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.: 2001/288

DATE OF DECISION: August 14, 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 March 15, 2001 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that Heritage House Hotel Ltd. ("HHH") had contravened Part 4, Section 34 of the *Act* and ordered HHH to cease contravening and to comply with the *Act* and to pay an amount of $3,494.71. The Determination was based on a complaint filed with the Director by Bristle on January 4, 2000. Bristle alleged in that complaint that he was owed regular wages, annual vacation pay and statutory holiday pay for a period from January, 1998 to January, 2000..

An earlier Determination, dated September 12, 2000, originally addressed that complaint. It concluded HHH had contravened concluded Section 58 (annual vacation pay) 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 (daily minimum wages) and 45 (statutory holiday pay) of the *Act* and closed the file on those matters of complaint.

That Determination was appealed. Bristle argued the September 12, 2000 Determination was wrong in its conclusion that there was no contravention of Section 34 of the *Act* by HHH. There was no appeal from any other aspect of that Determination. The Tribunal found merit in that ground of appeal and the Determination was cancelled. As suggested, the Director has issued a new Determination. As HHH had already paid the annual vacation pay amount found to be owing under that Determination, there was no need to consider that claim again.

Bristle says this Determination is also wrong because it has not considered whether he was paid all wages owed in the period from January, 1998 to June, 1998 (the parties have referred to this period as January, 1999 to June, 1999, but it is obvious the parties are speaking to the first six months of the claim period, which was January, 1998 to June, 1998).

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 case is whether Bristle has demonstrated there is any error that would justify the Tribunal's cancelling of varying the Determination.

FACTS

In addition to the above background, the Determination provided the following information, none of which has been challenged by Bristle:

> Subsequent to the decision from the Tribunal, the complainant requested that the new Determination include the dates from January to June, 1999 [should be 1998]. These dates were when he worked for the previous owner. He also stated he did not feel he had been paid the proper number of statutory holidays.
>
> These two matter were considered in the original Determination. In the complainant's discussion with the undersigned he advised that while working for the previous owners he worked the minimum of 4 hours. This was reflected in the original Determination.
>
> In relation to the statutory holidays this was considered in the original Determination and it was found that the employer had produced documentation showing that he was receiving statutory holiday pay. The complainant had no records to show that he was not paid in accordance with the **Act**.

Bristle has provided no information with this appeal apart from a copy of his complaint.

ARGUMENT AND ANALYSIS

In his appeal, Bristle says:

> I therefore respectfully submit that the additional 6 months in question, as submitted in my initial claim, should be evaluated and added to the judgment already issued.

In its response to this appeal, received by the Tribunal on May 2, 2001, HHH notes the following:

> I spoke to Mr. Dyer [the previous owner of HHH] when all this started thinking I could enlist his support with respect to Kelvin choosing his own hours. He was very clear that Kelvin was very up on the labour regulations and as a result was very careful to always abide by the letter of the law.

The Director, in reply, makes the following points:

- during the investigation which led to the Determination of September 12, 2000, Bristle had stated that while employed by the previous owners, which in reference to the complaint covered the period from January, 1998 to June or July, 1998, he had always

been paid the daily minimum four hours wages. He stated that on more than one occasion.

- those assertions are incorporated in the Determination.

- the appeal of the September 12, 2000 Determination confirmed those assertions. The scope of the unpaid wage claim which was submitted by Bristle through his representative in that appeal was 403.75 hours, all accumulated after July, 1998.

- the Tribunal's decision on the appeal of the September 12, 2000 Determination did not affect its conclusion that no statutory holiday pay was owed to Bristle. No appeal from that conclusion was taken.

In his final submission on this appeal, dated May 23, 2001, Bristle submits that his original complaint expressed a dissatisfaction with how Mary Brooks, who was the Manager of the hotel just before its sale in June, 1998, had handled his hours. He demonstrates a certain disdain for the process and the possibility that, after having indicated to the delegate he had always been paid the daily minimum hours while employed by the previous owners, after a change of ownership and three years after the filing of his complaint, the employer records might not be available. He says:

> The fact that Heritage House Hotel can't find records, in contravention of the Employment Standards Act, should not unreasonably delay this claim. If they don't have the records, they don't have them. The position of an adjudicator will not improve by waiting. Or are the missing records to turn up suddenly, if we wait long enough.
>
> More time would simply be a waste of time.

Bristle has seriously misjudged the nature of an appeal to the Tribunal. The function of an appeal is to decide whether there has been an error made in the Determination. The fact that HHH may not be able to produce payroll records for the period January to June, 1998 only means there are no records from the employer. That is a violation of the *Act*, for which the Director has the authority to impose penalties, but it does little to prop up Bristle's wage claim. Bristle has not provided any basis for concluding he did not receive minimum daily pay during that period. In fact, he has asserted on several occasions, to the delegate and to the Tribunal, that he had received the minimum daily wage. The absence of a factual foundation for this appeal contrasts significantly from the facts available to the Tribunal on the appeal of the September 12, 2000 Determination, where the record of hours worked had been provided by the employer and the error was clear on the face of that record.

This is not a case where no decision was made by the Director. In both the September 12, 2000 Determination and the Determination under appeal, the Director concluded, based on the information available, that no contravention of the *Act* could be found in respect of the period

January to June, 1998. That is a factual judgement about the merits of a complaint based on the available material and information. In *Re Mykonos Taverna operating as Achillion Restaurant*, BC EST #D576/98, the Tribunal said that where a conclusion of fact made by the Director is sought to be challenged on appeal, the burden on the appellant is to show that the decision was based on wrong information, that it was manifestly unfair or that there was no rational basis upon which those conclusions of fact relevant to the decision could be made. This approach is consistent with the statutory objective of achieving "efficient" resolution of disputes and with the statutory and legal obligation of the Director to adhere to the principles of fairness and reasonableness when exercising her authority under the *Act*. In this case, the question is whether Bristle has shown the decision is unfair or unreasonable or that there was no rational basis for the conclusions of fact made by the Director.

Based on the position taken by Bristle during the investigation and on the appeal of the September 12, 2000 Determination and on the investigation done by the delegate, the conclusion reached was quite fair and reasonable and rationally grounded in the available facts. Nothing in the material on file and nothing in the appeal has shown it to be otherwise. The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated March 15, 2001 be confirmed in the amount of $3494.71, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal