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 -

Kinross Gold Corporation
("Kinross")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE NO.: 1999/180

DATE OF DECISION: June 25, 1999

DECISION

OVERVIEW

This is an appeal filed pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by Kinross Gold Corporation ("Kinross") of a Determination of a delegate of the Director of Employment Standards (the "Director") dated March 2, 1999. The Determination found Kinross had contravened Section 40 of the *Act* and ordered Kinross to cease contravening the *Act*, to comply with its requirements and to pay an amount of $54,480.53 in respect of the contravention. The Determination arose out of events that followed the expiry of two variances that had been granted to Kinross by the Director under Section 73 of the *Act* for a period commencing February 15, 1996 and ending February 28, 1997. The Determination also dealt with a claim by Kevin Jager for length of service compensation. The decision of the Director on that claim has been appealed by Jager and has been addressed in a separate decision.

Kinross says the Determination finding they had contravened Section 40 of the *Act* and requiring them to pay $54,480.53 is wrong. In the appeal, counsel for Kinross sets out five issues to be addressed:

1. Were the loader operators, janitors and labourers covered by either of the original variances?

2. Did the Company continue the employees on the 8 x 8 shift schedule following the expiry date of the 1996 variance without the consent of the Employment Standards Branch?

3. Did the Company fail to comply with the *Act* when it implemented the 4 x 4 shift on March 30, 1997?

4. Did the Company fail to comply with the *Act* when it re-implemented the 8 x 8 shift in the fall of 1997?

5. Are any of the ex-employees entitled to overtime pay on the basis they did not agree to work 12 hour shifts?

There is little dispute on the relevant facts and the Tribunal has decided an oral hearing is not required in order to properly address the issues raised by this appeal.

ISSUES TO BE DECIDED

The issues raised by this appeal are outlined above.

FACTS

The following facts have been extracted from the submissions of the parties to this appeal:

1. Kinross owned and operated the QR Mine which was located approximately 70 km. east of Quesnel. Access to the mine was by an industrial road. The mine employed both mill personnel and underground miners.

2. On February 15, 1996, the Director of Employment Standards issued two Variances to Kinross, one which allowed Kinross to implement a shift schedule for "Mill Operators, Crusher Operators, Two (2) Millwrights" of "twelve (12) hours per day on four (4) consecutive days followed by four (4) consecutive night shifts followed by eight (8) consecutive days of rest" (the "8 x 8 schedule"), and one which allowed Kinross to implement a shift schedule for "Mill Foremen, Gold Room Operators, Power House Mechanics" of "10 hours per day on eight (8) consecutive days followed by six (6) consecutive days off". The latter was later amended to delete reference to "Mill Foremen" and add "Assayers, Electricians, Millwrights". The variances were set to, and did, expire on February 28, 1997.

3. Kinross decided not to continue the shift schedule established by the variances and allowed them to lapse. In early March, 1997, Kinross notified its employees of that decision and also notified the employees that they intended to implement a schedule of twelve (12) hours per day, four (4) days on and four (4) days off (the "4 x 4 schedule"). Kinross implemented the 4 x 4 schedule effective March 30, 1997. Notwithstanding Kinross sought the approval from the affected employees for the 4 x 4 shift, no record of any approval by the affected employees has ever been presented. Counsel for Kinross says there was verbal approval for the proposed shift. That submission will be developed later.

4. On April 15, 1997, Kinross notified Employment Standards that all its employees were either on a 4 x 4 schedule or on a 4 x 3, 10 hour per day schedule. Approval for the change in the shift schedule was not sought from Employment Standards and there is no indication on the record that approval for the change in the shift schedule was sought or received from any other regulating authority.

5. On April 23, 1997, the Director notified Kinross by letter that eight employees had filed complaints under the *Act*, claiming they had not been paid overtime wages. The names of the complainants were listed in the letter. The Director issued a demand for records.

6. The 4 x 4 schedule continued in effect until September 15, 1997 when Kinross applied to Employment Standards for variances which would, in effect, re-implement the shift schedules that had been in place from February 15, 1996 to February 28, 1997. Kinross also applied to the Ministry of Energy, Mines and Petroleum Resources for a variance to the Health, Safety and Reclamation Code for British Columbia, Part 1.5.4 to allow workers in the mill to work longer than the 8 hour day specified in the Code. This latter application was approved by the Mines Branch on or about November 19, 1997.

