Employment Standards TRIBUNAL

An appeal

- by -

Mainland Demo Contracting Ltd. and Mainland Group Contracting Ltd. and Mainland L. Contracting Ltd. and Mainland Labour Contracting Ltd. and Doon Development Ltd.

("MDC and the associated companies")

- 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: David B. Stevenson

FILE No.: 2017A/16

DATE OF DECISION: June 28, 2017

DECISION

SUBMISSIONS

Ryan P. Berger	on behalf of Mainland Demo Contracting Ltd. and Mainland Group Contracting Ltd. and Mainland L. Contracting Ltd. and Mainland Labour Contracting Ltd. and Doon Development Ltd.
Kara L. Crawford	on behalf of the Director of Employment Standards

OVERVIEW

1. On May 17, 2017, I issued a decision, BC EST # D055/17, on an appeal by Mainland Demo Contracting Ltd. and Mainland Group Contracting Ltd. and Mainland L. Contracting Ltd. and Mainland Labour Contracting Ltd. and Doon Development Ltd. ("MDC and the associated companies") of a Determination issued by the Director of Employment Standards, through his delegate (the "Director"), in favour of Gurpal S. Sekhon (Mr. Sekhon") for wages in the amount of $18,231.38, representing unpaid overtime, statutory holiday pay, vacation pay, compensation for length of service and interest.

2. The bulk of the appeal was dismissed under section 114(1) of the *Act*. A question relating to the overtime calculation for a period January 2, 2015, to February 15, 2015, was referred to the parties for submissions. I have received submissions from the Director and MDC and the associated companies.

3. I have considered those submissions and address that question in this decision.

ISSUE

4. The issue in this part of the appeal is whether the Director erred in law in awarding overtime wages to Mr. Sekhon, and correspondingly ordering MDC and the associated companies to pay overtime wages, for the period from January 2, 2015 to February 14, 2015. The issue engages a consideration of whether the statutory recovery period was correctly applied to the overtime calculation made by the Director.

THE FACTS

5. It is unnecessary to restate all of the facts set out in the earlier decision on the appeal by MDC and the associated companies.

6. It suffices to note that the Director found the statutory wage recovery, or capture, period, which is contained in section 80 of the *Act*, was limited to wages that became payable in the period from February 15, 2015, to August 15, 2015.

7. That finding is unassailable.

ARGUMENT

8. The Director submits section 42 of the *Act* – the provision that allows for banking of overtime – governs the question and that under section 42(5), the balance credited to a time bank is owing on termination, which in this case fell within the capture period.

9. MDC and the associated companies say the conclusion of the Director is not supported by the evidence; specifically, it is submitted there is no evidence of an "agreement" to bank overtime hours.

ANALYSIS

10. Section 42 of the *Act* allows an employee to make a written request for an employer to establish a time bank to which that employee's overtime wages may be credited and the employer may comply with that request.

11. There was no evidence before the Director that Mr. Sekhon ever requested his employer to create a time bank for him, nor was there any evidence that a time bank contemplated by section 42 of the *Act* was ever created.

12. The Determination records agreement between MDC and Mr. Sekhon that hours worked in excess of 90 in a pay period would be "banked", carried forward and paid at the end of the year at his regular (straight time) wage rate. This agreement is reflected in the "Background" section of the Determination and in evidence from Mr. Dhaliwal recorded in the Determination at the top of page R12.

13. I accept there was a verbal agreement to "bank" excess hours to be carried and paid at a later date. That agreement did not comply with the minimum requirements of the *Act*, as it contemplated paying the excess hours worked at straight time rates. Such agreement, as it sought to waive minimum requirements of the *Act*, had no effect: see section 4 of the *Act*. The overtime provisions in section 37.3 of the *Regulation* were applied and MDC and the associated companies was assessed an administrative penalty for contravention of those provisions. As well as having no effect under, and contravening the requirements of, the *Act*, the agreement did not comply with the provisions for establishing a time bank for overtime wages that are laid out in section 42.

14. I find the presumption upon which the argument of the Director is based – that there was a banking of wages under section 42 – is not supported by either the facts or the law. There was no banking of overtime wages under section 42.

15. Rather, the facts of this case must be viewed as nothing more than a failure by MDC and the associated companies to pay all wages owed to Mr. Sekhon at the time they were earned and were required to be paid, accompanied by an agreement between the two to defer payment of those wages to a later date. It is not necessary to reach any conclusion on the interplay between a properly established overtime bank and section 80 and this decision should not be taken as making any judgement on that.

16. Mr. Sekhon was a willing participant in the agreement to defer wages. While the agreement cannot survive the application of section 4, which effectively nullifies the effect of the agreement on statutory overtime entitlement regardless of the intention of the parties and consequently allows the statutory purpose of ensuring Mr. Sekhon has received the basic standards provided under the *Act* and *Regulation* are given effect, I do not accept the agreement made should be, or can be, shoe-horned into a statutory benefit that does not fit the facts. There is nothing in the record that suggests MDC and the associated companies and Mr. Sekhon were agreeing to create an overtime bank by agreeing to defer some of Mr. Sekhon's earnings to be paid at the end of the year. The *Act* does not convert any agreement to defer the payment of wages for excess hours worked into an overtime banking agreement under section 42. The circumstances of this case indicate it is appropriate that other purposes found in section 2 – promoting fair treatment and encouraging open communication – be given some consideration and effect.

17. In sum, I find Mr. Sekhon's claim to overtime wages for the period January 2, 2015, to February 14, 2015, fall outside the six-month statutory recovery, or capture, period is not recoverable.

18. Accordingly, Mr. Sekhon's overtime entitlement must be recalculated and the matter is referred back to the Director for that purpose.

ORDER

19. Pursuant to section 115 of the *Act*, I order the Determination be referred back to the Director to recalculate Mr. Sekhon's overtime entitlement based on the conclusions made in this decision.

20. I continue to be seized of this appeal and following receipt and review of the calculations made by the Director, and any submissions on those calculations, I shall finalize the appeal.

David B. Stevenson
Member
Employment Standards Tribunal