Citation: The Director of Employment Standards (Re)
2018 BCEST 63

An Application for Reconsideration

- by -

The Director of Employment Standards
(the "Director")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: Kenneth Wm. Thornicroft
Jacquie de Aguayo
Robert E. Groves

FILE No.: 2018A/28

DATE OF DECISION: June 1, 2018

DECISION

SUBMISSIONS

Laurel Courtenay	counsel for the Director of Employment Standards
Christopher Munroe	counsel for Bayshore Healthcare Ltd.

OVERVIEW

1. The Director applies for reconsideration under section 116 of the *Employment Standards Act* (the "*ESA*") of the Tribunal's decision in *Bayshore Healthcare Ltd.*, 2018 BCEST 18 (the "Appeal Decision"). The Appeal Decision, issued on February 21, 2018, cancelled a determination (the "Determination") made by a delegate of the Director of Employment Standards (the "Delegate").

2. The *ESA* establishes minimum terms and conditions of employment regarding such things as wages, overtime pay, vacation pay, statutory holiday pay, unpaid leaves, and termination pay. An employer and a non-union employee cannot, by contract, waive the application of any of the provisions of the *ESA*. However, the Director can grant a variance under section 73 such that certain specified minimum standards will no longer apply at the employer's workplace for so long as the variance is in effect.

3. Bayshore Healthcare Ltd. (the "Employer") applied for a variance regarding sections 35 and 40 of the *ESA*. These sections both concern overtime pay. Section 35 sets out the maximum hours of work before the overtime provisions of the *ESA* apply. Section 40 sets out the rates for overtime pay: time and half based on the employee's "regular wage" for work over 8 hours and up to 12 hours per day, or more than 40 hours in a week, and double time for hours beyond 12 in a day. The Employer sought an increase to the maximum daily/weekly hours of work before being required to pay overtime (section 35) and the obligation to pay overtime (section 40) in the *ESA*.

4. The Delegate dismissed the variance application for the reasons set out in a Determination dated July 31, 2017. The Delegate concluded that "the application…does not meet the requirements of section 73(1)(b) of the Act, in that it is not consistent with the intent of the Act".

5. On appeal, the Employer argued that the Delegate erred in law and failed to observe the principles of natural justice in making the Determination. The Appeal Decision concluded that the Delegate had failed to adequately explain why the variance application was inconsistent with the purposes of the *ESA* and thus breached the requirement to deliver adequate reasons for decision (Appeal Decision, paras. 38 and 41). The Member cancelled the Determination and referred the matter back to the Director.

6. This reconsideration application concerns the scope of the Tribunal's authority to review the Director's discretionary power to grant a variance under section 73 of the *ESA*.

7. In the sections that follow, we set out the relevant statutory provisions, outline the Employer's section 73 application, summarize the adjudicative history and then examine the substance of the Director's application.

THE STATUTORY FRAMEWORK

8. Section 72 states that "an employer and any of the employer's employees" may make a written application for a variance of a specified *ESA* provision. Subsection 30(2) of the *Employment Standards Regulation* sets out the particulars that must be included in a variance application letter:

> 30 (2) The letter must be signed by the employer and a majority of the employees who will be affected by the variance and must include the following:
>
> (a) the provision of the Act the director is requested to vary;
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> (b) the variance requested;
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> (c) the duration of the variance;
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> (d) the reason for requesting the variance;
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> (e) the employer's name, address and telephone number;
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> (f) the name and home phone number of each employee who signs the letter.

9. Subsection 73(1) of the *ESA* provides that the Director "may vary a time period or requirement specified in an application under section 72 if the director is satisfied that (a) a majority of the employees who will be affected by the variance are aware of its effect and approve of the application, and (b) the variance is not inconsistent with the purposes of this Act set out in section 2."

10. The section 2 purposes of the *ESA* are as follows:

> (a) to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment;
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> (b) to promote the fair treatment of employees and employers;
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> (c) to encourage open communication between employers and employees;
>
> (d) to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act;
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> (e) to foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia;
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> (f) to contribute in assisting employees to meet work and family responsibilities.

11. In considering whether to grant or refuse the application, the Director must be satisfied that the application meets three specific criteria: first, that the application concerns one or more of the provisions specified in section 72; second, a majority of the potentially affected employees understand and approve the application; and third, the variance is consistent with the purposes of the *ESA* (there are other considerations if the variance concerns section 64, but they are not relevant here).

THE VARIANCE APPLICATION

12. The Employer provides both in-home and facility-based health care services including respite care for families with critically-ill children. These services are funded either through the province of British

Columbia (either directly or through provincially-funded agencies) and, for a comparatively small group, through private insurance or by the affected families directly.

13. By letter dated May 10, 2017, the Employer applied for a variance that would affect less than one-quarter of its 348 Respite Health Workers ("RHWs") – these employees are primarily registered and licenced practical nurses, but 19 are non-nurse caregivers. The application stated: "…it is important to note that of the 348, more than three quarters work less than full time hours by personal choice, primarily due to other jobs and family obligations, thus they will, in practise, generally not be affected by the Averaging Variance, even though their consent has been obtained to it" (underlining in original text).

14. According to the Employer's May 10th application, the RHWs are paid an hourly rate and typically work a shift from 2 to 12 hours' duration, with most falling in the 6- to 12-hour range over a two- or three-day work week. The Employer asserted: "Many of the RHWs, by choice work 3 shifts of 12 hours or other variations on this, rather than working more days at 8 hours."

15. The specific terms of the requested variance were as follows:

> 1. a variance to permit [the Employer] to pay its [RHWs] at their regular hourly wage for up to 12 hours per day (to be paid 2x their regular wage for any hours over 12 in a day, although rarely required) (the "Daily Hours Variance"); and
>
> 2. a variance to permit [the Employer] to average weekly overtime for [RHWs] over periods of 28 days, such that affected employees would not work more than an average of 40 hours per week over a 28-day cycle and would be paid 1.5x their regular wage for any hours worked above that average (the "Averaging Variance").

16. The proposed variances would permit the employer to require the affected employees to work daily overtime up to 12 hours without having to pay them time and half under section 35, and to work weekly overtime without premium pay provided they did not work more than an average of 40 hours per week over a four-week cycle (otherwise, they would be paid time and half). In requesting the variance, the Employer made the following points regarding what it termed "offsetting benefits":

- the employees were already being paid wages equivalent to those paid in comparable unionized workplaces (where a form of overtime variance was incorporated into the applicable collective bargaining agreement) and "the variances sought would result in [the Employer's] RHWs, who do exactly the same work, effectively getting similar terms as have been negotiated by the Nurses Bargaining Association for their unionized counterparts at competitor care providers" but "without the corresponding obligation to pay union dues".
- "the affected RHWs overwhelmingly prefer to have the option to work longer shifts on fewer days [as this schedule provides them] with more flexibility and control to manage their work-life balance as they see fit".
- "Bayshore is prepared to implement a 1% raise for all RHWs within approximately 1 month if both variances are granted for an initial term of 2 years."

17. The Employer maintained that the variances were necessary so that its pediatric patients would have continuity of care and that "introducing more RHWs to a family to cover their funded respite hours [*i.e.*,

1 RHW for 8 hours and another for 4 hours rather than a single RHW for a 12-hour shift] will inevitably result in less consistent care for the patient, the need for the family to spend more time training the RHWs on the needs of the patient, more room for errors in care, more turnover in RHWs and generally more disruption due to lack of continuity of care". We note that while the Employer asserted that there would be adverse healthcare consequences if the variances were not approved, it never submitted any evidence to support that assertion.

