Employment Standards TRIBUNAL

An appeal

- by -

Kelvin Bristle
("Bristle")

- 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:** David B. Stevenson

**FILE No.:** 2000/688

**DATE OF DECISION:** January 10, 2001

# DECISION

## OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Kelvin Bristle ("Bristle") of a Determination that was issued on September 12, 2000 by a delegate of the Director of Employment Standards (the "Director").

Bristle had filed a complaint with the Director alleging his employer, Heritage House Hotel Ltd. ("HHH") had contravened the minimum daily wage (Section 34), statutory holiday pay (Section 45) and annual vacation pay (Section 58) provisions of the *Act*. The Determination concluded that HHH had contravened Section 58 of the *Act* and ordered HHH to cease contravening and to comply with the *Act* and to pay an amount of $171.56. The Determination also concluded that HHH had not contravened Sections 34 and 45 of the *Act* and closed the file on those matters of complaint.

Bristle says the Determination is wrong in its conclusion that there was no contravention of Section 34 of the *Act* by HHH. There is no appeal from any other aspect of the Determination.

The Tribunal has decided an oral hearing is not required in order to address the issue raised in this appeal.

## ISSUE

The issue in this appeal is whether Bristle has shown the Determination was wrong in concluding there was no contravention of Section 34 of the *Act*.

## FACTS

Except in one area, which I shall address later, there is no substantial dispute on the facts. The Determination provides the following background:

> The employer [HHH] bought the Heritage House Hotel, effective June 17, 1998. The previous owner was a Mr. Charles Dyer. At the time of the takeover, the complainant has been working at the Hotel for approximately 5 years. He was employed as a janitor cleaning one of the lounges in the hotel. In addition he was responsible for doing minor repairs around the building. While with the previous owner, the complainant had a regular work schedule. The complainant remained with the new owners and his work schedule was subsequently changed, which

> will be commented on further in this Determination. The complainant resided in the hotel and benefited from a rent reduction.

The complainant advised that while working for the previous owners he worked the minimum 4 hours. The supervisor at the Hotel had a "To Do" list to ensure that he worked a minimum 4 hours. Both parties at that time were aware of the *Employment Standards Act* of the requirement that an employee would be paid a minimum 4 hours even though they worked fewer hours.

> After the new owners took over the hotel, the complainant's hours were subsequently reduced. Also the complainant would only be paid for the hours worked, regardless of whether or not he worked less than 4 hours.
>
> The complainant would indicate on a daily time sheet the number of hours that he worked. These time sheets were kept with the employer and he maintained no records.

In its Analysis, the Determination also notes additional facts and factors that appear to have been relevant to the decision on the minimum daily wage complaint:

> In this matter both parties have been totally open and forthright in their positions. Both parties are aware of the requirements of the *Employment Standards Act*. The employer thought in all honesty that they were helping the complainant in his job with the hotel. The employer entrusted the complainant with complete flexibility around working at the hotel. If he was only able to work an hour, that was accepted by the employer and he was paid for one hour's work. The attached summary of hours worked clearly supports the employer's position that he was able to choose his hours of work. It is not a set schedule and also shows that this was in place when the new owners took over the hotel.
>
> The complainant has indicated that he knew about the minimum wages requirement and according to him approached the hotel manager on this matter. He continued to work at reduced hours. He also advised that with him being aware of the requirements of the **Act** he set up the employer by working the reduced hours. Also at no time did he file a complaint with the Branch regarding this matter. It can only be assumed that he did not file a complaint with the Branch because it may have jeopardized his position. However, he has indicated that he reminded the employer at least every two months about the requirement and they did nothing. When it was refused he should have taken other action at that time. In discussions with the complainant I was satisfied that he was not the type that would be intimidated. If he was continually raising it than those

> actions are indicative of him not being afraid of placing his position in jeopardy.

In the appeal filed on his behalf, Bristle takes issue with the conclusion that he was "able to choose his hours of work", asserting there is no support for that conclusion in the material. In its reply submission, HHH supports that conclusion, stating:

> Kelvin was not on a set schedule. In fact, he was able to set his own hours based on his own willingness to work. He could have chosen to work fewer days and for more hours on other days and had the minimum four hours fulfilled. Kelvin's hours could have been as long as he chose. He worked a shift where there was no supervision and had he signed in and out for four hours, doing the work that was available around the premises, no one would have objected. We could not make him stay for four hours if he was unwilling to stay. It was beyond our control. He chose of his own volition to sign in and out on the sheet provided. There was no one to witness the specific hours and no one to stop him from the four hour shifts had he wanted to work. The fact he did not stay for the four hours under those circumstances indicates that he left early voluntarily.

