Employment Standards TRIBUNAL

An appeal

- by -

Sterling Electrical Inc. formerly carrying on business as
First Response First Aid Services
("Sterling")

- 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: Shafik Bhalloo

FILE No.: 2015A/61

DATE OF DECISION: July 31, 2015

DECISION

SUBMISSIONS

Keith Janas	on behalf of Sterling Electrical Inc. formerly carrying on business as First Response First Aid Services
Shari Thomas	on her own behalf
John Dafoe	on behalf of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), Sterling Electrical Inc. formerly carrying on business as First Response First Aid Services ("Sterling"), has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the "Director") on April 7, 2015 (the "Determination").

2. The Determination concluded that Sterling contravened Part 4, section 40 (overtime) of the *Act* in respect of the employment of Shari Thomas ("Ms. Thomas"), and ordered Sterling to pay Ms. Thomas wages and interest in the amount of $1,874.27, inclusive of accrued interest under section 88 of the *Act*.

3. The Determination also levied an administrative penalty of $500.00 against Sterling for contravention of section 40 of the *Act*.

4. The total amount of the Determination is $2,374.27.

5. Sterling has appealed the Determination on the grounds that the Director erred in law and failed to observe the principles of natural justice in making the Determination.

6. Sterling is asking the Employment Standards Tribunal (the "Tribunal") to change or vary the Determination or to cancel it.

ISSUE

7. Is there a basis on which the Determination should be varied or cancelled?

THE FACTS

8. The following summary of facts is based on the reasons and the record.

9. Sterling operated a first aid business under the operating name First Response First Aid within the jurisdiction of the *Act*.

10. On May 17, 2012, the Specialized Workers' Union Local 1611 (the "Union") certified as the bargaining agent for employees of Sterling.

11. On May 30, 2012, the Union served notice to bargain with Sterling and met with Sterling in September and October, 2012, with a view to concluding a collective agreement. The negotiations between the Union and Sterling were unsuccessful, and the Union served Sterling with a strike notice on September 27, 2012.

12. On October 16, 2012, Sterling applied to the Labour Relations Board (the "Board") for a last offer vote, which the Board conducted on October 25, 2012, and the Union's membership rejected the last offer of Sterling. As a result, a collective agreement was not concluded between the parties.

13. The employees of Sterling, represented by the Union, during the said period, consisted exclusively of first aid attendants and nurses working at the Rio Tinto Alcan/Bechtel Kitimat Modernization Project ("KMP") site in Kitimat, British Columbia.

14. On October 17, 2012, KMP management informed Sterling and each of its employees that Sterling's contract to provide first-aid services to the KMP project would be cancelled effective October 20, 2012, which would be their final day of work at the project. The employees were subsequently paid termination benefits by Sterling through funds KMP provided.

15. On November 10, 2012, Sterling announced that, effective November 16, 2012, it would cease operating the first-aid business which it had carried on as First Response First Aid.

16. On March 7, 2013, the Union filed a third-party complaint against Sterling with the Employment Standards Branch (the "Branch"), contending that Sterling failed to pay overtime wages and compensation for length of service to its employees.

17. After receiving the Union's third-party complaint, the delegate contacted seventeen (17) employees of Sterling and asked them whether they would be interested in a further investigation of their employment with Sterling. Four (4) employees indicated that they wished to have a review conducted of their employment with Sterling. As a result, the delegate requested, and received, payroll records for these employees from Sterling. After reviewing the records, three (3) of the four (4) employees decided to take no further action, but one (1) employee, Ms. Thomas, requested a full review to be performed and a determination be made with respect to whether she was owed additional overtime wages by Sterling.

18. In his investigation into Ms. Thomas' employment with Sterling, the delegate noted that she was employed by the latter as a nurse from January 2, 2012, to October 19, 2012, at the rate of pay of $30.00 per hour for day shifts and $32.00 per hour for night shifts. He further noted that Ms. Thomas said she worked a regular schedule of twelve (12) hours per day with Sterling and argued that since no collective agreement was successfully negotiated between Sterling and the Union, her claim for overtime was properly within the ambit of the *Act* and within the jurisdiction of the Branch.