18. The Employer also asserted that the variances were necessary since it was not "economically viable" for it to pay overtime, because this would add about 17% to its wage costs. On this latter point, the Employer noted that the provincial government and other Crown agencies provide the majority of its funding on a "per hour of service delivered basis" and that it "is not able to obtain funding from the provincial government to provide overtime premiums for hours worked between 8-12 per day."

19. As for the matter of employee support, the Employer indicated that "304 of the 348 affected employees have agreed to the variance [the Employer] is seeking" – some of these employees provided separate letters of support. For the most part, however, the employees' consent was documented by way of their signature on a form letter prepared by, and on the letterhead of, the Employer. The Employer stated that the proposed variances would place it on a "similar footing" with other unionized firms providing similar services and that, in effect, the proposed variances represented "market practise".

THE DETERMINATION

20. As noted above, the Delegate refused the Employer's variance request because, referring to subsection 73(1)(b) of the *ESA*, the application "is not consistent with the intent of the Act".

21. The Delegate noted that the variance application was precipitated by the Employer's realization that the individual averaging agreements it had in place with its employees did not comply with section 37 of the *ESA*. This latter provision allows an employer and an employee to enter into a written overtime averaging agreement provided certain criteria are contained in the agreement including a specification of "the work schedule for each day covered by the agreement" (subsection 37(2)(iv)). The Employer's averaging agreements did not comply with this provision, resulting in the Employer making retroactive overtime payments and seeking a section 73 variance.

22. As recounted in the Determination, the Delegate attempted to contact some 150 of the employees who signed letters supporting the variance application. The Delegate noted (at page 7): "Despite my repeated attempts, many calls went unanswered or the Employee confirmed they had signed the application but advised they were unable to speak further". The Delegate actually interviewed 44 employees and reported "the majority…advised they signed the application during a meeting with their supervisor where they were told [the Employer] would no longer be able to assign shifts as it had in the past without the Variance" (page 7). The general views of these 44 employees were as follows (page 7):

- 24 employees "were concerned that without the Variance [the Employer] would cut their hours to avoid paying overtime and they signed the agreement in order to keep their hours". Indeed, that is precisely what transpired – at page 4 of the Determination, the Delegate noted "[the Employer] cannot afford to incur further overtime liability [and the employees] are now on 'restricted schedules' and cannot

work shifts as 'previously enjoyed'…[and] the Employees' preference [is] to return to the longer shifts".

- 9 employees "stated they did not agree with the Variance and not being paid overtime".
- 5 employees did not agree with the variance but nonetheless signed the application because they wanted families to "receive services as needed and/or because they wanted to support [the Employer]".
- finally, 6 employees "indicated being able to work longer shifts over fewer days in the week would assist them in meeting other work or financial obligations".

23. The Delegate further noted that an applicant for a section 73 variance must demonstrate informed employee consent by a majority of the affected employees and that the proposed variance is not inconsistent with the purposes of the *ESA*. Although the Delegate did not make an express finding that "a majority of the employees who will be affected by the variance are aware of its effect and approve of the application" (subsection 73(1)(a)), she did conclude, at page 10 of the Determination, that "while the Employees interviewed had varying positions on and reasons for signing the Variance, I accept they were generally aware of its effect when they signed [the Employer's] letter in approval". However, the Delegate's refusal to grant the variance was predicated on her finding that the proposed variance was inconsistent with the section 2 purposes of the *ESA*.

24. In assessing this latter issue, the Delegate observed that "the relaxation of minimum employment standards in such things as daily and weekly overtime is balanced by an improvement in other factors such as meeting work and family responsibilities, so that the proposed work schedule remains consistent with the purposes of the Act [and that a] simple opportunity for employment is not of itself a sufficient benefit to justify a variance" (page 8).

25. The Delegate, while accepting that the Employer's services "are of immense value to the clients and their families", nonetheless held that "the funding policies of other agencies and the value of the services [the Employer] provides to its clients fall outside my purview and are assigned little relevance and weight in my considerations" (page 9).

26. The Employer predicated its application, at least in part, on the assertion that the proposed variance would result in the RHWs "effectively getting similar terms as have been negotiated by the Nurses Bargaining Association for their unionized counterparts at competitor care providers". However, after reviewing the terms of the relevant collective agreement, the Delegate determined that the RHWs would *not* be placed on a "similar footing". In particular, and by way of comparison with the unionized care workers:

- the unionized employees cannot be forced to work 12-hour shifts at regular wage rates (their written agreement is required) and they may revoke their agreement to work 12-hour shifts at straight time wages by giving 2 weeks' written notice; and
- the unionized employees receive 4.6% of straight-time pay in lieu of premium statutory holiday pay but the RHWs would not receive that allowance, and could

> foreseeably have their entitlement to statutory holiday pay "adversely impacted" by the terms of the proposed variance.

27. With respect to the Employer's promise of a 1% pay increase, the Delegate expressed some concern regarding "the challenges in enforcing this undertaking" (page 9) but, in any event, was not satisfied that this raise "constitutes much if any offset to the loss of full application of section 40 of the Act" (the daily/weekly overtime provisions). The Delegate examined two separate scenarios (at page 10) and, in either case, concluded that the proposed 1% wage increase would not offset the loss of overtime pay (and concomitant statutory holiday pay and vacation pay) that would otherwise be payable.

28. The Delegate also expressed a concern that the proposed variance did not provide a fixed schedule and accordingly this "lack of structure, assurance or predictability [regarding shift assignments] appears inequitable when compared against the broad application and rigidity of the Variance requested" (page 11). In other words, the employees were not fully able to assess precisely how much in the way of wages they would lose, and what scheduling flexibility they would actually gain, if the variance were to be implemented.

29. Further, the Delegate was satisfied that the employees' consent to the proposed variance was primarily predicated "on their wish to [*sic*, work?] more work hours and/or support their clients as opposed to assisting them in meeting work and family responsibilities" (page 11). Finally, and by way of summary, the Delegate observed (at page 11):

> The purpose of a variance is not to address or remedy financial, service or social policy issues impacting an employer's operations, no matter how compelling those arguments and circumstances may be. Instead, it is to provide employees and employers some relaxation of minimum employment standards as balanced by a compensating benefit to the employees by their employer. Having fully considered the purposes of the Act, the application and all related information and argument therein, I am not convinced the Variance provides Employees with any substantial benefit beyond a nominal raise and the opportunity for some Employees to return to previous scheduling practices in exchange for [the Employer's] exemption from having to pay overtime to all Employees.
>
> This application does not identify a benefit to the employees which is sufficient to justify the requested alteration of their entitlement to a minimum employment standard.

THE EMPLOYER'S APPEAL AND THE APPEAL DECISION

30. The Employer appealed the Determination arguing that the Delegate erred in law and failed to observe the principles of natural justice (subsections 112(1)(a) and (b) of the *ESA*). Regarding the former, the Employer argued that the Delegate made certain factual and legal findings without a proper evidentiary foundation, erred in law by considering "irrelevant factors", and failed to give adequate weight to the Employer's "policy" arguments. The Member did not address the Employer's "error of law" arguments (Appeal Decision, para. 43), resting his decision solely on "natural justice" concerns – specifically that the Delegate "breached the requirement to deliver adequate reasons in the Determination" (para. 41).

31. The Employer's "natural justice" argument was based on the allegation that the Determination was tainted by a reasonable apprehension of bias on the Delegate's part (principally, though not exclusively,

as reflected in statements made during her interviews with some of the potentially affected employees). The Member considered, and unequivocally rejected, the Employer's bias allegation: "I find the [Employer's] evidence of bias wanting. It does not satisfy the requisite burden of proof, and I am not even remotely convinced that the Delegate's investigation was prejudiced against granting the Variation Application" (Appeal Decision, para. 22).

