Employment Standards TRIBUNAL

An appeal

- by -

Dr. Robert H. Dykes
("Dykes")

- 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.: 2001/230

DATE OF DECISION: July 10, 2001

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Dr. Robert H. Dykes ("Dykes") of a Determination that was issued on February 26, 2001 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that Dykes had contravened Part , Sections 18, 27 and 28 and Part 5, Sections 45, 46, 47 and 48 of the *Act* in respect of the employment of Wendy Hlina ("Hlina") and ordered Dykes to cease contravening and to comply with the *Act* and to pay an amount of $2,198.36.

The amount found to be owed in the Determination was subsequently varied by the Director in correspondence to the Tribunal dated April 6, 2001 to show an amount owed of $1,651.32. The amount owed does not affect the substance of the appeal.

In his appeal, Dykes says that Hlina "does not qualify for notice or termination compensation under the act", and provides nine reasons supporting that assertion. The Determination noted the appeal deadline was March 21, 2001. The appeal was delivered to the Tribunal on March 20, 2001.

ISSUE

The issues in this case is simply whether there is any appeal before the Tribunal.

FACTS

On February 10, 2001, a Determination was issued in respect of a complaint by Hlina. The Determination set out the nature of the complaint:

> Hlina alleges she was not paid her final paycheque and further that she was not paid for statutory holidays which fell during her period of employment.

The Determination also describes in detail efforts made by the investigating officer to acquire information from Dykes relevant to the complaint, including requests for payroll information preceding the issuance of a Demand For Employer Records, the issuance of the Demand For Employer Records, non-compliance with the Demand and the issuance of a Penalty Determination for non-compliance, which was not appealed, followed by the delivery of only partial records by Dykes and further requests, which were substantially ignored, between July 13, 2000 and January 31, 2001 for additional and more complete information.

The Determination set out the following conclusion:

> Based on the evidence provided and on the balance of probabilities, I conclude that Hlina was an employee, was not paid her final paycheque and was not paid

> statutory holidays. I further concluded that the rate of pay for the final paycheque should be $10.00 per hour.

There followed an analysis of the *Act* and the information provided and a calculation of the amount owed, which incorrectly used Hlina's hours of work for the last two weeks of employment rather than for the last one week of employment, which was the period for which Hlina claimed non-payment of wages. The Determination calculated that Hlina was entitled to statutory holiday pay for 17 statutory holidays occurring between April 21, 1998 and April 20, 2000, an amount of $1,014.22. 4% annual vacation pay and interest pursuant to Section 88 of the *Act* was added to both amounts.

On April 6, 2001, the Tribunal was notified that the amount owed had been miscalculated and the wages owed for the last week of employment was adjusted downward, while the statutory holiday pay entitlement was adjusted slightly upward. Annual vacation pay and interest were added to the wages and statutory holiday pay entitlement.

The Director and Hlina filed responses to the appeal. On April 26, Dykes delivered another submission to the Tribunal. It began:

> The amount of vacation pay is incorrect or based on incorrect information provided by the complainant to the Director.

The submission goes on to say:

> For approximately two years, Wendy Hlina was paid as a part-time employee who worked two half-days per week (i.e a total of 8 hours a week, on average) at $8/hour. Her rate of pay was eventually increased to $10/hour. Her average pay was approximately $160 every two weeks.
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> For a final period of six weeks, Wendy Hlina worked at $10/hour, but she paid herself $15/hour. The vacation pay can only be 4% of all wages paid in a proceeding [sic] year, which is less than the amount shown in the determination.

ARGUMENT AND ANALYSIS

The appeal filed with the Tribunal on March 20, 2001 raised no valid grounds of appeal in respect of matters arising under the *Act*. The submission challenged conclusions that had not even been made in the Determination, specifically that Hlina did not qualify for notice or compensation for severance.

The appeal, and the response by Hlina, are replete with allegations and accusations of theft, fraud, assault, harassment and sexual harassment, intimidation and unsafe work practices, all of which have absolutely nothing to do with whether Hlina was entitled to be paid wages for work performed and to statutory holiday pay under the *Act*. There are other forums and processes

available to address the multitude of allegations and accusations. Those are not matters that arise under the *Act* and I have not considered any of them in this appeal decision.

The submission of April 26 identified matters that were elements of the Determination. There are, however, three problems with that correspondence. First, it raises new and additional grounds of appeal that were not touched upon in the appeal filed on March 20, 2001 and were not related to any matter raised in that appeal. Second, the submission was delivered to the Tribunal well outside of the time limits set out in the *Act* for requesting an appeal of a Determination. Third, if it is suggested that the matters raised in the correspondence delivered to the Tribunal on April 26 should be considered as part of the appeal filed March 20, 2001, that part of the "appeal" did not comply with the Rules governing the filing of appeals.