7. On May 13, 1997, the United Steelworkers of America were asked by some employees to begin an organizing effort to certify the employees under the *Labour Relations Code*. An unfair labour practice complaint was filed with the Labour Relations Board during the organizing effort. On September 26, 1997 an application for certification was made for certain employees of Kinross and

on October 24, 1997 a second application for certification was made for a different group of employees. Employment Standards was assigned to investigate the complaint and the two applications. Neither application was successful.

8. On December 11, 1997, Kinross gave Employment Standards notice of group termination, effective February 28, 1998, affecting 95 employees. On March 9, 1998 Employment Standards received an application to extend the effective date for the group termination.

9. On March 11, 1998, Kinross notified Employment Standards that flexible shift schedules had been implemented for 41 of its remaining 54 employees. As a result, Employment Standards closed its file on the variance application referred to in paragraph 6.

ANALYSIS

I will attempt to deal with each of the issues raised by counsel for Kinross in the order in which they are stated.

1. Were the loader operators, janitors and labourers covered by either of the original variances?

The Determination concludes that the loader operators, janitors and labourers were not covered by the variance issued by the Director on February 15, 1996:

> Section 73(1)(a) and 73(4) of the Employment Standards Act (the "Act") refer to the "affected employees". Thus specifically affected employees need to be recognized in a variance. Section 73(3)(a) states that the director (of Employment Standards) may specify that a variance applies only to one or more of the employer's employees. The way the Branch does this is to state the name of individuals or positions directly on the variance determination, thus making it clear as to whom the variance applies.

The result of the conclusion made by the Director was that all persons employed as loader operators, janitors and labourers were entitled to receive overtime wages as prescribed by Sections 40 and 41 of the *Act* during the variance period.

The burden on Kinross on this issue, as it is for all the issues raised by this appeal, is to show this conclusion was wrong.

Counsel for Kinross approached this conclusion in two ways. First, she said none of the complainants worked as janitors or labourers. In reply, the Director submitted a company document addressed to Kevin Jager, a complainant and one of the first-aid attendants for Kinross, quite clearly stating he was hired as a labourer. The submission of the Director made reference to another employee (and complainant), Jacqueline Sam, in a similar capacity to Mr. Jager, labourer/first aid person. The Director also made reference to another complainant, Suzanne Rousseu, who the Director said worked as a janitor. In her final submission, counsel for Kinross does not comment on these points or on the apparent inconsistency between her initial submission and the company's letter to Mr. Jager.

The contention by counsel for Kinross that none of the complaiants were employed by Kinross as labourers or janitors is inconsistent with the material on the file referred to by the Director. No material has been provided in the appeal from which I can conclude the Determination is wrong in respect of its conclusion that there were janitors and labourers who were entitled to overtime wages for the period February 15, 1996 to February 28, 1997.

Second, counsel says there were two loader operators who, during their period of employment, worked only a 4 x 4 shift, which is one of the flexible work schedules allowed through the procedure set out in Section 37 of the *Act*. The Director replied that this was an acknowledgment that neither loader operator was included in the variance that allowed the 8 x 8 shift. I agree. However, the suggestion in the appeal submission made by counsel for Kinross was not that the loader operators were included in that variance, but that the Director ought to have considered whether, in all the circumstances, Kinross had substantially complied with the requirements of Section 37 of the *Act* and the *Regulations* and relieved Kinross from what she said were technical breaches of the *Act* and *Regulations*. In the context of this submission, she asserted that both loader operators ought to have been deemed to have approved the flexible work schedule because they worked it.

The Director submits that this argument is new, never having been raised or suggested in any previous dealings with Kinross or its counsel. Whether Kinross can raise such an argument at this stage does not need to be addressed because, even if I were inclined to agree that the Director ought to have approved the flex shift *ex post facto*, Kinross has not shown any factual basis supporting their assertion that the loader operators approved a flexible shift schedule. There is no indication on the record or in the appeal that the loader operators ever approved a flexible shift schedule, or that any of the other statutory requirements found in Section 37 were met by Kinross. The Tribunal also received a submission from one of the loader operators, Mr. Dekleer, who, among other things, said he had never heard of "flex-schedule" while he was employed by Kinross.

