Employment Standards TRIBUNAL

An appeal

- by -

Red Chris Development Company Ltd. carrying on business as Red Chris Mine
("Red Chris Mine")

- 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 (as amended)

TRIBUNAL MEMBER: Marnee Pearce

FILE No.: 2017A/34

DATE OF DECISION: June 5, 2017

DECISION

SUBMISSIONS

Joe Coutts	counsel for Red Chris Development Company Ltd. carrying on business as Red Chris Mine

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the *"Act"*), Red Chris Development Company Ltd. carrying on business as Red Chris Mine ("Red Chris Mine") has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on February 6, 2017.

2. The Determination concluded that Red Chris Mine had contravened Part 4, section 40 (overtime) of the *Act* in respect of the employment of James Ryan Jamieson ("Mr. Jamieson") and ordered Red Chris Mine to pay Mr. Jamieson $3,482.95 representing compensation for overtime and accrued interest. A $500.00 administrative penalty was levied against Red Chris Mine for contravening section 40 of the *Act*.

3. The total amount of the Determination was $3,982.95.

4. Red Chris Mine has appealed the Determination on the grounds that the Director erred in law in making the Determination.

5. In correspondence dated March 17, 2017, the Tribunal notified the parties, among other things, that no submissions were being sought from any party pending a review of the appeal by the Tribunal and, following this review, all or part of the appeal might be dismissed.

6. The section 112(5) record (the "record") has been provided to the Tribunal by the Director and a copy was delivered to Red Chris Mine's counsel on April 3, 2017, allowing the opportunity to object to its completeness. No objection has been received and, accordingly, the Tribunal accepts it as being a complete record of the material that was before the Director when the Determination was made.

7. I have decided this appeal is appropriate for consideration under section 114 of the *Act*. At this stage, I am assessing the appeal based solely on the Determination, the Reasons for the Determination, the appeal form, the written submissions filed with the appeal, my review of the material that was before the Director when the Determination was being made, and any other material allowed by the Tribunal to be added to the record. Under section 114(1) of the *Act*, the Tribunal has the discretion to dismiss all or part of the appeal, without a hearing, for any of the reasons listed in the subsection, which reads:

> *114 (1) At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of any appeal if the tribunal determines that any of the following apply:*
>
> (a) *the appeal is not within the jurisdiction of the tribunal;*
>
> (b) *the appeal was not filed within the applicable time limit;*
>
> (c) *the appeal is frivolous, vexatious, or trivial or gives rise to an abuse of process;*
>
> (d) *the appeal was made in bad faith or filed for an improper purpose or motive;*
>
> (e) *the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;*

(f) *there is no reasonable prospect that the appeal will succeed;*

(g) *the substance of the appeal has been appropriately dealt with in another proceeding;*

(h) *one or more the requirements of section 112(2) have not been met.*

8. If satisfied that the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, the Director and Mr. Jamieson will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1) it is liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal can succeed.

ISSUE

9. The issue at this stage is whether the appeal shows there is any reasonable prospect it will succeed.

THE FACTS

10. The following summary of facts is based on the Reasons for the Determination and the record.

11. Red Chris Mine operates a copper, gold and silver mine which falls within the jurisdiction of the *Act*.

12. Mr. Jamieson commenced employment with Red Chris Mine as an electrician on November 24, 2015, with a pay rate of $41.95 per hour, derived from an annual salary of $87,256.00 and based on an average work week of 40 hours.

13. Mr. Jamieson's scheduled hours of work consist of four hours paid travel, and 13 days of 12 hours of work followed by 14 consecutive days off.

14. A variance covering a group of employees including Mr. Jamieson was applied for and granted effective September 7, 2016.

15. Mr. Jamieson's complaint submission of February 15, 2016, requested outstanding wages, and argued that he had not entered into an averaging agreement upon commencement of work with Red Chris Mine.

16. Red Chris Mine responded to the complaint submission by arguing that the employment contract signed by Mr. Jamieson on November 24, 2015, was also a valid averaging agreement, meeting all legislated criteria, and in any event, there was no harm experienced by Mr. Jamieson.

17. The Director issued a preliminary assessment on June 23, 2016, in follow up to a fact-finding session conducted on June 6, 2016. The Director found there were significant deficiencies in the construction of the agreement so that it was not an agreement to average hours of work pursuant to section 37 of the *Act* and the parties were invited to provide additional evidence or argument on this point.

18. The Determination identified that there were two issues being considered by the Director:

(a) Was Mr. Jamieson working under an averaging agreement pursuant to section 37 of the *Act* in the period November 24, 2015, through February 15, 2016?

(b) Does Red Chris Mines owe Mr. Jamieson additional wages for this period?

19. The Determination hinged on the document received by Mr. Jamieson from Red Chris Mines on November 6, 2015, and signed by Mr. Jamieson on November 24, 2015. This offer of employment set out conditions of employment, and, according to Red Chris Mines, also served as an averaging agreement pursuant to section 37 of the *Act*.