On that last point, Section 109(1)(c) of the *Act* gives the Tribunal the authority to "make, with the approval of the minister, rules about how appeals and reconsiderations are to be conducted". The Tribunal has made such rules and they were approved by the Minister in November, 1995. The following rules have a bearing on this appeal:

> 3. You must appeal a Determination of the Director by filing with the Tribunal a written request within the time limits and according to the procedures set out in Sections 112 and 113 of the *Act*.
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> 4. The written request for appeal must be in form 1 and must contain the following information:
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> (a) the full name, address, telephone and facsimile number of the person submitting the request and their representative, if any;
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> (b) an address for delivery.
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> 5. The *Act* requires the written request to include the reasons for the appeal. The reasons for the appeal must do all of the following:
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> (i) identify the specific Determination of the Director that you are appealing, and attach a copy of that Determination;
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> (ii) briefly outline the relevant facts;
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> (iii) describe why you are appealing the Director's Determination; and
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> (iv) describe the order or orders you want the Tribunal to make.
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> . . .
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> 10. The Tribunal may refuse to accept a written request that does not comply with these Rules.

> 11. Unless otherwise permitted by the Tribunal, a written request will be processed only if it complies with the *Act* and these Rules.

It becomes a matter of discretion whether the Tribunal will allow an appeal that does not comply with the requirements of the *Act* or the Tribunal's rules to proceed. The Tribunal's discretion in this area is exercised in a principled manner. In *Re D. Hall & Associates Ltd.* BC EST #D354/99, the Tribunal addressed the circumstances of an appeal which had been filed without complying with the Tribunal Rules governing the content of appeals. In the course of its analysis, the Tribunal adopted an approach that balanced the statutory purpose of efficiency in dealing with disputes under the *Act* and the need for finality, adopting a statement from the decision of *Re SSC Industries Ltd.*, BC EST #D087/96, with the stated purpose of ensuring the process is fair, to all the parties, and is perceived to be fair.

I am not prepared in this case to allow the ground of appeal raised in the April 26, 2001 correspondence to proceed. The Determination provided a comprehensive analysis of the available information and the relevant statutory provisions. It clearly set out the manner by which the amounts owed were calculated. The appeal dated March 20, 2001 said nothing about the alleged errors in the calculations made in the Determination. The correspondence delivered to the Tribunal on April 26, 2001 does little more than assert the calculation is incorrect and was based on incorrect information. It does not identify in any comprehensive way the particular errors that are alleged to have been made or how the information relied on by the Director was "incorrect". Nor does it support the assertions made with anything statement of relevant facts. An application of the competing statutory purposes identified in *Re D. Hall & Associates Ltd.*, *supra*, do not justify allowing an appeal on the grounds stated in the April 26, 2001 correspondence. As well, that ground of appeal was raised more than five weeks after the time limited for filing an appeal had passed. There is no explanation for the delay in raising that concern in a timely way. For that reason and for the reasons outlined above, I would not exercise my discretion to extend the time limits to allow this ground of appeal to be included.

That effectively disposes of the appeal. I will, however, make one further comment in respect of the challenge to the calculations.

Even if I had allowed this ground of appeal to proceed, there are additional problems with the challenge raised in the April 26, 2001 correspondence. First, several allegations of fact are made that are unsupported by any material provided to the Director during the investigation and in some areas are contradicted by material in the file. Dykes says:

> For approximately two years, Wendy Hlina was paid as a part-time employee who worked two half-days per week (i.e a total of 8 hours a week, on average) at $8/hour. Her rate of pay was eventually increased to $10/hour. Her average pay was approximately $160 every two weeks.

That allegation is contradicted by pay stubs provided by Hlina during the investigation. There would be no basis for finding the Director was wrong to have used those pay stubs. The Determination also noted that the limited payroll information provided by Dykes during the

investigation did not consistently show either the hours or the days worked. Second, the allegations of fact are not even related to the Determination in a way that would demonstrate the alleged error in the Determination. I would not find there was an error in the Determination without some reason for doing so. Third, the basis on which the Director calculated the statutory holiday entitlement is clearly outlined in the Determination. Dykes has raised no challenge to the approach taken. His assertion that Hlina was only entitled to 4% vacation pay completely misses the point, as the main part of the Determination dealt with *statutory* holiday pay entitlement, not annual vacation entitlement. The annual vacation pay amount that was added to the wages found to be owed, approximately $40.50, *was* calculated at 4%.

Finally, on June 26, 2001 the Tribunal received another piece of correspondence from Dykes, this one containing an attack on the conduct and the objectivity of the Director's delegate involved in the file. The Tribunal has taken this letter for what it is - a personal expression of dissatisfaction with the process and the people involved in the process. It is unsupported by any evidence whatsoever, let alone the clear evidence required to support such allegations, and has been given no effect in this process.

The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated February 26, 2001 (varied April 6, 2001) be confirmed in the amount of $1,651.32, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal