied that a person has contravened a requirement of this Act or the Regulation...the Director may impose a penalty on the person" (emphasis added).

It does not follow that a penalty is automatic. In fact, in practice the Director does not impose a penalty in every case.

Section 81(1) of the Act provides in part that a Determination must set out the reasons for the Determination.

The issue of the power to impose a penalty has been considered in several cases before the Tribunal. I agree with the following interpretation of the Act in decision (*Randy Chamberlin and Sandy Chamberlin operating as Super Save Gas*) BC EST #D374/97:

Section 81(1) of the Act requires the Director to give reasons for the Determination to any person who is named in it. When I read this Determination I am unable to find any reasons which explain why the Director's delegate exercised the discretionary powers given by Section 98(1) of the Act. The Act does not require the Director to impose a penalty for every contravention of a "specified provision". Thus, in my opinion, when the Director's delegate exercises the discretionary power given by Section 98(1) of the Act, that power ought to be exercised in a way which is not arbitrary and the reasons for imposing the penalty must be stated clearly in the Determination. Furthermore, the principles of natural justice also speak in favour of there being a clear set out reason's (sic) within the Determination.

In my opinion, it is not adequate and does not comply with the requirements of Section 81(1)(a) to state: "As (the employer) has contravened a specified

provision...this is a penalty in the amount of \$0.00 for these contraventions.”

In the present Appeal no reasons were given for the Director’s exercise of discretion. This is enough to dispose of the appeal, however there are two other problems with the Determination that ought to be pointed out.

The Determination under any plain reading imposes a penalty under five sections of the Act including section 63. Apparently, the Director did not impose a penalty under section 63. There would be no way of knowing this from reading the Determination. It is critical that Determinations of penalties be certain because, as another adjudicator has stated, they are quasi-criminal in nature. If an employer cannot be certain of the provisions he has been penalized under any further escalated penalty will surely seem (and be) arbitrary.

In addition, it is noted that the penalty Determination was issued 18 months after the first complaint and six months after the original Determination. I am mindful of some of the purposes of the Act as set out in section 2:

promote the fair treatment of employees and employers,  
provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act...

While the Act contains no time limits within which penalties may be assessed it would seem that the very late imposition of a penalty in this case may well have been prejudicial to the employer. Had the penalty been imposed at the time of the original Determination it is unlikely that two separate appeals would have been brought before this tribunal. There does not appear to be any reason for the delay in imposing the penalty.

## **ORDER**

In summary, I order under Section 115 of the *Act*, that the Determination be cancelled.

**Alfred C. Kempf**  
**Adjudicator**  
**Employment Standards Tribunal**