32. The Member also observed that the Employer "somewhat obliquely…argues that the Director failed to provide adequate reasons in the Determination" (Appeal Decision, para. 5). In particular, the Employer suggested that the Delegate made certain findings without providing, in her reasons, the underlying evidence that supported those findings. However, the Employer did not specifically argue that the Delegate's reasons were inadequate in an administrative law context (see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247; *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] 1 S.C.R. 609; *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 70).

33. The Appeal Decision noted that the Director has a broad discretionary authority to approve or reject variance applications (para. 11). The Appeal Decision explained that the Tribunal should not interfere with the exercise of the Director's discretion unless it amounts to an abuse of process, there was a procedural irregularity, or the decision itself is unreasonable in the sense that the Director misdirected himself regarding the governing legal principles or refused to consider matters that ought to have been considered (para. 12). The Appeal Decision also noted, correctly in our view, that even if the two subsections 73(1)(a) and (b) preconditions are satisfied (majority employee consent and consistency with the section 2 purposes), it does not automatically follow that the variance sought will be granted, although a refusal in those circumstances must be based on relevant *bona fide* considerations (para. 14).

34. With respect to the Employer's argument that the proposed variation appeared to have very considerable employee support – a proposition that was undermined, at least to a degree by the Delegate's discussions with 44 of those employees (see Determination, page 7) – the Appeal Decision noted that even unanimous consent would not necessarily result in a successful variation application, since individual non-union employees cannot waive their rights under the *ESA* (see paras. 24 and 25).

35. In the present case, the Employer's evidence was that 304 out of its 348-employee workforce signed identical form letters, prepared by the Employer and on its letterhead, stating they were in favour of the proposed variance. However, the Employer conceded that "more than three quarters [of its employees] work less than full time hours by personal choice, primarily due to other jobs and family obligations [and] thus they will, in practice generally not be affected by the Averaging Variance" (Determination, page 5).

36. Thus, the Employer's own evidence before the Delegate and the Member was that the apparent employee consent to the variance was not as overwhelming (*i.e.*, 87%) as it may have initially appeared, given that no data was provided regarding support within the one-quarter of its workforce that would actually be affected by the variance.

37. Having found that there was no bias on the part of the Delegate, and that substantial majority employee support did not, of itself, justify the proposed variance, the Member then observed (para. 26) "that the

Determination is not without issues". The Appeal Decision, at paras. 30 – 31, noted that the Delegate took the position, as a matter of law, that a proposed relaxation of minimum standards must be offset "by an improvement in other factors such as meeting work and family responsibilities, so that the proposed work schedule remains consistent with the purposes of the Act". The Appeal Decision then noted that this approach was arguably inconsistent with the Tribunal's decision in *Sun Peaks Mountain Resort Association*, BC EST # D434/01, and, in particular, the following excerpts from that decision:

> …whether an employee is excluded from all or parts of the *Act* does not depend on whether there is a perceived corresponding benefit for the excluded employees. Rather, exclusions are based on factors inherent to the work performed, which include considerations of fairness, economic viability and unusual or unique features of the particular employment. In our view, and in light of the basis upon which the variance was sought, there should have been assessment of the particular features of the employment and the impact on the employer to operate without the variance…
>
> In our view it is appropriate in a variance application, and consistent with the intent of the *Act*, to consider the compensation and conditions of the relevant employment as a whole in determining whether the resulting variance will give an employee less than basic compensation and conditions of employment.

38. Additionally, the Appeal Decision noted (at para. 32) that although the Delegate determined the proposed variation was inconsistent with the section 2 purposes of the *ESA*, "the Determination does not clearly explain why that is the case" and, quoting from *GoodLife Fitness Centres Inc.*, BC EST # D089/14, "the reasons lack sufficient analysis to identify what relevant considerations and purposes outlined in section 2 of the *Act* factored into the [Delegate's] conclusion".

39. The central findings regarding the sufficiency of the Delegate's reasons are set out at paras. 37 – 39 of the Appeal Decision:

> I understand, and agree with, the Delegate's conclusion that the Variation Application fails to identify a corresponding benefit to employees offsetting deviation from a minimum standard. However, I am unable to glean from the Determination how the Delegate considered the Appellant's argument in the context of an analysis under section 73(1)(b) of the *ESA*.
>
> In this instance, the Delegate has not adequately explained her finding that the Variation Application is inconsistent with the purposes of the *ESA.* The lack of an identifiable corresponding benefit is not sufficient, particularly considering that section 30 of the *Employment Standards Regulation* does not identify that as a requisite component of the application for variance.
>
> In my view, the Determination does not include the requisite "degree of analysis sufficient to identify the considerations that comprised the conclusion" (see *GoodLife Fitness Centres Inc., supra,* at paragraph 37, and *Victoria Confederation of Parent AdvisoryCouncils, supra*, at page 6).

40. The Determination was cancelled and the Employer's variance application was referred back to the Director.

THE DIRECTOR'S APPLICATION FOR RECONSIDERATION & THE *MILAN HOLDINGS* TEST

41. The Director says that the Appeal Decision is incorrect and should be cancelled.

42. The Tribunal will not automatically entertain a section 116 reconsideration application on its merits. Although the Director has the statutory authority to apply for reconsideration (subsection 116(2) of the *ESA*), the Tribunal may refuse to hear an application under section 116. In this regard, the Tribunal has consistently applied the "*Milan Holdings*" test (see *Director of Employment Standards*, BC EST # D313/98) and the two-stage test formulated in that decision when evaluating section 116 applications.

43. As observed in *Milan Holdings*, "an 'automatic reconsideration' approach would be contrary to the objectives of finality and efficiency for a Tribunal designed to provide fair and efficient outcomes for large volumes of appeals [and] would delay justice for parties waiting to have their disputes heard, and would likely advantage parties with the resources to 'litigate'." Under the two-stage *Milan Holdings* test, the Tribunal will first consider whether the application raises important issues of "law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases." If the application does not pass the first stage, it will be dismissed and the Tribunal will not examine, in detail, the underlying merits of the application (the merits are examined in the second stage, assuming the application passes the initial threshold review).

44. In this case, the Director says that the Tribunal's approach to appeals involving the Director's discretionary authority to grant section 73 variances has not been entirely consistent. The Director says that in some appeal decisions – as is the situation here – the Tribunal has cancelled determinations based on inadequate reasons, particularly regarding the subsection 73(1)(b) criterion ("the variance is not inconsistent with the purposes of this Act set out in section 2") – see, for example, *Sun Peaks*, *supra*; *Ownership Identification Inc.*, BC EST # D435/01; *Victoria Confederation of Parent Advisory Councils*, BC EST # D436/01; *Individual Pursuits Program Ltd.*, BC EST # D234/02; and *GoodLife Fitness Centres Inc.*, *supra*. The Director says that in other decisions the Tribunal "has found the Director's reasons sufficient [despite being] primarily concerned that the requested variance would deny a statutory benefit without any tangible improvement in other areas of employment (see, for example, *Raincoast Community Rehabilitation Services Incorporated*, BC EST # D097/15; *Armstrong*, BC EST # D026/97; and *Palladian Developments Inc.*, BC EST # D186/05).

45. The Director says this application presents the Tribunal "with an opportunity to flesh out its views on the proper analytical approach under s. 73(1)(b) and help to set a framework of analysis for future variance requests" and that "the historical context suggests such guidance is needed". Finally, and with respect to the Appeal Decision itself, the Director says that the decision is incorrect, given that the Member either misunderstood or failed to give full consideration to the Delegate's reasons, particularly as they concerned subsection 73(1)(b).

46. The Employer says that the Director's application fails to pass the first stage of the *Milan Holdings* test and should be dismissed without any searching inquiry into its merits. The Employer asserts that this application does not raise a "significant issue" because "the Tribunal has provided guidance time and again about what is required in reasons, and the Member made the simple, straightforward finding that the Delegate fell short in this case".

