Employment Standards TRIBUNAL

An appeal

- by -

Deryk Brower
("Brower")

- 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.: 2001/103

DATE OF DECISION: May 25, 2001

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Derek Brower ("Brower") of Determination ER # 003-689 issued January 11, 2001 by a delegate of the Director of Employment Standards (the "Director").

Brower had filed a complaint with the Director alleging he was not paid all wages earned by him during his period of employment by his employer, I.R. Capital Corporation operating as The Sabra Developments ("Sabra"). The Determination concluded that Brower was not entitled to any further wages, that Sabra had not contravened the *Act*, ceased investigating and closed the file on the complaint. The central finding of fact in the Determination was the conclusion that Brower had terminated his employment as of December 22, 1999.

Brower says that finding is wrong.

ISSUE

The issue is whether Brower has demonstrated the central factual conclusion was wrong.

FACTS

Brower was employed by Sabra as a Property Manager from February 22, 1999. On February 4, 1999 he signed a document, which the Determination described as a "disputed employment agreement". That agreement contained the following:

> It is our pleasure to confirm the terms of your employment with IR CAPITAL CORPORATION.
>
> . . .
>
> 6. **Vacation Package:** 2 weeks and one week at Christmas accrued on a monthly basis.

The agreement had been prepared and signed through a personnel agency. Sabra claimed to have been unaware of the employment agreement and its terms until December, 1999.

On December 17, 1999, Brower submitted a letter of resignation to Sabra. The body of the letter read:

> As of January 3, 2000 I will no longer be an employee of I.R. Capital Corporation. I will be taking December 23 and 24, 1999 as holiday days.
>
> Thank you for the employment at I.R. Capital Corporation.

The letter of resignation was delivered to Sabra on December 17, 1999. There is no suggestion in any of the material on file or in the Determination that the letter of resignation was not accepted, in whole or in part, by Sabra.

The last day Brower worked was December 22, 1999. The Determination noted:

> The complainant's last pay cheque was for a total gross of $1,668.52. Of this, $742.65 was for the last five days he worked between December 16th and 22nd. He also received $943.87 as annual vacation pay. His vacation pay was calculated at 4% of his gross wages for his employment period. He did not receive statutory holiday pay for either Christmas Day or New Years Day.

Brower claimed he was entitled to be paid for the two statutory holidays falling between December 22, 1999 and January 3, 2000, Christmas Day and New Year's Day, and was entitled to one additional week of vacation pay, or an additional 2% of gross wages, in accordance with the "disputed employment agreement".

In respect of the claim by Brower that he was entitled to vacation pay for one week at Christmas, the Determination stated:

> It would . . . seem that, if the employment agreement he signed was valid, the complainant came to work for Sabra on the understanding he would be receiving 3 weeks annual vacation, one of which he could take at Christmas. . . .
>
> Although I find it difficult to accept the employer's position that Sabra was unaware of the employment agreement the complainant signed with the personnel agency, that agreement does state that as part of the Vacation Package an employee would receive "2 weeks and a week at Christmas". From this document, it appears the only way the complainant might have received Christmas Week off with pay was if he had continued to be an employee, which he did not.

For the same reason, the Determination concluded Brower was not entitled to statutory holiday for Christmas Day and New Year's Day:

> . . . there seems to be no question he did not intend to work after December 22nd and, indeed, did not. The employer's position, that the complainant quit as of December 22nd, would appear to be valid. The Act stipulates that only employees are entitled to statutory holiday pay and the complainant was not an employee when the statutory holidays of Christmas Day 1999 and New Years Day 2000 occurred.

ARGUMENT AND ANALYSIS

In his appeal, Brower says:

> The Delegate erred in stating that "From this document, it appears the only way the complainant might have received Christmas Week off with pay was if he had continued to be an employee, which he did not." First, I gave two weeks notice to Sabra and I continued to be an employee until my stated resignation date of January 3, 2000. . . . I clearly considered that I was giving two weeks notice and because the company's office was closed during Christmas to New Year's, I did not report to the office during the second week. Nor was it correct for the Delegate to say the witnesses statements supported the employer's position that the office remained open. In fact, the Delegate found that the witnesses both "agreed that the company's office is closed to customers over the Christmas week." Further, at the very least, the Delegate erred in finding for the employer' position that I quit as of December 22 . . . .

The decision of the delegate was based entirely on the conclusion that Brower had quit his employment on December 22, 1999 and, for the purposes of the complaint, had ceased to be an employee as of that date. There is no analysis by the delegate of the reasons for that conclusion and appears to be based on nothing more than the fact he did not work after December 22, 1999.

The burden is on Brower to show the Determination is wrong in law, in fact or some combination of law and fact to an extent that justifies intervention by the Tribunal. I am satisfied that Borwer has met that burden. The appeal is allowed for the reasons that follow.