20. The Director found that the signed November 24, 2015, employment agreement was not an averaging agreement, as it did not meet the requirements of section 37 of the *Act*. There was no start or expiry date, no indication of the number of times the schedule could be repeated, and the employer was able to unilaterally change the terms of work.

21. The Director found that the employment agreement set out a schedule which averages 40 hours per week over a 4-week rotation, but did not specifically set out the intent to average hours of work over this 4-week period for the purposes of overtime entitlement. As such, "the employment agreement is simply a schedule, not an averaging agreement".

22. Having found that Mr. Jamieson was not working under a section 37 averaging agreement, entitlement to additional wages was calculated based on the submitted payroll records.

23. The Director determined that Red Chris Mines owed Mr. Jamieson overtime wages in the amount of $3,395.29, inclusive of vacation pay, plus accrued interest for a total of $3,482.95.

24. The Director applied an administrative penalty of $500.00 against Red Chris Mines for contravention of section 40 of the *Act*.

ARGUMENT

25. Red Chris Mines' ground for appeal is that the Director erred in law in finding that Mr. Jamieson was not working under an averaging agreement pursuant to section 37 of the *Act* and that Red Chris Mines therefore owed Mr. Jamieson overtime wages.

26. The appeal submission argues that Mr. Jamieson's employment agreement is also a valid averaging agreement under section 37 of the *Act*.

27. Red Chris Mines referenced the historical intent of section 37 of the *Act* by including excerpts from a May 2002 News Release issued by the Ministry of Skills Development and Labour, arguing that the intent was to provide flexibility and dispense with the requirement to apply for a variance for a pre-approved, legislated work schedule.

28. The Tribunal has not issued any explanatory decisions addressing section 37, nor has it required an averaging agreement expressly reference its intent or be labelled "averaging agreement" in order to be considered valid.

29. The employment agreement between Red Chris Mines and Mr. Jamieson complies with section 37 of the *Act* and is a valid averaging agreement because:

- it is in writing;
- it was provided, agreed to and signed before Mr. Jamieson started working at the mine site;
- it expressly indicates that the work schedule, the Rotation, consists of 160 hours over a 4 week period, thereby indicating the number of weeks over which the hours would be averaged;

- it expressly indicates that the work schedule consists of 13 shifts of 12 hours each, and 2 shifts of 2 hours each on each travel day to and from the mine site, followed by 13 days off work – a schedule which averages 40 hours per week over a 4 week period;
- the Employment Agreement is for an indefinite term and thus the averaging agreement will repeat indefinitely, unless terminated;
- it expressly states it is effective November 24, 2015, the start date, and
- the Employment Agreement expressly provides for an end date by including a termination provision setting out how and when both parties may end the Agreement.

30. Even if the employment agreement did not meet the specifics of section 37(2)(a) any such breach was minimal and Mr. Jamieson had been treated in a fair manner and suffered no harm.

31. The Delegate did not consider the purpose of the *Act* when considering if the employment agreement was a valid averaging agreement under section 37.

32. At the very least, the purpose and spirit of the *Act* should be considered with regard to remedy.

33. Red Chris Mines cited *Goodlife Fitness Centres*, BC EST # D089/14, noting that the Tribunal considered section 2 of the *Act* which outlines the purpose of the *Act,* and in particular, "the objectives of promoting fair treatment for employees and employers, fostering a productive and efficient workforce, and contributing in assisting employees to meet work and family responsibilities."

34. Section 123 of the *Act* which states that "a technical irregularity does not invalidate a proceeding under this *Act"* should have be considered, as it was in the 1998 Tribunal decision *Capable Enterprises Ltd.*, BC EST # D033/98, which relied on section 2 and section 123 to make the determination that an employer had received notice of the intent to take pregnancy leave.

35. Section 37(12) of the *Act* states that subsections (2) to (11) are deemed to be incorporated in an averaging agreement. This section supports the intent of section 37 is to promote flexibility in dealing with averaging agreements.

36. Red Chris Mines submitted that the Determination should be canceled based on the errors identified.

ANALYSIS

37. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *Act*, which says:

> 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
>
> (a) the director erred in law;
>
> (b) the director failed to observe the principles of natural justice in making the determination;
>
> (c) evidence has become available that was not available at the time the determination was being made.

38. A review of decisions of the Tribunal reveals certain principles applicable to appeals that have general application and have consistently been applied in considering appeals.

39. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal that there is an error in the Determination under one of the statutory grounds.

40. The Tribunal has adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 - Coquitlam*), [1998] BCJ No. 2275 (BCCA):

> 1. a misinterpretation or misapplication of a section of the *Act;* [in *Gemex*, the legislation was the *Assessment Act*];
> 2. a misapplication of an applicable principle of general law;
> 3. acting without any evidence;
> 4. acting on a view of facts which could not reasonably be entertained; and
> 5. adopting a method of assessment which is wrong in principle.

41. Red Chris Mines argues that the Determination should be cancelled due to an error in law in not treating the employment agreement as an averaging agreement under section 37 of the *Act*.