19. Sterling, on the other hand, argued that since the Union was certified, Ms. Thomas and other employees of Sterling are governed by the requirements of the Labour Relations Code (the "Code"). In the circumstances, Sterling argues that the Union had the opportunity and the responsibility to address any concerns through the unfair labour practice complaints process before the Labour Relations Board. Sterling also submitted that it no longer operates First Response First Aid and, therefore, it should not be held liable for any claim made against First Response First Aid.

20. In the Findings and Analysis portion of the Determination, the delegate noted that "[t]here are no real disputes with respect to the facts relevant to this complaint" because the parties agreed with respect to the hours worked, rates of pay and total wages paid. In his view, the matter did not turn on findings of fact, but

on the interpretation of the purposes of the *Act*. He then considered sections 2, 3 and 74 of the *Act* and based on these provisions assumed jurisdiction over the dispute. As Sterling is not disputing the jurisdiction of the Director in this appeal, I will not review that aspect of the Determination here.

21. Having said this, the delegate then reviewed the records produced by Sterling relating to Ms. Thomas and noted that there was no dispute between the parties that Ms. Thomas worked twelve (12) hours per day and that, although she was paid some overtime, she was not paid *all* overtime in accordance with the *Act* and therefore Sterling contravened section 40 of the *Act*. Based on the payroll records, the delegate concluded that Ms. Thomas was owed a total of $1,350.02.

22. The delegate's "further review of the payroll [records] revealed that two pay periods which were calculated based on a wage rate of $30.00 per hour were actually paid at $32.00 per hour", and made adjustments to the overtime amount owing, concluding that "the total outstanding becomes $1,745.22". This calculation, on its face, is confusing because an adjustment to the $1,350.02 amount on account of overpayment would effectively reduce Sterling's obligation to Ms. Thomas and not increase it. Therefore, on July 7, 2015, the Tribunal sought submissions on the subject from the Director and Ms. Thomas to better comprehend how the higher amount of $1,745.22 was arrived at. On July 10, 2015, the Director responded with an explanation that explained the confounding language in the Determination stating:

> I believe that the confusion over this point arises out of the wording in the Determination which failed to clearly explain the change in the calculation. To clarify, initially a calculation was performed using an hourly wage rate of $30.00 for all pay periods. Doing so resulted in an assessment of $1,350.02 outstanding to Ms. Thomas. Upon review, it was noted that for the final two pay periods the actual rate of pay paid to Ms. Thomas had been raised to $32.00 per hour (see the pay statements at pages ERP10 and ERP11 of the Record). The effect of calculating the wage entitlement based on a rate of $30.00/hour when the appropriate rate for those two pay periods was, in fact, $32.00 per hour was to understate the wages earned in that period in the initial calculation. Once the appropriate rate of pay of $32.00/hour was entered into the overtime calculation program for the period 16 September - 19 October 2012, the result was a reassessment of wages due to Ms. Thomas which, as would be expected, increased to $1,745.22.

23. On July 29, 2015, Ms. Thomas followed the Director's submissions with her submissions which did not add anything to explain the calculation of the delegate of overtime owing to her in the Determination. On the same day, July 29, Mr. Janas, Operations Manager and Sole Proprietor of Sterling, also made written submissions on the matter but his submissions, rather than address the calculation of the overtime challenged whether any overtime was owing to Ms. Thomas. He contended that if Ms. Thomas worked any overtime hours then she was paid for it at the appropriate rate otherwise "she would have come after us". He also then goes on to reiterate submissions we he previously made in the appeal which I have referred to in summary form below under the heading Submissions of Sterling and therefore do not find it necessary to set out in this part.

24. Having said this, I note that the delegate also levied an administrative penalty of $500 against Sterling in the Determination having concluded that Sterling breached section 40 of the *Act*. He did however sympathize with Sterling's position noting that the latter was caught between two regulatory regimes- the Code and the *Act*.