47. In our view, this is an application that passes the first stage of the *Milan Holdings* test. By our count, the Tribunal has issued no less than 36 decisions where it was required to review the Director's discretionary decision to refuse to grant a section 73 variance. In our view, it is at least arguable that the Tribunal's approach in such cases has not been uniformly consistent. We will more fully review the Tribunal's jurisprudence in this regard later on in these reasons; however, it is sufficient for purposes of the *Milan Holdings* first stage analysis to say that this application raises important questions that concern not only the immediate parties but, equally importantly, parties who may be involved in future variance applications. Employers should have a clear idea regarding the evidence required to support a section 73 variance. Further, the Director and his delegates are entitled to have a clear idea about what constitutes legally "sufficient" reasons in a section 73 matter.

THE DIRECTOR'S CHALLENGE TO THE APPEAL DECISION

48. The Member accepted that the Employer's application did not disclose an offsetting economic benefit for the employees in exchange for the loss of their statutory overtime pay entitlements (Appeal Decision, para. 37). The sole reason set out in the Appeal Decision for cancelling the Determination was the Member's conclusion that the Delegate failed to adequately explain why the proposed variance was "inconsistent with the purposes of the *ESA*" (para. 38). The Member concluded that the lack of a corresponding employee benefit was not, in and of itself, a sufficient basis for refusing to grant a section 73 variance.

49. The Director says that the foundation for the Appeal Decision – the sufficiency of the Delegate's reasons – was not, in fact, an issue raised in the Employer's appeal documents. The Director maintains that the Employer "did not argue that the Delegate's reasoning was inadequate and the Director was not asked for submissions regarding the adequacy of the reasons". However, the Director does not appear to take the position that this state of affairs is a stand-alone basis for setting aside the Appeal Decision.

50. With respect to the sufficiency of the Delegate's reasons, and relying on the Supreme Court of Canada's decision in *Newfoundland Nurses*, *supra*, the Director says that the Delegate's reasons must be assessed to determine if, overall, the reasons are reasonable. In this regard, the reasons need not "include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, and that a decision-maker is not required to make an explicit finding on each constituent element leading to its final conclusion". The Director says that the Delegate's reasons are legally sufficient provided the Tribunal is able to "understand why [the Delegate] made [her] decision and permit [the Tribunal] to determine whether the outcome falls within the range of reasonable outcomes".

51. Turning to the substance of the Delegate's reasons, and in particular the statutory requirement that variances be consistent with the section 2 purposes of the *ESA*, the Director maintains that the Delegate *did* expressly turn her mind to section 2, and adequately explained why the proposed variance fell short on that score. For example, in her "Findings and Analysis" the Delegate noted that the *ESA* is remedial legislation and specifically referred to subsections 2(a), (b) and (f) – provisions concerning the importance of basic minimum employment standards, fair treatment of employees and employers, and the balancing of work and family responsibilities. The Delegate held that the proposed work schedule must be consistent with the purposes of the *ESA* and that a "simple opportunity for employment is not of itself a sufficient benefit to justify a variance" (page 8).

52. Further, the Director says, citing *Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 and the Tribunal's decision in *Sun Peaks*, *supra*, that among the various purposes set out in section 2, the provision of minimum compensation and basic employment standards is the "over-arching" purpose of the *ESA*. That said, other statutory purposes must be taken into account, otherwise they would be superfluous. But, unlike the situation in *Sun Peaks* (where the Tribunal cancelled the determination and referred the variance application back to the Director to be reconsidered), in this instance "the Delegate's reasons demonstrate that in order to take away from the main and fundamental purpose of the *ESA* in s. 2(a), an applicant for a variance must demonstrate that some other purpose of the *ESA* is promoted by the proposed variance."

53. The Director says that the Delegate's conclusion – accepted in the Appeal Decision – that there was no offsetting financial benefit for the loss of overtime pay (and possibly a concomitant negative impact regarding statutory holiday pay and vacation pay), mandated an inquiry as suggested in *Raincoast Community Rehabilitation Services*, *supra*, to determine if there was "improvement in other areas of [the employees'] employment" to counterbalance the loss of overtime pay. The Director says that the Delegate's analysis of the employees' financial losses that would accrue if the variance were granted, when compared to "the purported benefits of such things as increased flexibility and the promise of a 1% pay increase was in the nature of an inquiry under s. 73(1)(b)."

54. Apart from the partially offsetting 1% wage increase, the Employer's original variance application identified two important factors that justified the variance: if the application were refused, i) there would be a "critical impact…on the provision of critical respite care to the families of seriously ill children"; and ii) "while of somewhat lesser importance, on its employees' work schedule preferences". In its original application, the Employer characterized these two considerations as "Patient Needs" and "Employee Support".

55. With respect to Patient Needs, the Employer identified continuity of care as being extremely important, but maintained that it was too costly (due to overtime pay) to have a single RHW provide 12-hour care, and thus two RHWs would provide care over separate consecutive 8-hour and 4-hour shifts for a single patient. The Employer stated that its funding agencies would not provide extra funds to offset overtime costs and thus a variance was necessary. The Delegate accepted that the Employer provided "immense value" to its clients and patients but determined "the funding policies of other agencies and the value of the services [the Employer] provides to its clients fall outside my purview and are assigned little relevance and weight in my considerations" (Determination, page 9). The Director, without expressly endorsing the Delegate's conclusion in this regard, seemingly suggests that the Delegate did not err in discounting the Employer's financial constraints.

56. The Employer argued that without a variance it would be more costly to run its business. The Employer says that it intends to schedule its workforce in order to reduce to the greatest extent possible any overtime expenses should the variance be refused. The Employer says that its wage costs would increase by 17% if employees worked 12-hour shifts with overtime (versus no overtime), but it must also be stressed that this asserted labour cost consequence stands as a mere assertion wholly uncorroborated by any evidence in the record before us. However, if accurate, this shows the significant loss of *ESA* entitlements the employees were being asked to accept in exchange for a 1% wage increase.

57. As for the proposed work schedule and the employees' apparent desire to continue to work longer shifts over fewer days, the Director says the Delegate noted that given the absence of a set schedule for the employees, "there was no guarantee that employees would receive a net benefit in terms of scheduling should the variance be granted". In addition, the Delegate found that employee support was largely predicated on a desire to maintain a certain number of work hours rather than assisting them to meet work and family obligations.

58. The Employer maintained that the proposed variance would essentially mirror the terms of existing collective agreements governing work by comparable employees and thus "the variances sought would result in [the Employer's] RHWs, who do exactly the same work, effectively getting similar terms as have been negotiated by the Nurses Bargaining Association for their unionized counterparts at competitor care providers" and, on that basis, the proposed variance was "objectively fair". The Director says that the Delegate rightly rejected this assertion given the important benefits that were included in the collective agreement that would not be available to the Employer's RHWs (see Determination, page 9). In addition, the Delegate concluded that the proposed 1% wage increase did not offset the employees' loss of their overtime, statutory holiday pay and concomitant vacation pay entitlements under the *ESA*.

59. Finally, the Director says that the Delegate adequately addressed each of the Employer's arguments advanced in support of its variance application and that the Delegate's reasons for refusing the variance were "transparent, intelligible, and justif[y] the result". The Director submits that the Appeal Decision should be cancelled.

THE EMPLOYER'S RESPONSE

60. The Employer rejects the Director's assertion it did not argue that the Delegate's reasons were inadequate in its appeal documents: "That is, with all due respect, not true". The Employer maintains that as in *GoodLife Fitness Centres Inc.*, *supra*, a decision it cited in its original appeal, "a similar problem arose in the case at bar because the Delegate's reasons did not provide a reasonable evidentiary basis for key factual conclusions [and] although [the Employer] did not specifically use the phrase 'adequacy of reasons', the matter was squarely and properly before the Tribunal".