A conclusion under the *Act* that an employee has terminated his or her employment is a conclusion of mixed fact and law. In *Re Wilson Place Management Ltd. operating Wilson Place*, BC EST #D047/96, the Tribunal stated:

> The act of resigning, or "quitting", employment is a right that is personal to the employee and there must be clear and unequivocal evidence supporting a conclusion that this right has been voluntarily exercised by the employee

> involved. There is both a subjective and objective element to the act of quitting: subjectively, an employee must form an intention to quit; objectively, that employee must carry out an act that is inconsistent with further employment.

Based on an analysis of the Determination and the material on the file, I can find no basis in fact or in law for the delegate to have concluded Brower quit his employment on December 22, 1999. In all the circumstances, the decision of the delegate was unreasonable, and quite wrong. I cannot find either the subjective or the objective evidence necessary to conclude Brower terminated his employment on December 22, 1999.

Subjectively, the letter of resignation is clear and unequivocal evidence of an intention by Brower to resign his employment effective January 3, 2000. There is no such clear and unequivocal evidence in the Determination or in the material on file that his stated intention ever changed or that he intended to resign his employment on December 22, 1999, as found by the delegate. The only information provided to the delegate that might have suggested a different intention was found in a letter from Adam Shafron, an employee of Sabra, who wrote, on March 7, 2000, his recollection of events occurring in and around December 22, 1999:

> On Thursday December 16th, 1999 I learned that Deryk had given his notice. I was told to meet with Deryk over the next 2 weeks and become familiar with his job and duties as I would be filling in until a replacement was found. During a meeting with Deryk on Monday December 20th Deryk informed me that his last day at I.R. Capital Copr. [sic] would be Wednesday December 22nd. I informed Mr. Rogowski and Mr. Mann of Deryk's intent to have Wednesday as his last day of work.

Accepting that Mr. Shafron's recollection is correct, the comments attributed to Brower are, at best, ambiguous on whether that was a statement of intention to resign his employment on December 22nd. They state only an intention to make December 22nd his last day of work, not an intention to quit or resign his employment on that day. Taken in context, the comment was not inconsistent with the letter of resignation given to Sabra by Brower on December 17th.

As well, the fact that Brower's last day worked was December 22nd, does not, in the circumstances, establish the required objective element for a conclusion that he had quit on that day. On a full analysis, the only conclusion justified by the evidence is that Brower's last day of work was December 22 because he believed he was entitled to time off with pay for the period between that date and the effective date of his resignation.

The appeal material contains part of a submission made by Sabra to the Delegate on March 7, 2000. The submission addressed the merits of Brower's complaint and stated, in part:

> Mr. Brower did not notify us of his exact intentions until Monday, December 20th, 1999, when he had a discussion with Mr. Adam Shafron and advised him that his last day of work would be Wednesday, December 22nd, 1999. Due to Mr.

> Brower's early departure, our accounting department had to prepare his final cheque and they advised Mr. Mann the Mr. Brower was claiming additional vacation time over and above the statutory and company obligation of two weeks per annum. Mr. Mann discussed the issue of the additional week with Mr. Brower.

I note as an aside that Mr. Shafron had told both Mr. Mann and Mr. Rogowski of Brower's intention to make December 22 his last day of work. Brower provided a copy of the "disputed employment agreement" to Mr. Mann, as Mr. Mann apparently had claimed no knowledge of its terms. The submission goes on to state:

> Mr. Mann contacted Irene Croden at the personnel agency and was advised by her that no one from I.R. Capital had ever authorized the additional week's vacation.

There can be no doubt Sabra knew Brower was planning to take the statutory and annual vacation entitlement that he believed had accrued to him under the "disputed employment agreement" and that was, at least in large part, the basis for December 22nd being his last day of work. Even if Brower was wrong about his vacation pay entitlement for the last week of December, the evidence provided to the delegate was that he would not likely have worked the last week of December in any event as Sabra's office was closed to customers, so his absence during that week cannot be used to support a conclusion that he had quit. In the Determination, the delegate noted:

> In a previous telephone conversation, Rogowski stated that the complainant's absence during that week caused the company considerable difficulty because he had anticipated that the complainant would be available to assist in training his replacement.

That statement can be given no effect. If it ever reflected the position of Sabra on or about December 20, 1999, when Brower told Mr. Mann he was claiming vacation time off for the last week of December, there is no evidence that it was never communicated to Brower in that way. As well, if Sabra had wanted Brower to work the last week of December, there was sufficient opportunity to make that request known to him, explaining to him the "difficulty" his lack of availability would cause. Later in the Determination, the delegate set out the following information provided by Sabra:

> In a telephone conversation on September 6, 2000 Rogowski stated that the company grants some employees Christmas Week off but that is to be considered a bonus given at the discretion of the employer. If the complainant had wanted this time off with pay it was incumbent upon him to discuss this matter with Rogowski rather than simply taking it off and expecting to be paid in full for it.