42. To meet the need for flexibility in the workplace, the *Act,* in section 37, allows employers and employees to enter into "averaging agreements" which permit hours of work to be averaged over a period of one, two, three or four weeks.

43. Pursuant to section 37(2) of the *Act,* in order to be valid, an averaging agreement must:

> (a) be in writing;
> (b) specify the number of weeks (1 – 4) over which hours will be averaged;
> (c) specific the work schedule for each day covered by the agreement;
> (d) specify the number of times the agreement may be repeated;
> (e) specify a start date and an end date for the agreement;
> (f) be signed by an employer and an employee before the start date.

44. All of the above are conjunctive requirements.

45. Red Chris Mines argues that the start date for employment and the termination provision setting out how the parties may end the agreement are sufficient to meet the requirement for a start and end date of an averaging agreement. A more explicit expiry date than that provided by the employment agreement's termination provision is unnecessary in order to comply with the legislation.

46. In *Sterling Electrical Inc.,* BC EST # D080/15, the Tribunal addressed the validity of a document entitled "2-Week Averaging Agreement" signed by an employee on a specific date, but absent a specified start and expiry date. The decision outlined the need to meet the six requirements contained within section 37(2) of the *Act* for an averaging agreement to be valid. The decision reads, in paragraph 44:

> In this case, the averaging agreement produced by Mr. Janas in Sterling's appeal does not contain a start date and an expiry date, although it does set out the date on which it was executed – March 8, 2012. In

> the result, I find that the averaging agreement is not compliant with section 37(2) of the *Act* and therefore not valid.

47. Having reviewed the considerations in *Sterling Electrical Inc.*, *supra*, it is reasonable to consider the decision as providing clear direction on this point – a definitive start date and end date are needed for an averaging agreement to be valid and compliant with section 37(2) of the *Act*.

48. This argument of Red Chris Mines is not new, and was before the Director and considered in the Determination. The Director considered the absence of a start and end date, the lack of specification concerning the number of times the schedule could be repeated, and the unilateral scheduling power available to the employer in conjunction, concluding:

> Without some clear language in the agreement to establish that the employee and the employer have agreed to average the employee's hours of work for the purpose of an overtime entitlement the agreement does not meet the most basic requirement of an averaging agreement pursuant to section 37 of the *Act*. In the absence of such language the "Rotation" referred to in the employment agreement is simply a schedule, not an averaging agreement.

49. Taking into consideration the clear reading of section 37(2) of the *Act,* and the prior Tribunal decision of *Sterling Electrical Inc., supra,* which confirmed the requirement for a specific start and end date for an averaging agreement, I find no error in law in the Director's decision that the employment contract is not a valid averaging agreement as it does not comply with the legislative requirement of a start and end date.

50. Red Chris Mines has argued that the employment agreement does not repeat and accordingly, does not conflict with section 37(2) of the *Act*.

51. The literal approach taken in *Sterling Electric Inc.*, *supra,* concerning the need for a start and end date is reasonably applicable to all of the criteria outlined in section 37(2) of the *Act,* and accordingly the absence of a specific number of times, if any, that the agreement may be repeated, is significant and may well be viewed as a fatal error.

52. Red Chris Mines states categorically that the Delegate did not consider the purposes of the *Act* under section 2 of the *Act* when determining whether the employment agreement was also an averaging agreement; this is not consistent with the Determination, which referenced Red Chris Mine's section 2 argument before going on to provide a decision based on a straightforward reading of the legislative language of section 37(2) of the *Act*.

53. I am not persuaded that a literal reading of section 37(2) conflicts with the stated purposes of the *Act* as found in section 2 of the *Act* or that the evidence supports the Delegate did not consider section 2 of the *Act*.

54. Red Chris Mines argues that it is not consistent with the purpose of the *Act* to analyze all of the provisions of section 37(2)(a) as if they were all of the same importance, without considering the purposes of the *Act*.

55. Section 37(2)(a) provides a list of legislated conjunctive requirements – each must be satisfied – and there is no legal basis in legislation or presented by Red Chris Mines to support the argument that some of the legislated conjunctive requirements are 'less important' than others and should accordingly be remedied as technical irregularities under section 123 of the *Act*.

56. I find no error of law in the Determination. The conclusion reached by the Director on the section 37(2) issue followed an analysis of the evidence presented by the parties during the complaint process and is

rationally supported by the facts and law. While I appreciate that Red Chris Mines disagrees with the conclusion, it has not shown that any of the factual findings and conclusions were made without any evidence at all, were perverse or inexplicable, or that the Director misapplied the law of the *Act* relating to section 37(2).

57. It is appropriate to exercise my discretion under section 114(1) and dismiss this appeal. The purposes and objects of the *Act* are not served by requiring the other parties to respond to it as there is no reasonable prospect that the appeal will succeed.

ORDER

58. Pursuant to section 115 of the *Act,* I order that the Determination dated February 6, 2017, be confirmed in the amount of $3,982.95, together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

Marnee Pearce
Member
Employment Standards Tribunal