61. The Employer, relying on *Sun Peaks*, *supra*, says that a variance application regarding overtime pay cannot be refused simply because there is an insufficient corresponding benefit for the employees. The Employer then submits:

> Although the Delegate set out the purposes of the *ESA*, at no point in the Determination were the purposes of the *ESA* considered and analyzed in relation to [the Employer's] argument in any clear or cogent way…the Delegate simply rejected various arguments without any analysis on the basis that there was an insufficient corresponding benefit.

62. The Employer also suggests that the Director's submission on reconsideration is, in effect, an attempt to bootstrap the Delegate's reasons because it "contains part of the explanation the Member found was missing from the original Determination" and this is "inopportune and improper". The Employer's counsel did not specifically identify what portions of the Director's submission were objectionable. We note that the Director strenuously objects to this unparticularized assertion and, for our part, we are not persuaded that the Director's submission goes beyond the scope of proper argument.

ANALYSIS AND FINDINGS

63. We believe that it is appropriate to review the Tribunal's section 73 jurisprudence and to identify the principles that ought to guide the Tribunal when it reviews an exercise of the Director's discretion to grant or refuse a variance. Additionally, we will briefly address the legal principles regarding the adequacy of reasons for decision issued by statutory decision-makers. Finally, we will address whether the Delegate's reasons were, in law, sufficient.

The Tribunal's Section 73 Jurisprudence

64. Section 73 variances fall within the discretionary authority of the Director. Although a refusal to grant a variance may be appealed to the Tribunal, the Tribunal will not assess the matter afresh and make an independent decision whether the variance should be granted or refused. Rather, the Tribunal's function is considerably narrower – it must determine if the Director (acting through his delegates) in exercising this discretionary power acted appropriately, in the sense that the decision did not amount to an abuse of power, was not motivated by bad faith or by some other improper consideration and, more broadly, was reasonable in light of the evidence that was before the Director (*Goudreau*, BC EST # D066/98).

65. The Director may only grant a variance regarding those *ESA* provisions specifically set out in section 72; an employer and its employees cannot unilaterally agree to enter into some form of variance by contract regarding those provisions listed in section 72, or any other provision of the *ESA* (*Aarm Dental Group*, BC EST # D158/96; *Lee*, BC EST # D240/96). Further, once granted, the variance applies to all affected employees even those who did not individually consent to the proposed variance (*Campbell*, BC EST # D568/98). The employees who will be affected by the variance must give "informed" consent" (*Dinsmore*, BC EST # D169/98) and, even if most or all of the employees give their informed consent, the Director must still make an independent assessment whether the proposed variance is consistent with purposes of the *ESA* – the Director will not simply "rubber stamp" a variance even if it has unanimous or near unanimous employee consent (*Arcas Consulting Archaeologists Ltd.*, BC EST # D410/98; *Palladian Developments Inc.*, BC EST # D186/05). A variance should not be granted on an indefinite basis (*Ownership Identification Inc.*, BC EST # D435/01).

66. In *Armstrong*, *supra*, the Tribunal observed that a variance application should not be approved simply because the employer prefers not to pay wages as prescribed by the *ESA*; in other words, the variance application should not be a unvarnished request for an *exclusion* from the operation of one or more *ESA* provisions. At page 6 the Tribunal stated:

> …the Director is *not* saying that Armstrong…cannot schedule employees as proposed. The Director has merely determined that if an AARM Dental Group employee works beyond 8 hours in a day, Armstrong (just like any other employer in the province who is governed by the *Act*) will be obliged to pay that employee overtime as set in out in section 40.
>
> Armstrong simply wishes to avoid paying overtime to his employees. Further, he has not advanced any compelling justification for his request. I agree with the Director that applications for variances should involve some sort of *quid pro quo*, that is, the employee should receive some other benefit in exchange for the loss of the statutory entitlement…

> In my view, Armstrong's variation application is not motivated by a desire to "better serve the needs of our patients and our staff"; rather, it is motivated by a simple desire to avoid additional labor costs. As I indicated above, there is absolutely no statutory impediment to the implementation of the proposed work schedules so long as overtime is paid as mandated by the *Act*. If labor costs are (as I believe to be the case) the real issue here, Armstrong can easily deal with that matter by renegotiating the employment contracts of his employees. Indeed, upon giving proper notice of any proposed change, Armstrong can act unilaterally in this latter regard.

67. The Tribunal has emphasized in several subsequent decisions that a section 72 application that amounts to a request for a simple exclusion, without offering any counterbalancing employee benefits, should not be approved (see, for example, *Yellow Cafe*, BC EST # D212/96; *Interior Health Care Services Ltd.*, BC EST # D293/96; *Terrace Kitimat Bldg. Maint. Ltd.*, BC EST # D150/97; *Royal Canadian Legion Branch #11*, BC EST # D157/97; *Budget Rent-A-Car BC Ltd.*, BC EST # D296/99; *Prince George Family Services Society*, BC EST # D300/96; *Thompson Bros. (Constr.) Ltd.*, BC EST # D512/00; *Brooke Radiology Associates*, BC EST # D119/01; *Protect Security Services Ltd.*, BC EST # RD247/03; *Palladian Developments Inc.*, BC EST # D186/05; *Raincoast Community Rehabilitation Services Incorporated*, BC EST # D097/15). That said, in *Sun Peaks*, *supra*, the Tribunal observed that a compensating benefit can be found in non-monetary factors, provided the benefits are consistent with other section 2 purposes separate from 2(a) (employees should "receive at least basic standards of compensation and conditions of employment").

68. In this case, the Delegate expressed concern about the proposed variance in that the Employer did not propose a fixed work schedule. Indeed, the Employer maintained that by reason of the "ever changing availability of clients and Employees", it was not feasible to submit a fixed schedule. The enumerated purposes of the *ESA* include "to promote the fair treatment of employers and employees (section 2(b)), "to encourage open communication between employers and employees" (section 2(c)), and "to contribute in assisting employees to meet work and family responsibilities" (section 2(f)). Fixed work schedules are consistent with each of those purposes so that employees are not being unfairly called in to work when they have other commitments (including family commitments) and employees and employers have a mutual interest in knowing who will be working and when. Employees should indicate to their employers when they are unavailable for work and employers should communicate to their employees when they will be required to work – open communication must be encouraged when work schedules may vary over the course of several weeks or months.

69. In *ARC Programs Ltd.*, BC EST # D030/96, the employer – echoing arguments advanced in this case – applied for an overtime pay variance that would have allowed it to meet the variable needs of its at-risk youth clients. The employer argued that it needed scheduling flexibility and thus a fixed work schedule could not be implemented. The employer also argued that it needed the variance because its funding model would not permit it to pay overtime. However, the variance was refused, in part because it amounted to a request for a partial *ESA* exclusion and there was no concrete proposal that could be assessed in terms of the section 2 purposes set out in the statute. Similarly, in *Palladian Developments Inc.*, *supra*, the Tribunal seemingly accepted that a proposed shift schedule should be included as part of the variance application process so that the employees would know what they are consenting to, and the Director would know what he is being asked to approve (see also *The Axys Group Ltd.*, BC EST # D067/96).

70. However, in *Telav Inc.*, BC EST # D167/98, the Tribunal questioned whether *ARC Programs* expressed a general principle, particularly since there is nothing in the *ESA* requiring a variance applicant to submit a fixed schedule regarding the affected employees. The Tribunal Member noted, at page 7: "There may be circumstances where the Director properly requires a fixed schedule, but this is not one such case. Such a requirement would ignore the changing needs of the workplace and the flexibility necessary to meet the demand of an increasingly fast-paced and competitive marketplace." Prior to May 30, 2002, the *ESA* contained section 31 [now repealed] that required employers to post shift schedules and presumptively required an employer to give an employee 24 hours' notice of any shift change.