Nor do I accept the proposition that seems to run through the arguments of Kinross in this appeal, which is that the requirements of Section 37 of the *Act*, and the *Regulations* that relate to that section, should be viewed as mere technical or procedural matters which can either be ignored or inferred *ex post facto*. Such a conclusion would be inconsistent with the purposes and objects of the *Act* identified in Section 2, which states:

2. The purposes of this Act are to

(a) ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment,

(b) promote the fair treatment of employees and employers,

(c) encourage open communication between employers and their employees,

(d) provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act,

(e) foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia, and

(f) contribute in assisting employees to meet work and family responsibilities.

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:

> . . . 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.

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.

Kinross has not shown any error by the Director on this issue.

2. Did the Company continue the employees on the 8 x 8 shift schedule following the expiry date of the 1996 variance without the consent of the Employment Standards Branch?

The short answer to this issue is that they did continue the 8 x 8 shift after the stated expiry date without the consent of Employment Standards. The question asked, however, really misstates the argument of counsel for Kinross, which is not that the 8 x 8 shift was continued after February 28, 1997 without the consent of Employment Standards, but that, in the circumstances, the Director should not have issued any remedy to the employees for the employer's non-compliance with the *Act*. Kinross argues that as a result of a telephone discussion between their Administration Superintendent and a representative of Employment Standards, Kinross believed it could continue the 8 x 8 shift past the expiry date without "penalty". Reduced to its basic premise, their argument is found in the following statement from the appeal:

> If, as is now the position of the Branch, an employer will be held liable for overtime pay for every day an employee continues to work an extended shift schedule without a written extension to the variance, the Branch had an obligation, in our submission, to advise the company of this simple principle.

That argument ignores the employer's basic statutory obligation to comply with the requirements of the *Act*. The employer obviously understood it had this obligation as in February it started to prepare for an application for a further variance, demonstrated on the file by an employee request form dated February 18, 1997 to Employment Standards and the Ministry of Mines, Energy and Petroleum Resources. Additionally, even if the representative of Employment Standards did not convey any sense that Kinross was in jeopardy of incurring a "penalty" if a new application for variance was not made, the fact is that Kinross *never* made *any* application for a variance after February 28, 1997 to Employment Standards, either under Section 37 or under Section 73 of the *Act*. I also conclude, as did the Director, that Kinross knew that approval of the employees was required for an 8 x 8 or a 4 x 4 shift and failed to get that approval. Minutes of the Employee Review Committee, dated March 5, 1997 indicate a vote was taken to adopt a 4 x 4 shift and the proposal was rejected. Purportedly, there was another vote taken, which Kinross says approved the 4 x 4 flexible shift schedule, but no record of that vote was ever kept by Kinross and the fact of approval is disputed by a number of former employees. I agree that the facts support the perspective of the Director on this argument, stated in their reply submission as follows:

> They knew what they had to do to gain approval and they failed to do it. It is submitted that once they realized they would not gain approval, they simply steam-rolled their plan through forcing their new schedule onto the employees. . .

This argument is dismissed.

3. Did the Company fail to comply with the Act when it implemented the 4 x 4 shift on March 30, 1997?

This question is answered in the analysis under issue 2. Section 37 of the *Act* allows an employer whose employees are not covered by a collective agreement to adopt one of the flexible work schedules prescribed in *Employment Standards Regulations* (the "*Regulations*"). That section reads:

37. (1) An employer may adopt a flexible work schedule for employees not covered by a collective agreement if

(a) the schedule is prescribed in the regulations and is for a period of at least 26 weeks,

(b) the employer has followed the procedure in the regulations,

(c) at least 65% of all employees who will be affected by the schedule approve of it, and

(d) within 7 days after the date of approval by the employees, the employer has provided the director with a copy of the schedule.

(2) An employer may at any time cancel a flexible work schedule.

(3) The director may cancel a flexible work schedule if

(a) an employee affected by the schedule complains in writing to the director, and

(b) the director is satisfied the employer has not complied with subsection (1)(b) or has unduly influenced, intimidated or coerced any employees to persuade them to approve the schedule.

(4) Unless cancelled under subsection (2) or (3), a flexible work schedule expires 2 years after it is approved under subsection (1)(c) but it may be renewed with the approval of at least 65% of the affected employees.

(5) An employer must retain for 7 years after the date of approval all record relating to the approval of a flexible work schedule.