To the extent it is necessary and relevant to resolve the factual difference, the burden is on Bristle to show the conclusions of fact made in the Determination are wrong and he has not met that burden. It is not sufficient to simply say there was "no evidence" that Bristle was able to choose his hours of work. In order for Bristle to meet the burden imposed on him, the appeal must show the conclusion of fact made in the Determination was "perverse", in a legal sense. In fact, there is some support for the conclusion made in the Determination, where the Director, outlining the employer's position and the complainant's position notes:

> . . . the complainant was not on a set schedule. He was allowed to set his own hours based on his own willingness to work. . . . [page 2]
>
> In relation to working at his choosing the complainant stated that he never agreed to this. [page 3]

The suggestion that Bristle in effect set his own hours was a significant part of the response from HHH from the outset. Bristle never denied that suggestion. To the contrary, it appears he acknowledged it, but added he had never agreed to that kind of arrangement. The question is what relevance that conclusion ought to have been given.

The Determination noted that HHH agreed that Bristle worked on several occasions less than four hours in a day and was only paid for the actual hours worked. That is also shown in the summary of shifts and hours worked by Bristle for the period from July 17, 1998 to January 24, 2000 was attached to the Determination.

**ARGUMENT AND ANALYSIS**

Bristle says that the Director has, among other things, failed to correctly interpret and apply Section 34 of the *Act* to the circumstances of the complaint. Section 34 states:

34. (1) If an employee reports for work on any day as required by an employer, the employer must pay the employee for

(a) at least the minimum hours for which the employee is entitled to be paid under this section, or

(b) if longer, the entire period the employee is required to be at the workplace.

(2) An employee is entitled to be paid for a minimum of

(a) 4 hours at the regular wage, if the employee starts work unless the work is suspended for a reason completely beyond the employer's control, including unsuitable weather conditions, or

(b) 2 hours at the regular wage, in any other case unless the employee is unfit to work or fails to comply with the Industrial Health and Safety Regulation of the Workers' Compensation Board.

I have no difficulty at all in deciding this appeal must succeed on the question of whether the Director erred in concluding there was no contravention of Section 34 of the *Act* and find that HHH did contravene Section 34 of the *Act*. I do not accept that even if Bristle was allowed to set his own schedule, HHH is relieved from its obligation under the *Act* to pay him the minimum daily wages required under Section 34. The argument made by HHH, and seemingly accepted by the Director, has been rejected by the Tribunal in *Re Parents Auxiliary to the Nanaimo Gymnastics School*, BC EST #D422/99 (Reconsideration of BC EST #D267/99. The issue in that reconsideration was the employer was liable to pay the 4 hour minimum wage to employees who were unable to work 4 hour shifts or who refused to stay for 4 hours. In disposing of that issue, the Tribunal stated:

> The employer controls the work place and has the option to employ whoever is most suited for the position. If the employer decides to employ someone who is only willing to work one or two hours at a time then it is the employer's choice to pay that person the 4 hour minimum, despite the fact that they only work 1 or 2 hours, or to employ a different instructor who is available to work the full 4 hours. This situation often happens in the food service business where an employer only requires an employee over the lunch hour but must pay for the 4 hour minimum unless there is a variance in place or it is part of a split shift which includes the evening as well.

> If the employee is refusing to work a full scheduled 4 hour shift then the employer must decide whether to continue to employ that employee or to pay the minimum 4 hours regardless of the actual hours worked.

In the circumstances of this case, HHH was fully aware that Bristle was consistently working less than the four hour minimum. He provided his daily hours of work regularly and was paid on the hours worked every two weeks. HHH allowed that to occur and to continue. It is absurd for HHH to say, as they do in their appeal reply submission, that it was beyond their control. They could have easily controlled the situation, first by complying with their statutory obligation under Section 31 and by, as noted above, deciding whether to continue employing an employee who refused to work the scheduled shift.

Bristle has asked that the Tribunal to decide Bristle is owed the equivalent of 403.75 hours in wages and to vary the Determination accordingly. I do not intend to do that. The appeal suggests there might be a question of whether, in the circumstances of his illness and/or complications arising from treatment he was receiving, Bristle would only entitled to 2 hours daily minimum for some of the days on which he worked. That is a question the Director has not yet had an opportunity to consider and is more appropriately left to the Director at this stage. On that question, I note the comments of the Tribunal in *Re Hintz,* BC EST #D382/98, that:

> If the employee "starts work", the employee is entitled to four hours pay at the regular rate unless work is suspended for a reason completely beyond the employer's control. The Employer has the burden to show that work is suspended for reasons completely beyond its control (see, for example, *D.E. Installations Ltd.*, BC EST #D397/97 and *Johnny's Other Kitchen Ltd.*, BC EST #D279/97). In *Nechako Enterprises Ltd.*, BC EST #D078/98, the Tribunal held that an alleged agreement to have an employee, who regularly worked less than four hours, "voluntarily" sign out before the four hours, did not constitute a circumstance beyond the employer's control.

**ORDER**

Pursuant to Section 115 of the *Act*, I order the Determination dated September 12, 2000 be cancelled. I suggest that a new Determination be issued.

***DAVID B. STEVENSON***

**David B. Stevenson**
**Adjudicator**
**Employment Standards Tribunal**