71. In our view, although we acknowledge that there is nothing in section 73 of the *ESA*, or in section 30 of the *Employment Standards Regulation*, requiring a section 72 applicant to specify a proposed shift schedule, we do believe that it is appropriate, in most instances, for the Director to require a proposed work schedule so that the employees understand what precisely they are being asked to approve and the Director is better able to determine to what extent the proposed variance is consistent with the purposes of the *ESA*. Further, with a shift schedule in hand, the affected employees and the Director will have a clear understanding of the precise monetary impact of the proposed variance, including forgone overtime pay and concomitant impacts on both statutory holiday pay and vacation pay. There may well be extraordinary circumstances where a proposed shift schedule need not be submitted but, as a presumptive rule, a variance application should be accompanied by a proposed shift schedule where relevant (for example, it would be wholly unnecessary if the variance request concerned special clothing).

72. In its original section 72 application, the Employer maintained that it paid wage rates equivalent to those paid to similar RHWs in the unionized sector but that, unlike its unionized competitors, it did not have the scheduling flexibility that was incorporated into the unionized sector's collective bargaining agreement. The Employer maintained that, absent a variance, it was at a competitive disadvantage relative to its unionized competitors regarding the payment of overtime: "…as a matter of fairness amongst the care providers, [the proposed variance] will allow [the Employer] to compete on an equal footing for wage costs with those unionized competitors". The Employer asserted that the provincial government, and other provincial funding agencies simply would not provide additional funding to pay overtime for an RWH who worked a 12-hour shift and thus it would be required to use two RHWs (for an 8-hour and a 4-hour shift) to meet the needs of a single patient and that this was a markedly less satisfactory health care option: "To deny it [*i.e.*, the proposed variance] will result in shorter shifts and more caregivers which will negatively affect the care and health of these sick children".

73. The Employer's "financial constraint" argument is essentially identical to that argued in *Kaslo and District Public Library*, BC EST # D082/12, where the employer asserted that its financial constraints necessitated a ban on any overtime hours. The Tribunal accepted the Director's position that the proposed variance was simply a request for an overtime waiver without any compensating advantages, and that the employer's straitened financial circumstances did not constitute a free-standing basis for granting such a waiver. However, in *Sun Peaks*, *supra*, the employer argued, among other things, that it could not afford to pay overtime pay and that the denial of an overtime pay variance and the concomitant shorter employee shifts it would cause "will affect the ability of the staff to make ends meet and compel them to seek other employment" (page 5). In cancelling the determination (refusing

the variance) and referring the employer's application back to the Director, the appeal panel held (at pages 8 – 9):

> Generally speaking, whether an employee is excluded from all of parts of the *Act* [referring to the exclusions set out in the *Employment Standards Regulation*] does not depend on whether there is a perceived corresponding benefit for the excluded employees. Rather, exclusions are based on factors inherent in the work performed, which include considerations of fairness, economic viability and unusual or unique features of the employment and the impact on the employer to operate without a variance.
>
> …In our view it is appropriate in a variance application, and consistent with the intent of the *Act*, to consider the compensation and conditions of the relevant employment as a whole in determining whether the resulting variance will give an employee less than basic compensation and conditions of employment.
>
> …the Director cannot simply say no variance will be granted unless the application shows the employees will benefit from the requested relaxation of minimum standards. That response does not adequately address the intent of the *Act* and is an improper fettering of discretion by the Director.
>
> (see also *Victoria Confederation of Parent Advisory Councils*, *supra*, regarding the employer's alleged inability to pay wages in accordance with the *ESA*)

74. The Tribunal has also identified a further consideration when addressing a request for, in effect, a waiver of the employees' wage entitlements under the *ESA* (such as overtime pay), namely, the fact that a waiver gives the applicant employer an unfair labour cost advantage in the marketplace (see, for example, *Sun Village Lodge Inc.*, BC EST # D348/96). Such a waiver surely cannot constitute objectively "fair treatment" (see subsection 2(b) of the *ESA*) of the applicant employer's competitors (see also *Terrace Kitimat Bldg. Maint. Ltd*., *supra*).

75. This reconsideration application concerns the sufficiency of the Delegate's reasons. Apart from the Appeal Decision, so far as we can determine, the Tribunal has issued four other decisions where it cancelled a section 73 variance determination because the Delegate's reasons were legally insufficient – *Sun Peaks*, *supra*; *Victoria Confederation of Parent Advisory Councils*, *supra* (although, in a later decision, the Tribunal upheld the original denial of the "minimum daily pay" variance – see BC EST # D190/03); *Individual Pursuits Program Ltd.*, *supra*; and *GoodLife Fitness Centres Inc.*, *supra*. In addition, in *Ownership Identification Inc.*, *supra*, although the employer's appeal of a refusal to issue a variance was dismissed, that dismissal was predicated "solely on the ground that it is an application for an exclusion, which the Director has no authority to consider" (page 10). The appeal panel clearly expressed its concerns about the sufficiency of the Delegate's seasons.

76. In the sections that follow, we will briefly review the leading Supreme Court of Canada decisions regarding sufficiency of reasons in an administrative context and will then turn to the sufficiency of the Delegate's reasons in this case.

Sufficiency of Reasons in the Administrative Context

77. The starting point regarding the sufficiency of a statutory decision-maker's reasons for decision is *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, a case concerning an

immigration officer's deportation order. The Supreme Court of Canada held that a statutory decision-maker's obligation to provide cogent reasons for decision falls within the general duty of procedural fairness. Written reasons are presumptively required "where the decision has important significance for the individual [and] when there is a statutory right of appeal" (para. 43). In *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, the high court commented more fully on the requirements of a "reasoned decision", stating that decision-makers must provide "reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived" (para. 55) and will pass muster if "taken as a whole, are tenable as support for the decision" (para. 56). The court confirmed this global assessment approach in *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] 1 S.C.R. 609, at para. 31.

78. In *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at para. 46, the Supreme Court suggested that reasons for decision must be justified, transparent and intelligible and a reviewing body should consider whether the resulting decision falls within a range of possible acceptable outcomes. The court opted for a deferential approach and this is particularly apposite where, as here, the review concerns the exercise of a discretionary power. In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708, the court emphasized that reasons do not have to be exhaustive, and need not address all of the arguments advanced before the decision-maker (para. 16). In assessing the reasons for decision for adequacy one should be mindful of *both* the reasons and the result (para. 14): "…the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes" (see also *Construction Labour Relations v. Driver Iron Inc.*, [2012] 3 S.C.R. 405 at para. 3).

79. As previously noted, the Tribunal has on at least five separate occasions commented critically regarding the Director's reasons for refusing a section 73 variance (and, in four of those decisions, the Tribunal cancelled the determination and referred the matter back to the Director).

80. In *Sun Peaks*, *supra*, the employer sought an overtime pay variance although the application was deficient because it did not set out all of the information required under section 30 of the *Employment Standards Regulation*. The appeal panel accepted that the Director's discretion is "broad and generous" and that the Director's Delegate did not "abuse her power", "act in bad faith", or err "in construing the limits of her authority". There was no "procedural irregularity". Nevertheless, the panel concluded that the Delegate fettered her discretion and took an unnecessarily narrow view of the factors that were relevant to the variance request. In particular, the Delegate apparently found that there was no benefit to the employees but did not adequately explain why that was so; nor did the Delegate consider statutory purposes other than section 2(a) (basic compensation standards); and that while section 2(a) is an extremely important purpose, it did not "express the full intent of the *Act*".