Kinross failed to comply with the *Act* when it implemented the 4 x 4 shift. An employer whose employees are not covered by a collective agreement and who seeks to adopt a flexible work schedule must satisfy the following requirements:

- adopt one of the flexible work schedules prescribed in the *Regulations*,
- commit to maintain the flexible work schedule for a period of at least 26 weeks, unless the employment is of a seasonal nature,
- seek approval from the employees affected by the proposed flexible work schedule and, for at least 10 days before approval is sought, display an information bulletin in a location

where it can be read by all affected employees, which must include the flexible work schedule the employer proposes to adopt,

- have the form of information bulletin approved by the Director,
- acquire and record the approval of at least 65% of the employees affected by the flexible work schedule, and
- within 7 days of approval, provide the Director with a copy of the flexible work schedule.

The Director concluded Kinross did not satisfy these requirements. Kinross argues it did. The burden of showing the Director was wrong is on Kinross and that burden has not been met.

4. Did the Company fail to comply with the Act when it re-implemented the 8 x 8 shift in the fall of 1997?

The shift sought to be implemented in the fall of 1997 was not one of the flexible shift schedules prescribed by the *Regulations*. As such, the variance sought by Kinross was one contemplated by Section 72(f) of the *Act*. Under Section 73 of the *Act*, the Director is given a discretion to issue a variance. Section 73(1) says that before issuing a variance under Section 72 the Director must be satisfied that a majority of employees affected by the variance are *"aware of its effect and approve of the variance"* and that *"the variance is consistent with the intent"* of the *Act*.

There is no doubt Kinross made an application for a variance, but there is also no doubt the Director never issued the variance sought. The Director concluded Kinross contravened Section 40 of the *Act* when it implemented the shift schedule without receiving a variance from the Director. Kinross has not shown that conclusion to be wrong.

In her reply to the submissions of the Director and several of the complainants, counsel for Kinross raised a new argument in respect of the implementation of the 8 x 8 shift in the fall of 1997. She submitted that the Director had no jurisdiction to impose liability on Kinross relating to the 8 x 8 shift because that shift had been approved by the Chief Inspector of Mines, acting under the authority of Section 1.5.4 of the Health, Safety and Reclamation Code, which says:

> *1.5.4 Notwithstanding the Employment Standards Act, the chief inspector may, after investigating a joint request from the manager and the workers affected for a variance to section 1.5.1, and after an inspector has supervised a secret ballot at the mine, grant a variance by prescribing hours of work for designated areas or job classifications.*

Counsel for Kinross argued:

> It is a well known proposition that specific legislation such as the *Mines Act* takes precedence over general legislation such as the *Employment Standards Act* as it relates to the operation of a mine. For greater certainty, however, the Code confirms in its opening sentence that the Chief Inspector has the power to grant a variance with respect to the mining personnel at Kinross' operation **notwithstanding the *Employment Standards Act***. It is our submission that the Director of Employment Standards has no jurisdiction to impose liability on Kinross when approval had been granted pursuant to the Code, which approval could be granted to Kinross, notwithstanding the provisions of the *Employment Standards Act*.

The *Regulations* contain extensive provisions identifying persons or occupations that are excluded from the application of all or part of the requirements of the *Act*. Nowhere does the *Act* exclude persons employed

in a mine or persons designated by or included in a variance issued by the Chief Inspector of Mines. In my opinion, the "notwithstanding" provision of the Health, Safety and Reclamation Code does not have the effect of removing persons affected by a variance issued under the Code from the statutory overtime provisions of the *Act*. The *Act* is remedial legislation. It would take clearer words than are presently found in Section 1.5.4 of the Code to remove the minimum statutory overtime entitlement of an employee covered by the *Act*.

5. Are any of the ex-employees entitled to overtime pay on the basis they did not agree to work 12 hour shifts?

This issue is answered by reference to the overtime provisions of the *Act*, specifically the opening words of subsection 40(1) and (2), which state:

40. (1) An employer must pay an employee who works over 8 hours a day and is not on a flexible work schedule adopted under section 37 or 38 . . .

(2) An employer must pay an employee who works over 40 hours a week and is not on a flexible work schedule adopted under section 37 or 38 . . .

The above provision is mandatory. The balance of subsections 40(1) and (2) set out the rates at which overtime must be paid. The Director is not awarding damages, she is applying a statutory consequence for non-compliance with the *Act*. This argument raises again the suggestion that the Director should retrospectively assume compliance. I have already rejected that suggestion and Kinross has not established any basis upon which I can conclude the calculations made by the Director are wrong.

The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated March 2, 1999 be confirmed, together with whatever interest has accrued since the date of issuance pursuant to Section 88 of the *Act*.

David Stevenson
Adjudicator
Employment Standards Tribunal