

An appeal

- by -

Terry P. Notter
("Notter")

- 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

ADJUDICATOR: Carol L. Roberts

FILE No.: 2002/106

DATE OF DECISION: May 7, 2002

DECISION

OVERVIEW

This decision is based on written submissions by Terry Notter, Brian Kynoch, Senior Vice President & C.E.O., Mount Polley Mining Corporation ("Mount Polley Mine"), and Hans Suhr, a delegate of the Director of Employment Standards.

OVERVIEW

This is an appeal by Terry Notter, pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued February 12, 2002. Mr. Notter alleged that he was owed outstanding wages in the amount of \$7,681.86. The Director concluded that Mr. Notter was not owed any wages, and closed the file.

ISSUE TO BE DECIDED

Whether the Director's Delegate erred in concluding that Mr. Notter was not entitled to wages.

FACTS

As determined by the Delegate, the facts are as follows.

Mr. Notter worked as a maintenance General Foreman for Mount Polley Mine from July 1997 to November 15, 2001. Mount Polley Mine operated under an economic plan sponsored by the Job Protection Commission of British Columbia effective July 1998 to June 30, 2000. Under the terms of that plan, the mine realized cost reductions for a period of two years. Certain of those costs were repayable contingent on specific commodity prices and exchange rates during each calendar quarter. Mount Polley Mine ceased operating on November 15, 2001 due to low commodity prices.

There was no dispute as to the amount of wages claimed by Mr. Notter. However, Mount Polley Mine contended that all employees had agreed to a wage rollback of 10% of their wages during the two year economic plan period noted above. Mr. Notter acknowledged his acceptance of the rollbacks in writing on July 6, 1998.

On April 30, 2001, a bonus equivalent to the 10% rollback was paid to all employees as the Mine was in production at that time. A second bonus equivalent to the 10% wage rollback was to be repaid on April 30, 2002 if the mine was in production on that date. Mr. Notter's seeks recovery of the second bonus, which he claims was not contingent on the success or failure of Mount Polley Mine.

After reviewing the evidence, the delegate concluded that, because Mr. Notter agreed to have his wages rolled back, and paid on June 30, 2002 in the event that the mine was in operation on that date, no wages were owed.

ARGUMENT

Mr. Notter argues that the delegate erred in failing to determine whether the money owed was wages or deferred earnings. He contends that Mount Polley employees agreed to reduce their wages by 10%, and that a bonus, equal to the WAGES DEFERRED (emphasis in original) would be payable.

In Mr. Notter's view, the bonus represents deferred earnings, not "abolished" earnings, and should have been paid to him 48 hours after the Mine was closed.

Mr. Kynoch submitted that Mr. Notter was one of the employees at a meeting with he and Mr. George Wight, the General Manager of Mount Polley Mine, outlined the wage rollback plan. Mr. Kynoch states that, during that meeting, he emphasized that the scheduled bonus payment would only be payable if the mine was operating at the time the employees were to be paid. He further submits that Mr. Notter signed the letter agreeing to this condition after the meeting concluded.

The Delegate contends that the Determination should be upheld, as Mr. Notter presents no new facts or evidence supporting his argument that it is incorrect.

ANALYSIS

The burden of establishing that the Determination is incorrect rests with an Appellant. Having reviewed the submissions of the parties, I am unable to find that the delegate erred.

According to the agreement between the parties, the amount claimed by Mr. Notter, being the second bonus, would be paid on April 30, 2002 upon certain conditions precedent being met. One of those conditions was that the mine would be in operation on the date the amount was paid. Because the mine closed in November, 2001, it was not in operation on April 30, 2002, and the condition precedent was not met. Consequently, the amount, whether it is characterized as a deferred wage, a bonus or something else, was not payable to Mr. Notter within 48 hours of the date of the termination of his employment. I find no error in the Determination.

ORDER

I Order, pursuant to Section 115 of the *Act*, that the Determination, dated February 12, 2002, be confirmed.

Carol Roberts
Adjudicator
Employment Standards Tribunal