Employment Standards TRIBUNAL

An appeal

\- by -

Tri Stone Mining Inc.
("Tri Stone")

\- 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)

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| **TRIBUNAL MEMBER:** | Carol L. Roberts |
| **FILE No.:** | 2017A/88 |
| **DATE OF DECISION:** | August 21, 2017 |

# DECISION

## SUBMISSIONS

Gurbachan Singh Singara — on behalf of Tri Stone Mining Inc.

## OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*") Tri Stone Mining Inc. ("the Employer") has filed an appeal of a Determination issued by the Director of Employment Standards (the "Director") on April 7, 2017. In that Determination, the Director found that the Employer had contravened sections 18, 40, 45 and 58 of the *Act* in failing to pay Chelsey M. Parr, Amanda Parr, Reginald A. Parr and Reginald A. Parr Jr. ("the Complainants") a total of $78,494.23, representing wages, overtime wages, statutory holiday pay, annual vacation pay and interest. The Director also imposed three administrative penalties in the total amount of $1,500 for the contraventions of the *Act*, for a total amount owing of $79,994.23.

2. The date for filing an appeal of the Determination was May 15, 2017. The appeal was filed June 27, 2017, and the Employer sought an extension of time in which to file the appeal.

3. The Employer appeals the Determination contending that the delegate erred in law and failed to observe the principles of natural justice in making the Determination.

4. This decision is based on the Employer's submissions, the section 112(5) "record" that was before the delegate at the time the decision was made, and the Reasons for the Determination.

## FACTS AND ARGUMENT

5. The Employer is a federally incorporated company. Registered in British Columbia as an extraprovincial company on July 10, 2014, the registration was cancelled January 2, 2017, for failure to file an annual report. It appears that Mr. Singara is the sole director.

6. The Employer operates a small gold mining operation in the interior of British Columbia. The Complainants described the operation as a 25 person camp with various equipment including a D8 Caterpillar, rock trucks and wash plants. Workers loaded, hauled and "washed" dirt to find gold and were also required to build roads into new areas to open test sites.

7. The Complainants, a father and his three adult children, testified that they were employed to perform a number of tasks including operating machinery, setting up the test plant, running tests, feeding the plant and other duties consistent with the mining operation. They had worked seasonally for the Employer in 2014 and 2015, and the Employer approached them to perform the work again in 2016 because they were familiar with the kind of work that was necessary and because they worked their own gold mining lease. The Complainants, who each did various as well as specific tasks, began working between July 10 and July 20, 2016, at different rates of pay. All of the Complainants ended their employment on September 13, 2016.

8. At issue before the delegate was whether or not the Complainants were owed wages, and if so, the amount of those wages.

9. Reginald Parr informed the delegate that he was the "quasi site manager", receiving direction regularly about what work was to be done and where the workers' efforts were to be focused, from Manny Dhillon, a Tri Stone representative. Mr. Parr then communicated this information to the other Complainants.

10. Each of the Complainants provided the delegate with detailed daily timesheets for the period of their employment. The timesheets set out dates, the task performed and the hours worked. They also noted the time taken for lunch breaks because the Employer informed them they would not be paid for lunch breaks. The Complainants submitted their timesheets to the Employer every two weeks. Mr. Parr informed the delegate that their hourly rates were agreed to by the Employer and were based on the experience of each of the Complainants, including the machinery they were qualified to operate.

11. On December 19, 2016, the delegate sent letters to the Employer, to Mr. Singara, and to the registered and records office, including a copy of each complaint and all the information she had received from each complainant, seeking the Employer's response. The delegate also issued a Demand for Employer Records, which were to be provided by January 6, 2017. The Employer did not respond and did not provide any Employer Records in response to the Demand.

12. In January 2017, Mr. Parr received an email from Mayuri Ganatra of Mayuri Ganatra Law Corporation ("MGLC") containing a settlement offer. The Complainants did not accept the offer.

13. On January 6, 2017, the delegate received an email from MGLC informing her that Ms. Ganatra had been instructed to make an offer of settlement to the Complainants. Ms. Ganatra informed the delegate that she was aware of the delegate's letter and the January 6, 2017, deadline for the provision of Employer Records. Ms. Ganatra also asked for an extension of time to enable her to get an agreement on the release. The delegate attempted to contact Ms. Ganatra by both telephone and email regarding a new date for providing a response, but Ms. Ganatra did not respond.

14. On January 17, 2017, the delegate sent her preliminary findings, along with her calculation of wages owing, to the Employer and to Mr. Singara by registered mail, asking for a response by January 27, 2017. The delegate's preliminary findings included information on administrative penalties that would be imposed. The delegate received no response to her preliminary findings letter although Canada Post confirmed that the correspondence had been successfully delivered.

15. The delegate telephoned Ms. Ganatra on March 28, 2017 and left a message asking that Ms. Ganatra return her call. Ms. Ganatra did not do so. The delegate also sent an email to Manny Dhillon, whom the Complainants identified as someone with a management role with the Employer. The email included documentation that had been sent to the Employer on January 17, 2017. The delegate received no response from Mr. Dhillon.

16. On April 5, 2017, the delegate received an email from Ms. Ganatra asserting that the Complainants were not employees but contractors, and contending that some of the Complainants' invoices had been paid.

17. The delegate noted that the Employer's participation in the investigation was limited to Ms. Ganatra's email of April 5, 2017, and found that the assertions contained in that email were not supported by any documentation.

18. The delegate determined that the Complainants' assertions were essentially unrefuted.

19. The delegate noted that the Employer was a mining employer, and as such, sections 35, 37 and 40 of the *Act* relating to overtime wages could be varied by virtue of section 37.13 of the *Employment Standards Regulation* (the "*Regulation*").

