EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the *Employment Standards Act* R.S.B.C. 1996, C. 113

- by -

Britannia Gold Corporation
("Britannia")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE NO.: 97/764

DATE OF HEARING: January 19, 1998

DATE OF DECISION: February 19, 1998

DECISION

APPEARANCES

for Britannia Gold Corporation	Maurice Mathieu William Murray
for the individuals:	in person (except Steven Simonen)

OVERVIEW

This is an appeal filed pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) by Britannia Gold Corporation ("Britannia") of a Determination of a delegate of the Director of Employment Standards (the "delegate") dated September 24, 1997. That Determination concluded Britannia owed an amount of $9646.81 in respect of the employment of four employees: Bernard Mathieu, Peter Johnson, Chris Craft and Steven Simonen. Britannia says the Determination is wrong for two reasons: first, the mathematical calculations done by the delegate were not in accord with the information provided by Britannia; and second, certain hours which were included in overtime calculations were "bonus" hours and should have been included in the summary of "wages and bonuses" paid by Britannia during the period relating to the claims.

ISSUES TO BE DECIDED

The main issue in this appeal is whether Britannia has satisfied the burden on them to persuade me that the decision of the delegate is wrong. If they can satisfy that burden, the next issue is whether the mathematical calculations done by Britannia are correct and should be substituted for those of the delegate, or whether the matter should be referred back as I am allowed to do in Section 115(1)(a) of the *Act*. Subsequent to the hearing, the Tribunal received correspondence from Britannia asking for the working sheets of the delegate and a further opportunity to submit on the correctness of the ruling made by the delegate. A collateral issue arises out of that request relating to the practice and procedure of the Tribunal.

FACTS

The complaints at issue in this appeal were initiated by a number of miners employed by Britannia in an underground mine near Grand Forks, known as the Lexington Project. It

was a "muck and blast" operation. The complaints claimed that Britannia had contravened the overtime requirements of the *Act*. The delegate found they had. No appeal is taken from that conclusion. Britannia was ordered to pay an amount of $9646.81 in respect of the contravention. It is only that amount which is in dispute.

During the claim period, Britannia adopted a work schedule of 10 hour shifts, with a rotation of 10 days on, four days off. For the most part, this shift rotation commenced Tuesday and ended Thursday of the following week. Documents submitted by Britannia show there were some exceptions to that rotation. Also, some employees worked additional shifts in mine maintenance and/or mine safety inspection during their four days off. No overtime was paid by Britannia on any hours worked.

The work schedule adopted by Britannia was not one of the prescribed work schedules found in Appendix 1 of the Regulation to the *Act*, and in any event, no approval had been sought from the employees and no copy of the schedule had been provided to the Director of Employment Standards. Applying Section 35 of the *Act*, the maximum hours of work provision, overtime was required to be paid on all hours worked in excess of 8 in a day or 40 in a week (which for the purposes of calculating overtime, starts 12:01 a.m. Sunday and ends midnight the following Saturday).

The normal hourly rate for the individuals was $16.00 or $18.00 an hour. Some of the individuals were asked from time to time, and agreed, to perform jobs other than their regular jobs and received a higher hourly rate when performing those jobs. Britannia argues the difference between the normal hourly rate and the higher hourly rate should have been treated as a "bonus", not "wages", and should not have been included as part of the summary indicating the wages paid or payable when the delegate summarized the amount which, on an application of the *Act*, had been earned by those individuals.

Britannia provided a detailed list of hourly breakdowns for the individuals in support of their appeal. The working papers of the delegate, from which she established the regular and overtime hours for the individuals applying the formula found in the Act for calculating overtime were not given to Britannia along with her conclusion that Britannia had contravened the overtime requirements of the Act and was required to pay an amount of $9646.81.

