EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Graeme Couldrey and Denis McLeod
("Couldrey" and "McLeod")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	David Stevenson
FILE NO.:	97/732 and 97/763
DATE OF HEARING:	January 19, 1998
DATE OF DECISION:	February 19, 1998

DECISION

APPEARANCES

for the individuals:	In person
for Britannia Gold Corporation	Maurice Mathieu William Murray

OVERVIEW

This decision addresses two appeals filed pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*), the first by Graeme Couldrey ("Couldrey"), who is appealing a Determination of a delegate of the Director of Employment Standards (the "delegate") dated September 25, 1997, and the second by Denis McLeod ("McLeod"), who is appealing a Determination which is also dated September 25, 1997. In the Couldrey Determination, the delegate concluded Couldrey was not owed any wages for a period from August 16, 1995 to February 1, 1996 and in the McLeod Determination, the same conclusion was reached for a period from November 16, 1995 to February 1, 1996. Both Couldrey and McLeod had complained they had not received overtime benefits according to the requirements of the *Act* during their respective periods.

In respect of Couldrey's complaint, the delegate concluded he had been paid an amount which, she said, "more than offset any overtime payments". In McLeod's complaint, the delegate concluded McLeod had actually been overpaid an amount of $596.36.

Couldrey says the delegate was "grossly incompetent" in her investigation of his complaint. Most significantly, he asserted that she had failed to understand the wage and bonus structure that he and some of the other employees worked under. McLeod says the Determination is wrong because the bonus was paid to him as an incentive or reward for achieving extra "footage" and had nothing to do with the overtime issue.

Couldrey and McLeod were both employed by Britannia Gold Corp. ("Britannia") at the Lexington Project. Their claims arose in virtually identical factual circumstances and both raise the same issue. It is convenient to address both claims in one decision.

ISSUE TO BE DECIDED

The issue in these appeals is whether the delegate erred in how she treated the production bonus received by Couldrey and McLeod.

FACTS

The facts relevant to the claims and these appeals are not in dispute. I was able, during the hearing, to acquire agreement on all of the facts necessary to decide the issue in these appeals. I am astounded that the delegate was not able to do the same, as they are not particularly complex or contentious.

Couldrey and McLeod were employed by Britannia as miners. Couldrey commenced employment on August 16, 1995 and McLeod on November 16, 1995. Both worked in an underground mine near Grand Forks, known as the Lexington Project. It was a "muck and blast" operation. Couldrey, McLeod and two other miners worked the "face" of the mine. Couldrey was the shift boss on one of the two shifts being worked and McLeod was shift boss on the other. Each had one other miner working with him at the "face".

Couldrey had worked for Britannia at least one other mine site. At that mine site, Couldrey and the other miners at the "face" were paid for their work solely on the basis of production, which meant the miners' wages were based on the distance (the number of feet) the "face" of the tunnel was advanced on their shift. Compensation based on production is a typical arrangement in underground mines. On the Lexington Project, however, because of some uncertainties associated with how much production could be obtained on a regular basis, it was agreed between the miners and Britannia that the wage structure would be a combination of hourly rate and production, with each crew receiving a total of $38.00 an hour, $20.00 an hour for the shift boss and $18.00 for the other miner, and a production bonus of $80.00 a foot for each foot of advance over six feet on a shift. Couldrey, McLeod and the other two miners agreed to combine all production bonuses earned by both shifts during the pay period and asked Britannia to allocate a one-quarter share of the total earned bonus in the pay period to each of them.

During the claim period, the employees at the mine were scheduled to work 10 hour shifts, working a rotation of 10 days on, four days off. For the most part, the 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, including Couldrey and McLeod, 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.

Couldrey and McLeod also agreed to do "rock bolting". It was agreed that when doing this job, they would be paid $28.00 an hour, or $8.00 an hour above their normal hourly rate . Other employees also did "rock bolting" and also received $8.00 an hour over their normal hourly rate of pay when performing that job. Still other employees were asked, and agreed, to perform jobs other than their regular jobs for a higher hourly rate when performing those jobs.

During the period August 16, 1995 to February 1, 1996, 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 delegate, when calculating the amount of wages which were paid or payable and purportedly applying the requirements of the *Act*, apparently decided the production bonus was not wages. I say "apparently" because there is no clearly stated conclusion to that effect in either Determination, but it is a logical inference, since the production bonuses paid to Couldrey and McLeod during their respective periods were not included in the summary of wages paid or payable for the two individuals.

ANALYSIS

I begin the analysis by referring to the definition of "wages" in the *Act*:

> ***"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 difficult to understand how the delegate could conclude the production bonus did not meet the definition of "wages" in the *Act*. There is simply no controversy that the production bonus was *"an incentive"* and was directly related to *"production"*. As wages, the amounts paid as production bonuses should have been included in the summary done by the delegate when she determined wages paid and payable for each of the individuals. They were not. As a result, the Determination is wrong and must be canceled.

Britannia argued that, at least, the production bonus should be counted toward any overtime liability under the *Act* because most, if not all, of the production bonus was achieved while the miners were working daily overtime hours. The reasoning, as I understood it, was that if the production bonus was achieved when the miners were working overtime hours they implicitly accepted that the bonus would be their compensation for the overtime hours worked. As attractive as it might be in the circumstances of this case to apply that reasoning, I cannot find support for it in the *Act*.

Under the *Act*, overtime is tied to work performed, not to the value of the work, either to the employee or the employer. To demonstrate this point, I note there were a number of employees at the mine were on a straight hourly rate and had no agreement with Britannia that would allow them an opportunity to achieve a production bonus. They worked the same schedule and substantially the same hours as Couldrey and McLeod. Britannia's argument has the peculiar result that those other employees would receive overtime pay for overtime worked, while Couldrey and McLeod would have their overtime entitlement effectively absorbed by the amount of production bonus paid. There is no difference in the circumstances of the employees and Couldrey and McLeod, except the latter had an agreement with Britannia that allowed them to increase their wages in any hour in which they were able to surpass designated production quotas. The fact of such an agreement is not a relevant consideration to whether an employee is entitled to overtime pay under the *Act*. Britannia's argument would make the administration of the overtime wages sections of the *Act* uncertain and virtually unmanageable.

It would likely add new areas for factual disagreement and, in order to ensure there was some empirical data for a delegate to work from, would require additional payroll information be kept by the employer. The facts of this case demonstrate these areas of

concern. There was no agreement among the parties that most of the production bonus was achieved in overtime hours and no records confirming that assertion. Based on Britannia's limited knowledge of how the overtime provisions of the *Act* applied, it is unlikely their efforts to establish the kind of information suggested would be adequate or complete. To further demonstrate the difficulty with Britannia's position, the argument does not answer how overtime worked when no production bonus was achieved should be addressed. Under the wage scheme no production bonus was payable on the first six feet of advance made during a shift. Work performed to advance the first six feet was paid on an hourly rate, whether it was achieved during straight time or overtime hours. It is apparent from records provided by Britannia that there was overtime in excess of forty hours in a week which was worked achieving the first six feet of advance during a shift.

The consequence of the above analysis is that overtime provisions of the *Act* can only take account of the hours worked. Issues about whether the fact of working those overtime hours have given an employee the opportunity to increase their wages are not appropriate considerations in determining whether overtime pay is owing.

ORDER

Pursuant to Section 115 of the *Act*, both Determinations, both dated September 25, 1997, are canceled and the matters are referred back to the Director.

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David Stevenson
Adjudicator
Employment Standards Tribunal