81. *Victoria Confederation of Parent Advisory Councils*, *supra*, was issued concurrently with *Sun Peaks* (and by the same 3-person appeal panel), and the reasons closely track those issued in the latter decision. The employer (which had twice previously been granted minimum daily pay variances) sought another variance so that its elementary school crossing guards would only be paid for the 1.5 hours they worked each day (the daily minimum was then 4 hours' pay but now is 2 hours' pay). The Director was prepared to grant a variance for 2 hours' daily pay but not for 1.5 hours' pay. The panel referred the matter back to the Director on the basis that she "did not consider all relevant factors in reaching her decision on whether this application was consistent with the intent of the *Act*" and, in particular, "it is not clear why

the Director would find a 2 hour minimum meets the intent of the *Act* but not the 1.5 hours requested" (page 6). In a later decision addressing the Director's referral back report (BC EST # D190/03), the appeal panel confirmed the Director's original decision to deny the requested variance. The panel stated, at page 4:

> The Tribunal will not interfere with [the Director's] exercise of discretion unless there was an abuse of power, the Director made a mistake in construing the limits of her authority, there was a procedural irregularity or the decision was unreasonable. Absent those considerations, the Director has the right to be wrong and the Tribunal will not substitute its views for those of the Director.
>
> The Tribunal found that the Director had not provided sufficient reasons, did not consider all of the relevant factors, and had improperly fettered her discretion. The Director has now provided full reasons with reference to the legislation and public policy. Where policy was taken into consideration, the Director has demonstrated that consideration has also been given to the particulars of this case. In that way, the Director's reasoning is clear in discussing how policy is applied and demonstrates that she has not improperly fettered her discretion by applying policy without regard to the specifics of the case.

82. The 3-person panel in *Sun Peaks* and *Victoria Confederation of Parent Advisory Councils* also issued a third concurrent decision, *Ownership Identification Inc.*, *supra*, but in this latter decision, ultimately upheld the determination refusing the requested variance solely because "it is an application for an exclusion, which the Director has no authority to consider" (page 10). The employer sought the indefinite "deletion" of sections 34 to 36 of the *ESA* for its livestock inspectors, arguing that absent the variance, the province's farm livestock inspection program would be jeopardized due to high costs. The Director denied the application but limited her analysis to section 2(a) ("basic standards of compensation") and did not address the employer's separate section 2 arguments advanced in the application. The panel found that by limiting her analysis to the question of whether the employees would receive any economic benefit from the proposed variance, the Director unduly fettered her discretion. But, as noted above, the panel nonetheless dismissed the employer's appeal because the variance sought constituted a request for a wholesale exclusion of the livestock inspectors from certain provisions of the *ESA*.

83. *Individual Pursuits Program Ltd.*, *supra*, concerned a proposed overtime pay variance affecting 16 group home employees – the employer sought approval of a shift schedule that would have approved shift lengths of 6 to 24 hours' duration over a six-month period. The employer previously had been issued an overtime variance. The employees, by giving up daily (and occasionally weekly) overtime pay, would work fewer days each week and would benefit from savings in travel time and ancillary costs. No employee would be required to work a shift in excess of 8 hours (a point the Director apparently misstated in her reasons). The determination refusing the variance was cancelled and the matter was referred back to the Director. In making this order the Tribunal member commented as follows:

> …the Determination lacks analysis. The Director found that a compensating benefit was required. However, it is not clear how possible benefits were weighed in light of the various purposes outlined in section 2 [and] the Director failed to discuss the section 2 purposes or to analyze the positive or negative factors raised by the employees in support of the variance. The Director has provided a paucity of information or analysis from which to draw conclusions.

> Further, the Director's finding on the intent of the *Act* rests on the specific provisions that the appellants are asking to vary.
>
> The Director has issued a Variance in the past. It sounds as though this employer has operated on long shifts without overtime since it began operation. Has there been some recent change that causes the Director to view the situation differently now than before? Are there employees who opposed the application? Why does the Director find that the benefits mentioned by the employees are not adequate to support the application? How do those benefits fit with the purposes outlined in section 2?
>
> These are some considerations that lead me to conclude that the Director did not consider all relevant factors in reaching her decision on whether this application was consistent with the intent of the *Act*.

84. The Tribunal's decision in *GoodLife Fitness Centres Inc.*, *supra*, similarly involved a determination cancellation and referral back solely predicated on the Director's failure to adequately explain why the variance application was refused. In this case, the proposed variance would have reduced the daily minimum hours from 2 hours to 30 minutes for the employer's fitness instructors – all part-time employees who, for the most part, had other employment – who individually taught fitness classes lasting as little as 15 minutes to a maximum of 90 minutes and were paid between $25 and $40 per hour. The application specifically cited subsections 2(b), (e) and (f) in support of its application ("fair treatment"; "productive and efficient work force"; and "assisting employees to meet work and family responsibilities"). In this latter regard, the employer noted, among other things, that instructors taught their class (typically, only one class in a single day) then immediately left the club and did not wish to be required to remain on site for a minimum 2-hour period; requiring a 2-hour minimum would create an inequity as between, say, an instructor who taught a single 30-minute class and another who taught two consecutive 60-minute classes – both would be paid the same amount; and many instructors would quit rather than being forced to teach two or more classes each day to reach the 2-hour minimum. The Tribunal cancelled the determination stating, at paras. 37 – 38:

> …while the Determination concluded that GoodLife's variance application did not meet the purpose and intent of the *Act*, I find the accompanying reasons for that conclusion are unclear or lacking. It is not enough to simply state in the reasons the conclusion; reasons must contain a degree of analysis sufficient to identify the considerations that comprise the conclusion…the reasons lack sufficient analysis to identify what relevant considerations and purposes outlined in section 2 of the *Act* factored into the Director's conclusion. I note, for example, the Director states that an application for a variance must "also demonstrate that the relaxation of minimum employment standards...is balanced by an improvement in other factors such as meeting work and family responsibilities", however, the Director does not address GoodLife's following submission in the application:
>
> > ...most of GroupLife's group exercise instructors have other career or family commitments and teach classes for the personal reward and enjoyment they get from it, as well as for the oftentimes essential second income stream these classes provide. They appreciate the flexibility in being able to schedule teaching time around their other commitments.
>
> Overall, I find the Director fails to discuss in the Reasons the section 2 purposes in context of the facts in this case or to analyze the factors, positive or negative, GoodLife raises in support of its

> variance application or address those relevant considerations identified by counsel in GoodLife's appeal submissions that formed part of GoodLife's application for variance. To borrow the language in the Tribunal's decision in *Sun Peaks Mountain Resort Association*, *supra*, "(t)hese are necessary elements to any Determination, particularly one that denies variance". In the circumstances, I find GoodLife has made out a sufficient case for the Tribunal to interfere with the Director's exercise of discretion.

85. The following principles may be gleaned from the foregoing review. First, an administrative decision-maker's reasons for decision must be "justified, transparent and intelligible" and should be assessed "globally" taking into account both the result and the justification for that result. Second, and in regard to the Director's discretionary authority under section 73, the Tribunal must give the Director a degree of latitude in exercising his discretion; mere disagreement with the substantive outcome is not a proper basis for the Tribunal to intervene. Third, the Tribunal may intervene, however, if the Director's exercise of discretion constitutes an abuse of power or was motivated by bad faith; if the Director erred in construing the limits of his statutory authority; if there was a procedural irregularity; or if the decision is objectively unreasonable. Fourth, and regarding this latter "reasonableness" criterion in the context of section 73 variance applications, the Director should address the applicant's specific arguments why the variance is consistent with one or more purposes of the *ESA* – it is not enough for the Director to refuse a variance solely because its effect will be to provide less compensation than would otherwise be payable (for example, regarding overtime pay). On the other hand, the Director may properly refuse to approve an unvarnished request for a statutory *exclusion* in the absence of any other compensating employee benefit (although such benefits need not be strictly monetary in nature). Fifth, while the Director may consider the applicant's operational or economic viability considerations that might militate in favour of a proposed variance, the Director must be wary of providing an unfair competitive advantage to the applicant relative to its competitors, particularly if there is no objective benefit for the employees who will be losing, at least to a degree, some of their entitlements under the *ESA*. Sixth, the application itself should clearly identify the economic consequences of the proposed variance for the affected employees (for example, by providing a proposed work schedule) so that they are in a position to give informed consent to the application, and so that the Director can determine to what extent the proposed variance is consistent with the purposes of the *ESA*.