Similarly, the above information can be given no effect in regard to whether Brower quit his employment on December 22, 1999. Two points do, however, arise in respect of it: first, it does

not say that Brower would have worked Christmas Week or contradict other evidence provided to the delegate that Brower would likely not have worked that week; and second, it supports the reliability of the conclusion that Sabra did nothing to dissuade Brower from the view that he was not required to be at work during the Christmas Week. All of the above would seem to point strongly to a conclusion that his absence from work during the last week of December was related to something other than an intention to quit on December 22nd.

The delegate was struck by the absence of any reference in the letter of resignation to Brower taking the last week of December as vacation time off. In the Determination, he says:

> . . . I find it significant that the complainant, in his letter of resignation, wrote that he would be taking "December 23 and 24 as holiday days". He does not indicate that he would be taking December 27th until December 31st as vacation days. It would seem prudent to have added to this letter something to the effect that, as per the employment agreement signed with Croden Personnel, he would be taking Christmas Week as well. That he did not strikes me as an odd omission.

In view of the acknowledgement by Mr. Rogoswki that Brower had indicated to Mr. Mann his intention to take the last week of December as "additional vacation time", the fact the resignation letter contains no reference to it is irrelevant, regardless of how odd it might have seemed.

I do not agree, however, that the absence of reference to taking annual vacation time off was "odd" in the circumstances. As Brower stated in his appeal, " . . . the fact that I didn't mention I would not be in on a week the company was closed signifies nothing more than my reliance on my terms of employment". To reiterate, the "disputed employment agreement" provided for a vacation package that included "one week at Christmas". Nor, in respect of Brower identifying December 23 and 24 as "holiday days", does it appear the delegate, when making the above statement, considered the effect of Section 47 of the *Act*. That provision states:

47. If a statutory holiday falls on a non-working day for an employee, section 46(2) to (4) applies.

Both Christmas Day, 1999 and New Year's Day, 2000 fell on non-working days. The relevant parts of Section 46(2) to (4) state:

46. (2) In addition, the employer must give the employee a working day off with pay according to section 45.

. . .

(4) The employer must schedule the day off with pay

(a) before the employee's annual vacation,

> *(b) before the date the employment terminates, or*
>
> *(c) if the pay for the day off is credited to an employee's time bank, within 6 months after the date of the statutory holiday,*
>
> *whichever is earliest.*

There is no dispute that, everything else being equal, Brower had satisfied the conditions for entitlement under the *Act* to a day off with pay for Christmas Day and New Year's Day. In this case, because Brower was terminating his employment as of January 3, 2000 (and believed he was entitled to take the last week before his resignation became effective as part of his annual vacation), notifying Sabra that he was taking December 23 and 24 as days off is not inconsistent with the above statutory provisions and requirements. In my view, a fair reading of the letter of resignation in that regard is that Brower was doing no more than crystalizing his entitlement to a working day off with pay for the two statutory holidays falling on non-working days before his annual vacation and/or termination and was notifying his employer of that.

In reality, the very act of notifying his employer that he was taking December 23 and 24 as holiday days is totally inconsistent with any expression of an intention to quit his employment on December 22. I find that Brower was an employee of Sabra until January 3, 2000.

I have concluded the Determination must be varied and I have also concluded that the matter does not need to be referred back to the Director for that purpose (see *Re Biport Forest Products Ltd.*, BC EST #D149/00 (Reconsideration of BC EST #D429/99). As noted above, Brower's entitlement to statutory holiday pay for Christmas Day and New Year's Day is clear once it is found he remained an employee of Sabra until January 3, 2000. I also find that the employment agreement entitled Brower to 3 weeks paid holiday, or three weeks vacation time off and 6% holiday pay. That agreement can be enforced even though it exceeds the minimum requirements of the *Act*. In *Re Dusty Investments d.b.a. Honda North,* BC EST #D043/99 (Reconsideration of BC EST #D101/98), the Tribunal said:

> The Director has authority under the *Act* to regulate and enforce the employment relationship, including elements of the employment relationship that exceed minimum standards. There is no doubt that a primary purpose of the Act is to ensure employees receive "at least basic standards of compensation and conditions of employment", but the application of the *Act* is not limited to enforcing only minimum standards.

There is sufficient material on file to conclude that Sabra has contravened the *Act* and that Brower is owed an amount of $947.62 in wages, comprising $307.69 statutory holiday pay and $639.91 annual vacation pay, and I order this amount be paid, together with any interest that has accrued pursuant to Section 88 of the *Act*.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated January 11, 2001 be varied to show an amount owing of $947.62, together with any interest that has accrued pursuant to Section 88 of the *Act*..

David B. Stevenson
Adjudicator
Employment Standards Tribunal