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 -

Maurer Construction Ltd., operating Maurer Log Homes
(" Maurer ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: David B. Stevenson

FILE No.: 2000/048 and 2000/071

DATE OF HEARING: March 13, 2000

DATE OF DECISION: April 26, 2000

DECISION

APPEARANCES:

for Maurer Construction Ltd.	Douglas M. King, Esq. Jeffrey C. Bartel, Esq. Alfred Maurer
for the individuals	in person

OVERVIEW

This decision addresses appeals filed pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by Maurer Construction Ltd., operating Maurer Log Homes ("Maurer") of two Determinations, one issued on January 6, 2000 and the other issued on January 21, 2000 by a delegate of the Director of Employment Standards (the "Director"). The first Determination concluded that Maurer had contravened Sections 18, 35 and 40 of the *Act* in respect of the employment of Greg T. Reimche ("Reimche"), ordered Maurer to cease contravening and to comply with the *Act* and ordered Maurer to pay an amount of $2328.99. The second Determination concluded Maurer had contravened Sections 18 and 40 in respect of the employment of Roland Curnow ("Curnow") and ordered Maurer to cease contravening and to comply with the *Act* and ordered Maurer to pay an amount of $3936.72.

Maurer has appealed both Determinations, alleging they are invalid by reason that the Director, through the delegate who made the Determinations, acted in bad faith, engaged in an abuse of process and failed to properly consider evidence relevant to the complaints. The appeal of the Reimche Determination had also raised an issue concerning hours worked on a job in Colorado in December, 1998, but that aspect of the appeal was abandoned by Maurer at the hearing.

Additionally and alternatively, Maurer says that each of the two individuals, Reimche and Curnow, signed a Release accepting the amounts set out in their respective Release as full and final payment for any overtime that had accrued to each of them prior to November 1, 1998 and that having signed those releases and accepted the amounts, were prevented from claiming any additional overtime was owed.

ISSUES TO BE DECIDED

The issue to be decided is whether Maurer has shown that the Determinations are wrong in law or in fact.

FACTS

The facts set out in the Determination belie the real matter in dispute in both these appeals. The Determinations simply notes that prior to December 1998, Maurer had not paid overtime to either Reimche or Curnow and owed Reimche $3085.16 and Curnow $7596.11 in overtime wages. On

December 16, 1998, Maurer had both individuals sign a Release, agreeing to accept 50% of the overtime owed over a 12 month period commencing January 16, 1999.

Through its principal officer and its operations manager, Alfred Maurer, Maurer elaborated on what would otherwise be a relatively straight forward matter with the following evidence:

1. In the summer of 1998, Maurer was contacted by a delegate of the Director, Donna Miller (Ms. Miller). She indicated she was investigating an issue of outstanding overtime to Maurer's employees. Maurer introduced a letter, dated August 11, 1998. The letter noted that several complaints against Maurer had been received by the Director, noted Subsection 76(3) of the *Act*, enclosed a copy of the Guide to the *Act*, referring Maurer to pages 10 to 14 of the guide, requested Maurer complete a self audit, paying particular attention to statutory holiday benefits and overtime payments, asked Maurer to pay any money found to be outstanding directly to employees, with copies of the cheques issued, together with the calculations, to the Branch and notified Maurer that the Director would perform a payroll audit in February, 1999 to ensure compliance with the *Act*.

2. Maurer responded, through legal counsel, on September 30, 1998. The response was introduced. Among other things, it noted that Maurer was unaware of any non-compliance with the *Act*, was struggling to keep the operation afloat and indicated that Maurer and his employees were interested in making an application to the Director under Section 72(h) for an overtime variance. In that respect, the letter said:

   > If there is a form that would grant us any such variance or would facilitate our client and his employees making an application, we would ask that you provide it together with any other information other than what is stated in Part 9 of the Act, we would be grateful.

3. An investigation was conducted with the cooperation and assistance of Maurer.

4. The investigation indicated that Maurer owed overtime wages to many of its employees, including the two individuals in this appeal.

5. At the time of the investigation, Maurer was in serious financial difficulty and its ability to continue in business was in doubt.

6. Following the investigation, probably in October, 1998, Ms. Miller arranged a meeting with Mr. Maurer and the employees. At the meeting, Ms. Miller told the group that it was not the Director's mandate to put companies in the Okanagan Valley out of business and that she was looking for solutions. She proposed that each employee accept $200.00 as full payment for back overtime, with an assurance from Maurer that all overtime from that day forward would be paid according to the requirements of the *Act*.

7. There was no agreement from the employees, who wanted to know how much each was giving up.

8. Maurer agreed to provide that information to each employee and to keep in touch with Ms. Miller.

9. Maurer proceeded with a breakdown for each employee. That process was completed in mid-December, 1998 and the results were available to each employee.

10. On December 15, Maurer stopped by to see Ms. Miller. They discussed a proposal to resolve the overtime issue, giving employees two options, to accept an immediate payment of 25% of their overtime entitlement or to accept 50% of their overtime entitlement paid over 12 months.

11. Mr. Maurer says Ms. Miller agreed to that and offered to provide the wording for a form of Release, which she sent to him by fax the following morning. Maurer prepared the Release on December 16 and over the course of that day had each employee choose an option and sign it.

12. There were about ten employees asked to sign the Release. Mr. Maurer told the employees that the Release was being brought down by Ms. Miller, she had approved it and they had to pick one of the two options and sign the document before leaving work that day.

13. The Releases, or a copy of them, were sent to Ms. Miller.

14. Except that Ms. Miller would check from time to time to ensure the payments were being made, Maurer heard nothing more from her until the Determinations were issued.

ANALYSIS

The initial position of Maurer in these appeals is that the conduct and the representations of Ms. Miller during October and December, 1998 resulted in a variance under Part 9 of the *Act* in respect of Maurer's past overtime obligations. Specifically, Maurer says it received a variance under Section 72(h) of the *Act*, which states:

> *72. An employer and any of the employer's employees may, in accordance with the regulations, join in a written application to the director for a variance of any of the following:*
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> *(h) section 40 (overtime wages for employees not on a flexible work schedule)*

I do not accept that any variation was granted to Maurer. There are several reasons for reaching this conclusion. Only one, however, needs to be outlined as it provides a complete answer to this assertion.

The *Act* and the *Employment Standards Regulations* (the *"Regulations"*) set out very specific procedural requirements relating to the application for and the granting of variances under Section 72. Any such application must be in writing. Section 30 of the *Regulations* describes how to apply for a variance, setting out the following requirements:

- a letter must be sent to the Director;

- the letter must be signed by the employer an a majority of the employees who will be affected by it;

- the letter must include the provision of the *Act* that is sought to be varied, a description of the variance requested, the duration of the variance, the reason for requesting the variance, the details of the employer and the name address and telephone number of each employee signing the variance.

Even where the application meets all of the procedural requirements of the *Act* and *Regulations*, under Section 73 of the *Act*, the Director retains a discretion to grant or deny the variance. The Director must be satisfied that a majority of the employees affected by the variance are aware of its effect and approve of the application. This normally entails a meeting between the employees and a representative of the Director, in the absence of the employer, and a secret ballot vote of the employees. The Director must also be satisfied that the variance sought is consistent with the intent of the *Act*. In the context of an application for a variance to Section 40, the application must clearly describe the proposed work schedule.

Maurer had all that information independent of Ms. Miller.

The requirements of the *Act* are not merely technical matters. They address a fundamental policy of the *Act*. The following comments of the Tribunal in *Kinross Gold Corporation*, BC EST #D245/99, which addressed an argument alleging the Director had authorized a flexible work schedule even though no record of such authorization existed, are applicable:

> Without denigrating the importance of the other purposes stated in Section 2, the overwhelming policy consideration in this matter is that employees are entitled to receive at least basic standards of compensation and conditions of employment from their employer. That is a statement of policy that the legislation says must direct the application and interpretation of the *Act*. We agree with the reference from *Machtinger v. HOJ Industries Ltd.*,(1992) 91 D.L.R. (4th) 491 (S.C.C.), that:
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> > . . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protection to as many employees as possible is favoured over one that does not.
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> Section 37 provides an opportunity for an employer to avoid the basic overtime standards and requirements outlined in Section 40 of the *Act*, provided the employer complies with the rules and requirements of Section 37 and the related *Regulations*. Provisions that detract from the minimum standards of the Act are strictly construed and, in these circumstances, require strict compliance with the legislative requirements.

In this case, Maurer alleges a variance, notwithstanding the complete absence of any indication that such an application was made, processed, considered or issued. This is not even a case of

requiring strict compliance with the requirements of Part 9 of the *Act*. There is just no indication that Maurer ever received a variance, if indeed any employer could acquire a variance to avoid past obligations that had already crystallized. On the evidence, I cannot find that the Director issued any variance to Maurer and the balance of my consideration of these appeals will proceed on that basis.

In the same context, Maurer alleges that Ms. Miller, acting as a representative of the Director, reached an agreement with Maurer about how the overtime issue would be resolved, participated in the agreed resolution by providing the wording for the Release, never advised Maurer to seek independent advice before implementing the agreement and later reneged on the agreement by processing the complaints filed by the individuals and issuing the Determinations. Maurer argues that these facts prevent Ms. Miller from issuing the Determination. There are several grounds used to support this argument, including bad faith conduct on the part of the Director (acting through Ms. Miller), unreasonableness, *res judicata* or, alternatively, a loss of jurisdiction over the overtime issue and estoppel. I have considered this argument as an alternative to the assertion that Maurer had been granted a variance.