86. With these comments in mind, we now turn to the Delegate's reasons in this case and whether the Appeal Decision should be confirmed, varied or cancelled.

Were the Delegate's Reasons Adequate?

87. The Employer applied for a variance regarding both daily and weekly overtime and maintained that these variances were required in order to meet its patients' needs and to permit the affected RHWs to better meet their family responsibilities and "other jobs and education activities" by working "fewer shifts of longer hours". The Employer maintained that it was not able to pay overtime in accordance with the provisions of the *ESA* because its funding agencies (principally, the provincial government) would not provide sufficient funds to allow it to pay overtime pay to its RHWs.

88. Despite arguing that it was not able to pay overtime pay as required by the *ESA*, the Employer proposed that it would implement a 1% wage increase for the RHWs if the variances were granted for a 2-year period. Further, the Employer asserted that it paid its employees "virtually identical" wages to those paid by its

unionized competitors for essentially the same work. However, the Employer argued that the terms of the collective bargaining agreement governing the work of the RHWs unionized colleagues included a provision relaxing the *ESA* overtime requirements and that the proposed variance, if granted, would result in the Employer's RHWs "who do exactly the same work, effectively getting similar terms as have been negotiated by the Nurses Bargaining Association for their unionized counterparts at competitor care providers". The Employer asserted that the overtime variance would allow it "to compete on an equal footing for wage costs with those unionized competitors."

89. The Delegate's reasons addressed all three of the Employer's arguments – namely, patient needs, employee support and financial/competition considerations. With respect to the patients' needs, the Delegate accepted that the Employer provided services of "immense value" but noted that the variance concerned a waiver of minimum statutory overtime standards and thus focused her analysis on whether the variance was consistent with the *ESA* rather than on the "service or social policy issues impacting [the Employer's] operations…no matter how compelling those arguments and circumstances may be."

90. As for the matter of employee support, the Delegate's employee interviews (44 employees of the 150 employees the Delegate contacted) tended to undermine the Employer's assertion that there was strong employee support for the overtime variance predicated on a need to have greater flexibility in order to balance family, educational or other responsibilities. A clear majority (24 employees) of those interviewed supported the variance principally because they were worried about having their working hours cut back; a further 9 employees did not support the proposed variance at all, and only 6 employees indicated that they supported the proposed variance in order to assist them in meeting other work or financial obligations. We cannot say that the Delegate's conclusion that the employees primarily supported the variance because they did not wish to see their hours cut and/or because they wanted to support their patients was unreasonable. In fact, it appears to be an entirely logical conclusion that flows from her investigation. We must also express some concern regarding the other 106 employees who were contacted – repeatedly – but who refused to speak with the Delegate. If these 106 employees were fully supportive of the Employer's proposed variance, we query why there were unwilling to speak with the Delegate. Being presented with a form letter of support by an Employer's representative, and then being asked to sign it in the presence of that representative, is one thing; a confidential conversation with the Delegate is quite another. For our part, we have some concerns about the reliability of the Employer's asserted "87% employee support". However, and despite our unease, for purposes of this decision, we will accept that "a majority of the employees who will be affected by the variance are aware of its effect and approve of the application" (subsection 73(1)(a) of the *ESA*).

91. As noted earlier in our review of the Tribunal's section 73 jurisprudence, the fact that the applicant may need a variance in order to better compete in the marketplace is not, of itself, a proper basis for granting a variance. Further, the Delegate's analysis indicated – and the Employer has not challenged the Delegate's findings in this regard, either on appeal or in its submission filed in these proceedings – that the effect of the variance would *not* be to place the Employer on an equal footing with its unionized competitors. Rather, the applicable collective bargaining agreement provided offsetting benefits for the bargaining unit employees that would not be included in the proposed variance (such as the right to refuse to accept 12-hour shifts at straight time rates and a 4.6% allowance in lieu of statutory holiday pay). In addition, bargaining unit employees are protected by a grievance arbitration procedure, have the right to collectively bargain for wages and benefits and have other *Labour Relations Code* protections (for example, an

employer cannot hire replacement workers in the event of a lawful labour dispute) that are not available to the Employer's employees. The Delegate's careful analysis of the economic consequences of the proposed variance (similarly, not challenged on appeal or before us) clearly showed that the employees would forfeit a certain portion of the pay that they would otherwise be entitled to receive under the *ESA* (overtime pay/statutory holiday pay/vacation pay) without gaining an offsetting monetary benefit.

92. Thus, the employees would be financially worse off if the variance were granted and there was no cogent evidence before the Delegate of any serious compensating differential (such as work life balance) that would justify surrendering their pay. The effect of the proposed variance would be to give the Employer a labour cost and workforce allocation advantage in the marketplace relative to its unionized competitors.

93. In its appeal, the Employer argued that the Delegate was biased – this argument was rejected in the Appeal Decision (para. 22). The Employer also asserted that the Delegate made certain legal and factual findings without a proper evidentiary basis. We are unable to conclude that the Delegate made any critical findings without a proper evidentiary foundation. As noted above, in several instances, the Employer never challenged the Delegate's analysis of the evidence before her.

94. The Member accepted that the Employer's proposed variance did not provide any equivalent offsetting economic benefits to the employees (para. 37). However, he cancelled the Determination because he was not satisfied with the Delegate's analysis of the subsection 73(1)(b) issue, namely, whether the proposed variance was consistent with the purposes of the *ESA* (para. 38). We respectfully disagree.

95. In our view, the Delegate's reasons for refusing the Employer's section 73 application are transparent and intelligible and fully justify the ultimate result. The Delegate considered all of the arguments advanced by the Employer in support of the section 73 application and addressed each on the basis of the evidence before her. The Director has a discretion whether to grant or refuse a section 73 application and the Tribunal is not entitled to override the Director's exercise of his discretion unless there is a clear basis for doing so. There is no evidence of bad faith or that the Delegate proceeded with an improper motive. Her reasons are clear and intelligible. She addressed the relevant evidence before her in the context of the *ESA*, and particularly section 2. In short, she found that the Employer had not established that there were any compelling overriding considerations that would justify the employees surrendering their basic wage entitlements under the *ESA*. The Tribunal cannot quash a discretionary decision by the Director merely because the Tribunal might have reached a different conclusion. We find that the Delegate's analysis of the evidence before her, and her resulting conclusion, are reasonable and therefore entitled to deference.

Summary

96. In our view, the Director has presented an application that passes the first stage of the *Milan Holdings* test. We have summarized the Tribunal's jurisprudence regarding section 73 variances and have attempted to provide the Director, as well as the employer and employee community, with some clarification and guidance regarding the type of evidence and argument that should be submitted to, and properly considered by, the Director in a section 73 application. Finally, in our view, the Director's application should succeed on the merits.

ORDER

97. Pursuant to subsection 116(1)(b) of the *ESA*, the Appeal Decision is cancelled. The Determination now stands as a final order.

Kenneth Wm. Thornicroft **Member and Panel Chair** **Employment Standards Tribunal**	**Jacquie de Aguayo** **Chair** **Employment Standards Tribunal**	**Robert E. Groves** **Member** **Employment Standards Tribunal**