20. The delegate found no evidence that the Employer implemented the overtime schedule established by the *Regulation*, and that the Complainants were therefore entitled to the overtime provisions of the *Act*.

21. The delegate calculated the Complainants' wages based on information they provided.

*Argument*

22. The Employer sent its appeal by registered mail to the Employment Standards Branch on May 11, 2017, which was within the statutory time period. The delegate later informed the Employer that the appeal should be sent to the Tribunal and provided the Employer with the Tribunal's contact information. The appeal was subsequently hand-delivered to the Tribunal.

23. The Employer argues that it informed the delegate that "the file was still under Police investigation" and that further evidence would be forthcoming. The Employer says that the Complainants took critical equipment belonging to the Employer, causing the Employer to sustain financial losses.

24. The Employer further argues that Mr. Reginald Parr was a sub-contractor and that the other Complainants were either employees or sub-contractors of Mr. Parr.

25. The Employer seeks to have the matter "set for a new hearing so that all evidence can be put before the Director."

## ANALYSIS

26. Section 114(1) of the *Act* provides that at any time after an appeal is filed and without a hearing of any kind the Tribunal may dismiss all or part of the appeal if the Tribunal determines that any of the following apply:

> (a) the appeal is not within the jurisdiction of the tribunal;
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> (b) the appeal was not filed within the applicable time limit;
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> (c) the appeal is frivolous, vexatious, trivial or gives rise to an abuse of process;
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> (d) the appeal was made in bad faith or filed for an improper purpose or motive;
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> (e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;
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> (f) there is no reasonable prospect the appeal will succeed;
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> (g) the substance of the appeal has been appropriately dealt with in another proceeding;
>
> (h) one or more of the requirements of Section 112(2) have not been met.

27. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

- the director erred in law;
- the director failed to observe the principles of natural justice in making the determination;
- evidence has become available that was not available at the time the determination was being made.

28. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision. I have concluded that the Employer has not met that burden.

*Timeliness*

29. The appeal was filed over one month past the time frame in which to do so.

30. In *Niemisto* (BC EST # D099/96), the Tribunal set out the following criteria which an appellant had to meet in seeking an extension of time in which to file an appeal:

> i) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
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> ii) there has been a genuine and on-going *bona fide* intention to appeal the Determination;
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> iii) the respondent party (*i.e.,* the employer or employee), as well the Director, must have been made aware of this intention;
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> iv) the respondent party will not be unduly prejudiced by the granting of an extension; and
>
> v) there is a strong *prima facie* case in favour of the appellant.

31. These criteria are not exhaustive.

32. I find there was a both a genuine and on-going *bona fide* intention to file an appeal. I find that the Employer took the necessary steps to appeal the Determination including obtaining and completing the requisite forms. The Employer also notified the Branch of his intentions. However, the appeal was sent to an incorrect body, being the Branch rather than the Tribunal, causing the Employer to miss the statutory time limit.

33. While I accept that the Employer had a credible explanation for its failure to file the appeal within the time period in which to do so, I conclude that the Employer does not have a strong *prima facie* case.

*Failure to observe the principles of natural justice*

34. Natural justice is a procedural right which includes the right to know the case being made, the right to respond and the right to be heard by an unbiased decision maker. There is nothing in the appeal submission that suggests how the Employer was denied natural justice and I find there was no denial of that procedural right.

35. The delegate provided the details about the complaints to the Employer by registered mail and asked the Employer to respond. Counsel for the Employer confirmed receipt of the information and suggested that the Employer had made the Complainants an offer to settle their complaints. The Complainants did not accept the offer and the delegate made several attempts to communicate with the Employer's counsel, the Employer and an individual who appeared to be a manager for the Employer about the substance of the complaints, with virtually no success.

36. The record discloses that on January 19, 2017, counsel for the Employer informed the delegate that she would be "responding to the complaint shortly," and that the Employer would be "filing a counterclaim" regarding losses suffered by the Employer "as a result of the illegal possession of company equipment." The delegate did not receive any further response to the complaints until April 5, 2017, well after the deadline set by the delegate for a response. In an email dated that day, counsel for the Employer asserted that the

Complainants were not employees. The email further suggested that the Employer would be filing a civil action for recovery of alleged financial losses suffered by the Employer. No further communication was received.

37. I find no basis for this ground of appeal.

*Error of law*

38. 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] B.C.J. No. 2275 (B.C.C.A.):

> 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 the facts which could not reasonably be entertained; and
> 5. adopting a method of assessment which is wrong in principle.

39. There is also nothing in the appeal submission that identifies how the delegate erred in law. Although the Employer argues that the Complainants were not employees, that assertion was also made by the Employer's counsel, and when asked for evidence in support of that assertion, the Employer did not respond.

40. An appeal is not an opportunity to present evidence that ought to have been presented to the delegate during the investigation of the complaint. I find that the Employer was given many opportunities to provide evidence in support of its position during the investigation. Having received no evidence in response to the complaints, the delegate made the determination based on the information before her. I find no basis to interfere with her conclusion that the Complainants were employees, or that they are entitled to wages in the amount determined.

41. Even if the Employer is of the view that it suffered financial losses due to Complainants' alleged failure to return equipment, that information is not relevant to the employment status of the Complainants or their entitlement to wages and would not be a basis to send the matter back to the Director for a new hearing.

42. Pursuant to section 114(1) of the *Act*, the appeal is dismissed.

**ORDER**

43. Pursuant to section 115 of the *Act*, I Order that the Determination, dated April 7, 2017, be confirmed in the amount of $79,994.23, together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

**Carol L. Roberts**
**Member**
**Employment Standards Tribunal**