BC EST # D015/97

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act S.B.C. 1995, C. 38

- by -

Harewood Charities Bingo Society
("Harewood")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 96/628

DATE OF DECISION: **January 8, 1997**

DECISION

OVERVIEW

This is a joint appeal by Harewood Charities Bingo Society ("Harewood") and two of its employees, Kate Alton ("Alton") and Rhonda Grant ("Grant"). The appeals are made under Section 112 of the *Employment Standards Act* (the "*Act*") against Determination No. CDET 004193 which was issued by a delegate of the Director of Employment Standards on October 3, 1996. The Determination denied two applications (under Part 9 of the *Act*) to vary Section 34 - Minimum Daily Hours.

I have been able to decide this application on the basis of written submissions.

ISSUE TO BE DECIDED

The issue to be decided is whether the variance sought by Harewood is consistent with the intent of the *Act*.

FACTS

Harewood is a non-profit organization which operates and manages bingo activities on behalf of a number of charities. The bingo hall's hours of operation are from 11:30 a.m. to 11:30 p.m. (Sunday - Thursday) and from 11:30 a.m. to 2:00 a.m. on Friday and Saturday. There are five bingo sessions per day during the week and six bingo sessions on weekend days. Currently, Harewood schedules employees to work for either two or three bingo sessions per day. Bingo sessions fall into the following schedule:

11:30 a.m.	to	1:45 p.m.
1:45 p.m.		4:00 p.m.
4:00 p.m.		6:00 p.m.
6:15 p.m.		9:00 p.m.
7:15 p.m.		11:30 p.m.
11:30 p.m.		2:00 a.m.

Employees (cashiers and floorworkers) who work a total of six hours in a day do not necessarily work six consecutive hours. It is more likely that employees are scheduled to work in two blocks of three hours duration each. This schedule meets Harewood's operational needs with respect to "opening" and "closing" each bingo session. Employees receive "three hours" pay for each bingo session.

Harewood requested the Director of Employment Standards to vary Section 34 of the *Act* to allow it to employ two employees (Grant and Alton) for three hours per day. Grant and Alton support Harewood in this appeal of the Director's decision not to grant a variance.

In its request for a variance Harewood made the following statement concerning Alton:

> "In order to meet the four-hour requirement, Kate must work six hours (two three-hour shifts). As a single parent with three children and another part-time job Kate finds this requirement onerous, and would prefer to be able to work one shift only."

With respect to the other employee, Grant, Harewood made the following statement:

> "Rhonda Grant has a full-time job during the school year (September to June) and works for us 1 to 2 days per week as well. As a single parent with two children, Rhonda would prefer to work three-hour shifts rather than the four required by the *Employment Standards Act.*"

The reason schedule attached to the Determination contained the following statement by way of an explanation for denying the variance application:

> "As these applications do not meet the intent of the *Employment Standards Act*, this application is herewith denied."

ANALYSIS

Section 73 of the *Act* gives the Director the discretion to grant a variance, but it is not a unfettered discretion. The Director must be 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 consistent with the intent of the *Act*"

There is no dispute that the first condition has been met (Grant and Alton approve of the application for a variance).

The Director (or her delegate) must also be satisfied that the application is "consistent with the intent of the *Act.*" The Director's delegate denied Harewood's application because it did not meet the intent of the *Act*.

In its appeal, Harewood argues that both Grant and Alton would prefer to work one bingo session (3 hours) per day for the following reasons:

- Both employees have other part time jobs which they are seeking to supplement; however, working an additional six hours is not always reasonable nor desirable.

- Both employees are single parents with sole responsibility for two and three dependents respectively; they are comfortable handling a three hour shift but their other responsibilities make longer shifts extremely difficult to manage.

Harewood also argues that Section 34 of the *Act* restricts the ability of Grant and Alton to work three hours per day and, thereby, balance their family and other responsibilities with their ability to earn income. Grant and Alton state clearly in their appeal that they consider it to be a benefit to them to be able to work three hours per day (rather than 6 hours/day or 0 hours/day).

Section 34 of the *Act* forms an important part of the *Act's* ability to meet one of its fundamental purposes: ensuring that employees receive at least "...basic standards of compensation and conditions of employment." As noted in an earlier decision by the Tribunal (see *ARC Programs Ltd*; BC EST # D030/96):

> An applicant for a variance must make its application in light of the fact that the provisions of the *Act* are "minimum requirements" and any agreement between an employer and its employees to waive these provisions is "of no effect" (Section 4). Although the parties cannot themselves waive a minimum standard of the *Act*, this is not to say that the Director cannot do so if this is justified under Sections 72 and 73. Indeed, the Director has been given that express authority by the *Act.* Sections 72 and 73 provide a means whereby the Director is authorized to vary the minimum requirements of the *Act* in proper cases. However, the Director's authority is circumscribed by the requirement that the variance be "consistent with the intent of this *Act.*"

It is clear from the submissions made by Harewood, Grant and Alton that the scheduling of work in three-hour blocks is designed to meet the employers operational needs. Bingo sessions could be lengthened or shortened. Alton and Grant could be scheduled to work four hours per day, or more, depending on the work projected volume of business. In that respect, I see Harewood's business needs as being similar to those of any employer in a restaurant or retail business whose operational needs would be met by scheduling its employees for a three hour period.

In my view, a variance should not be granted unless there is a compelling reason for granting one. Given that Harewood operates at least twelve hours per day, seven days per week I am not convinced that Harewood cannot develop a schedule which would meet both its operational needs and the needs of Grant and Alton for part-time employment. It seems to me to be implausible that work can only be scheduled in three hour blocks for all of Harewood's employees.

In summary, my review of the submissions made by Harewood Grant and Alton, in the context of the *Act's* purposes and requirements, leads me to conclude that the variance sought by Harewood is not consistent with the intent of the *Act*.

ORDER

I order, pursuant to Section 115 (1) the Act, that Determination No. CDET 004193 be confirmed.

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Geoffrey Crampton
Chair
Employment Standards Tribunal

GC:sr