25. It is also noteworthy that in the Record, there is a Variance Notice in the form of a determination issued by the Director on October 20, 2011, granting Sterling a variance of section 35 (maximum hours of work before overtime applies) and section 40 (overtime wages) of the *Act* in respect of the employment of Sterling's Level 3 First Aid Attendants working on the KMP project (the "Variance Determination"). The Variance Determination commenced as of the issuance date, October 20, 2011, and expired on October 20, 2013.

26. I also note the Record contains Sterling's shift schedules for both categories of its employees, First Aid Attendants and Nurses. Both categories are separated on the shift schedules with the First Aid Attendants far outnumbering the nurses.

SUBMISSIONS OF STERLING

27. Mr. Janas, Operations Manager and Sole Proprietor of Sterling, made written submissions on behalf of Sterling arguing that the delegate, for the following reasons, erred in law and breached the principles of natural justice in making the Determination:

> 1. Our variance was issued in the fall of 2011 and was for the duration of the First Aid Contract on the KMP project, and covered all employees working under the First Aid Contract, both First aid attendants [*sic*] and First Aid attendants [sic] with LPN tickets, along with those with other indorsements [*sic*] like drug and alcohol testing etc. it covered all employees on the Kitimat Moderation [*sic*] Project, both on construction site as well as the camp at the same location.
> 2. We were under union control, Different [*sic*] shift patterns were by employee request, but didn't change the directive of our varrarince [*sic*], 4 on 3 off 3 on 4, off or 7 on 7 off by employee request [*sic*].
> 3. Sterling Electrical Inc. has never had an employee by the name of Shari Thomas.
> 4. First Response First Aid was it's [*sic*] own company with its own tax and business number, it had its own insurances, bank accounts, payroll numbers, employees and management and is no longer in business.

28. Mr. Janas also argues that the delegate is incorrect in stating in the Reasons that there were no real disputes with respect to the facts relevant to this complaint. He states that the delegate was provided the information delineated in the enumerated paragraphs quoted above, and Sterling "brought all paper work and all necessary documents to prove" its case, but the delegate failed to consider and include this evidence in the Reasons.

29. He further states that the delegate disregarded the Variance Determination and, therefore, wrongly calculated overtime owing to Ms. Thomas. He states that Ms. Thomas is covered by the Variance Determination and has been paid in accordance with its terms.

30. Mr. Janas also submits that before or at the time the Branch issued the Variance Determination to Sterling, the delegate spoke to all employees of Sterling, including employees who would be working on the KMP site. He submits that Ms. Thomas was hired as WorkSafe BC Level 3 First Aid Attendant along with LPN (licensed practical nurse) endorsement. He states that she requested to work a 7 on 7 off shift schedule which falls within the 80 hours per pay period referred to in the Variance Determination.

31. Mr. Janas also includes with his written submissions what he refers to as a "signed variance" of Ms. Thomas. However, the document in question is not a variance *per se*, but a template of an averaging agreement with the heading "2-Week Averaging Agreement", signed by Ms. Thomas and Sterling's representative on March 8, 2012.

32. Mr. Janas also includes a package of documents entitled "New Employee Package" containing, among other things, a document entitled "Employer/employee agreement", an acknowledgement of First Response First Aid Services Safety Program, and a 2011 Personal Tax Credit Return form, all of which are dated March 8, 2012.

33. I also note that in his written submissions, Mr. Janas explains why Sterling is no longer operating First Response First Aid and attributes the demise of the business to the Union and Ms. Thomas. I do not find these submissions particularly relevant in this appeal, nor do I find relevant Mr. Janas' submissions that the Union would have filed a grievance if Sterling had failed to pay any employee any amounts owed. Therefore, I will not set out those submissions in any more detail here.

34. In his second set of submissions, dated June 2, 2015, in context of disputing or objecting to the completeness of the Record, Mr. Janas adds to his earlier submissions with respect to the Variance Determination, reiterating that that the Variance Determination covered Ms. Thomas. He further submits that the same delegate who made the Determination was responsible for issuing the Variance Determination after speaking with each employee of Sterling, including Ms. Thomas. Mr. Janas contends that the Variance Determination applies to First Aid Attendants, as well as those with medical endorsements such as LPN like Ms. Thomas. He reiterates that the "variance was based on OT after 80 hours worked per pay period, and any time after 12 hours worked in a day", and Ms. Thomas agreed to the Variance Determination and "signed the agreement". He goes on to submit that the Union has made bogus charges against Sterling and the Union's representative has "falsely accused" Sterling of not paying overtime.