ANALYSIS

I do not accept the argument that the difference between the normal wage rate of some individuals and the higher hourly wage rate that they received from time to time should have been considered as a "bonus" and not included in the calculation of wages paid or payable. The definition of *"wages"* in the *Act* reads:

"wages" *includes*

> *(a) salaries, commissions and money, paid or payable by an employer to an employee for work,*
>
> *(b) money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency,*
>
> *(c) money, including the amount of any liability under section 63, required to be paid by an employer to an employee under this Act,*
>
> *(d) money required to be paid in accordance with a determination or an order of the tribunal, and*
>
> *(e) in Parts 10 and 11, money required under a contract of employment to be paid, for an employee's benefits, to a fund, insurer or other person,*

but does not include

> *(f) gratuities*
>
> *(g) money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency,*
>
> *(h) allowances or expenses, and*
>
> *(I) penalties.*

It is clear that the higher wage rates were paid for work performed. The rates were based upon a particular type of work which, it was agreed between the individuals and Britannia, would generate a higher pay rate. There is nothing in the material before me to suggest the higher rate was paid as a "gratuity" or was paid at the discretion of the employer and was unrelated to hours of work, production or efficiency. That argument is dismissed.

In an appeal before the Tribunal, the burden of demonstrating, on a balance of probabilities, that the Determination is wrong in some material way lies with the

appellant, in this case, Britannia. They have failed to meet that burden. In support of their position, Britannia provided a detailed list of the days and hours of work of each of the individuals who were the object of the appeal. That list does not assist Britannia. In fact, it more strongly supports a conclusion that the summary of the delegate was correct.

Subsequent to the hearing, the Tribunal received correspondence from Britannia asking that the detailed work sheets of the delegate be produced to them and they be afforded an opportunity to refute the calculations contained in the work sheets. No request of that nature was made before or at the hearing. In essence, the request is for a further opportunity to disprove the conclusions of the delegate. The reasons given in support of the request are:

1. When Britannia prepared their list, they were only responding to the summary given to them by the officer; and

2. They believed the officer would be present at the hearing with all their data and any inconsistency could be compared with the list provided by Britannia.

The request has been given to me for reply, as it is considered to be part of the appeal file to which I have been assigned. It should be noted that there is a direct relationship between the working sheets and the summary which was delivered to Britannia as a Schedule the Determination. The working sheets are a weekly breakdown of the hours of work of each employee based on an application of the *Act*, showing hours worked each day, designated as either straight time or overtime hours (at either 1½ or 2 times hourly rate) and a total of straight, time and one-half or double time hours for each week. The summary, referred to above, is determined by adding all of the weeks in a relevant period. In light of the conclusion that Britannia has not shown the summary calculations in the Determination to be wrong, it is difficult to see how they expect to do more with the working sheets. What has to be decided is whether they should be allowed to do that.

In my opinion, the policy and procedural considerations that arise in this issue are not dissimilar from those which would operate in the context of an application for reconsideration under Section 116 of the *Act*. In this case, Britannia says, in effect, that while their submission at the hearing was incomplete, it may still be able to demonstrate an error in the Determination if the delegate is instructed to give over her working sheets, a consideration is postponed and Britannia is allowed time to argue the working sheets are in error. They are asking for a chance to introduce new evidence into the proceeding after the hearing has been concluded. An applicant under Section 116 in a similar position would not be allowed to bring new evidence into a reconsideration unless they could first cogently demonstrate a significant error of fact would be revealed from the introduction of new evidence and the evidence sought to be introduced is both relevant to the order or decision and was not reasonably available at the time of the original hearing to the party seeking to introduce it. In the context of a reconsideration application, the

Tribunal, in **Downton -and- British Columbia (Director of Employment Standards)**. BC EST #D136/97, made the following comments of the policy perspective involved:

> It would be unfair, expensive and contrary to the purposes of the *Act* to "provide fair and efficient procedure for resolving disputes" to admit a new analysis of evidence before the parties and the Tribunal at this stage in the proceeding.

That statement of policy is equally applicable to the circumstances of this case.

While I do not feel bound to apply that consideration in the context of this case, as I would in a reconsideration application, no compelling reason has been given that would warrant delaying consideration of the appeal while Britannia received, examined and made submission on the working sheets, which submissions would then have to be given to the individuals for their comment. At a minimum, Britannia would have to show some basis for a conclusion that the documents sought would assist their basic submission that the calculations made by the delegate were wrong. If the delegate's calculations were wrong, they could have done that through the summaries, which were present at the hearing, but they have not. The request that the working documents be provided to them for review is denied.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated September 24, 1997 be confirmed in the amount of $9646.81 together with whatever further interest that may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

.....
David Stevenson
Adjudicator
Employment Standards Tribunal