There are two difficulties with this argument. The first arises from the Tribunal's decision in *Joda M. Takarabe and others*, BC EST #D160/98, where the Tribunal considered the authority of the Director in the context of subsection 78(1) of the *Act*, which provides that:

> *78. (1) The director may do one or more of the following:*
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> *(a) assist in settling a complaint or a matter investigated under section 76;*
>
> *(b) arrange that a person pay directly to an employee or other person any amount to be paid as a result of a settlement;*
>
> *(c) receive on behalf of an employee or other person any amount to be paid as a result of a settlement.*

In *Takarabe*, the Director had reached an industry wide settlement in the bike courier industry that was less than the minimum statutory requirements of the *Act*. Several individuals affected by that settlement appealed. The Tribunal concluded that the Director had overstepped her statutory authority in the circumstances and, in so concluding, stated:

> . . . in our view, the discretionary authority given to the Director to assist in settling complaints does not amount to an authority to impose a settlement without consultation or over the objection of the parties to the dispute. Moreover, if the Director's assistance does not bring about a settlement and she issues a determination, she cannot issue a determination which provides for less than the statutory minimum standards.

There was no evidence of any consultation between Ms. Miller and the affected employees and no indication from them whether any of them objected to the accepting the terms stated on the Release. As a matter of law under the *Act*, in the absence of consultation with and approval by

the employees affected by the alleged agreement, Ms. Miller had no authority to enter into such an agreement for the individuals and the alleged agreement can no effect on the individuals' right to the minimum standards of the *Act*.

The second problem is that there is no legal basis, in any event, for the consequences that Maurer seeks to bring about, which is to compel his employees, including the individuals in this appeal, to accept less than statutory minimum standards.

The best position Mr. Maurer can take in all the circumstances is that, as a result of his dealings with Ms. Miller, he had been led to believe there was an agreement and expected the overtime issue would be resolved by having the employees sign a Release. Regardless of the legitimacy of his belief or his expectation, the circumstances in which they arose can neither create nor defeat substantive rights and, more specifically, cannot be relied on to deprive the individuals in this case of the minimum employment standards provided in the *Act*, which is, after all, broadly based remedial legislation. The following comments, expressed by the Ontario Court of Appeal in *Libbey Canada Inc. v. Ontario [Ministry of Labour]*, (1995) 26 O.R. (3d) 125, are in my view applicable:

> The *[Employment Standards Act]* was enacted for the benefit of the public, and in particular for employees. The statute imposes a positive duty on any employment standards officer who becomes seized of a claim for wages under the Act to investigate and decide that claim. See Part XV, and particularly ss. 61(3), 63, 64, and 65 of the Act. Having regard to the positive duty there is just no room for the setting up of an estoppel, based upon negligent or other misrepresentation on the part of a Ministry official to prevent the performance of that positive duty: see Maritime Electric Co. v. General Dairies Ltd., [1937] 1 D.L.R. 609, [1937] A.C. 610 (P.C.). See also Kenora (Town) Hydro Electric Commission v. Vacationland Dairy Co-operative Ltd., [1994] 1 S.C.R. 80, 110 D.L.R. (4th) 449, a decision of the Supreme Court of Canada dealing with common law estoppel as against a public utilities public body. It is noted that both the majority opinion of Major J. and the minority opinion of Iacobucci J. did not question the validity of this statement from the reasons of Lord Maugham at p. 613 D.L.R.:
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> > The sections of the Public Utilities Act which are here in question are sections enacted for the benefit of a section of the public, that is, on grounds of public policy in a general sense. In such a case . . . where as here the statute imposes a duty of a positive kind, not avoidable by the performance of any formality, for the doing of the very act which the plaintiff seeks to do, it is not open to the defendant to set up an estoppel to prevent it. This conclusion must follow from the circumstance that an estoppel is only a rule of evidence . . . it cannot therefore avail in such a case to release the plaintiff from an obligation to obey such a statute, nor can it enable the defendant to escape from a statutory obligation of such a kind on his part.

Maurer claims some adverse impact as a result of this process, but, in fact, is in no different position than had Ms. Miller made no effort at all to broker a settlement of the overtime issue. Had no effort at all been made by Ms. Miller in that regard, Maurer would still have been

required to comply with the minimum overtime standards in the *Act*. I would agree that Ms. Miller's conduct in her dealings with Maurer is open to criticism, in particular her involvement in providing Mr. Maurer with the wording for the Release, when she had no reason to believe the matter had been settled, and her failure to give Maurer a clearer understanding of what she was attempting to do. Her conduct does not, however, amount to bad faith or unreasonableness. If Ms. Miller ignored the alleged agreement and variance, it is because, for the purpose of the *Act* and of addressing the complaints by Reimche and Curnow, there was no variance and no agreement. As well, Maurer was under no illusion that the company was not in compliance with the overtime requirements of the *Act*.

I will turn briefly to the resulting validity of the Releases signed by the individuals. Simply put, Section 4 of the *Act* applies and the Releases have no effect on the minimum requirements of the *Act*.

The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determinations dated January 6, 2000 and January 21, 2000 be confirmed, together with any interest that has accrued pursuant to Section 88 of the *Act*.

DAVID B. STEVENSON

David B. Stevenson
Adjudicator
Employment Standards Tribunal