35. Mr. Janas concludes by accusing the delegate of colluding with the Union. He states that the delegate is "working with and siding with the union" with respect to Ms. Thomas' claim for overtime, and queries why the correspondence between the delegate and the Union about "dropping other claims and working with this claim" is not included in the Record.

SUBMISSIONS OF THE DELEGATE IN RESPONSE TO STERLING'S SUBMISSIONS ON THE COMPLETENESS OF THE RECORD

36. In response to Mr. Janas' submission that the delegate failed to disclose the complete Record because he left out correspondence with the Union, the delegate submits that although the Union, as a third party, initiated the complaint pursuant to section 74 of the *Act*, the Union does not have the same status as a complainant filing a complaint on their own behalf. Therefore, the delegate states the Union did not have access to information about individual employees affected by the investigation and the correspondence with the Union is very limited numbering only three letters all of which the delegate produces in his submissions and does not object to being included in the Record. The first letter, dated May 10, 2013, is from the delegate to the Union, advising that only three (3) employees responded to the delegate's letter to the employees, and only one- Ms. Thomas -wished the delegate to pursue further investigation. The second letter, dated November 6, 2013, is from the delegate to the Union and sets out the delegate's initial position that the employees affected by the third-party complaint were covered by a *de facto* collective agreement and, accordingly, excluded from coverage by Part 4 of the *Act*. The third and final letter, dated January 7, 2014, is from the union's counsel to the delegate challenging the delegate's position in the previous letter and arguing that the latter was incorrect in asserting that a collective agreement could be deemed to be in effect between the parties.

ANALYSIS

37. Section 3 of the *Act* provides:

> **Scope of this Act**
>
> **3** (1) Subject to this section, this Act applies to all employees other than those excluded by regulation.

(2) If a collective agreement contains any provision respecting a matter set out in Column 1 of the following table, the Part or provision of this Act specified opposite that matter in Column 2 does not apply in respect of employees covered by the collective agreement:

Column 1 Matter	Column 2 Part or Provision
Hours of work or overtime	Part 4

38. As Sterling and the Union did not consummate a collective agreement, which is a written agreement between an employer and a trade union, providing for rates of pay, hours of work or other conditions of employment, I find that Part 4, section 40 of the *Act* governs Ms. Thomas' claim for overtime wages, and the delegate, in assuming jurisdiction over the dispute under the *Act*, did not err in law although as noted before Sterling is not disputing jurisdiction of the Director under the *Act* in the Appeal.

39. Having said this, I note that section 4 of the *Act* states:

Requirements of this Act cannot be waived

4 The requirements of this Act and the regulations are minimum requirements and an agreement to waive any of those requirements, not being an agreement referred to in section 3(2) or (4), has no effect.

40. In the appeal submissions, Mr. Janas has produced a document entitled "2-Week Averaging Agreement" signed by Ms. Thomas on March 8, 2012. This document shows that her position is "LPN", which I take to be a licensed practical nurse.

41. 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.

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

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

43. All of the above are conjunctive requirements.

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. I

also add that I am not sure whether the agreement was signed before or after the purported arrangement set out in the document commenced. However, I need not determine this as I have found it non-compliant for the first reason above. As a result, the agreement is void pursuant to section 4 of the *Act*, as the requirements of section 37 cannot be waived.

45. I also add that the purported averaging agreement produced by Mr. Janas is not part of the Record. It appears it was produced by Sterling for the first time in this appeal. While I have already found it to be void, it is also not admissible in the appeal as it fails to qualify under the first part of the test for admitting "new evidence" set out in *Re: Merilus Technologies Inc.* (BC EST # D171/03). In particular, the agreement is not evidence that Sterling could not, with the exercise of due diligence, have discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made.

46. Having said this, I note that Mr. Janas also relies on the Variance Determination to argue that Ms. Thomas is covered by its terms and, therefore, no overtime pay is due to her. However, the Variance Determination only expressly covers the category of Sterling employees described as "Level 3 First Aid Attendants working on the Kitimat Modernization Project". It does not make any reference to the category of employees described as Nurses in Sterling's shift schedules. While Mr. Janas argues that the Variance Determination covers all of Sterling's employees working under the first aid contract at the KMP project, I do not share Mr. Janas' interpretation of the Variance Determination. In my view, if the Variance Determination meant to cover the employees in the Nurse category as well then it would have expressly said so as it does in case of the First Aid Attendant category. I am not convinced that the two categories – the First Aid Attendants and the Nurses – are effectively covered under the description "Level 3 First Aid Attendants" in the Variation Determination as Mr. Janas is suggesting. I also note that in Sterling's own shift schedules they are separated because they are indeed different. In the result, I find the Variation Determination does not cover the Nurses.

47. In Mr. Janas' second set of appeal submissions, he argues that the delegate responsible for making the Variance Determination was aware of the LPN endorsement and that the employees who held LPN status were considered nothing more than "First Aid Attendants with endorsements", and the delegate received their agreement to include them in the Variance Determination. I find this assertion to be no more than a bare assertion unsubstantiated by any evidence. I also find that it is not appropriate for Sterling to make this argument for the first time in the appeal; it should have been advanced in the first instance in the investigation stage.

48. I also find it is not appropriate for Mr. Janas and Sterling to argue for the first time on appeal that Ms. Thomas was "not a nurse under her contract with Sterling" and only held a "temporary interim LPN license". This argument should have been made in the first instance during the investigation stage and before the Determination was made. Therefore, I reject this argument.

49. For the same reason as above, I reject the argument that Ms. Thomas was not an employee of Sterling but First Response First Aid Services. This argument is improperly advanced for the first time in the appeal. Notwithstanding, I find there is no substance to this argument. I find that First Response First Aid Services was not an entity independent of Sterling but rather the business or operating name that Sterling used for its first aid business and Ms. Thomas was the latter's employee. I find support for this conclusion in Sterling's own materials contained in the Record, particularly in the last offer vote application filed by Sterling with the Labour Board on October 15, 2012. In this application, in paragraph 1, Sterling's counsel states the applicant is "Sterling Electrical Inc. dba First Response First Aid Services". In paragraph 2 he states that "Sterling is currently providing first aid services on Rio Tinto Alcan Kitimat Modernization Project in Kitimat, BC." In

paragraph 3, he states "Sterling was certified by the Union on May 17, 2012" and "[t]here are 16 employees in the bargaining unit." There is little, if any doubt, that Sterling is the employer of Ms. Thomas.

50. Further, the Variation Determination Mr. Janas so forcefully argues applies to Ms. Thomas and other employees working at the KMP site grants variance in respect of "Level 3 First Aid Attendants" to *Sterling Electrical Ltd.* carrying on business as First Response First Aid Services and *not* to First Response First Aid Services as a separate or independent entity. I find Sterling is indeed the employer in this case.

51. Finally, I do not find that there is any evidence of a breach of natural justice on the part of the delegate in making the Determination. The allegation of Mr. Janas that the delegate is "siding with the union" is tantamount to alleging bias on the part of the delegate. I find this allegation to be without any foundation. An allegation of bias is a very serious matter as it impugns the adjudication process and challenges the integrity of the decision-maker and therefore, it should not be made lightly without any basis.

52. Having concluded that the delegate neither erred in law nor breached the principles of natural justice in making the Determination, I confirm the Determination in all respects including the calculation of overtime wages ordered in the Determination to Ms. Thomas as explained by the delegate in his submissions of July 10, 2015.

ORDER

53. Pursuant to section 115(1) of the *Act*, I deny the appeal. I order that the Determination dated April 7, 2015, be confirmed in the amount of $2,374.27 together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

Shafik Bhalloo
Member
Employment Standards Tribunal