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-

James L. Armstrong

("Armstrong")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 96/683

DATE OF DECISION: January 23rd, 1997

DECISION

OVERVIEW

This is an appeal brought by James L. Armstrong ("Armstrong") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from Determination No. CDET 004532 issued by the Director of Employment Standards (the "Director") on October 31st, 1996. The Director determined that Dr. James L. Armstrong, Inc., Dr. Michael Flunkert Inc., Dr. Charmaine Fong Inc. and the AARM Dental Group (collectively, the "employers") were associated firms within section 95 of the *Act.* Further, the Director refused the employers' request for a variance which was filed pursuant to section 72(h) of the *Act* (overtime wages for employees not on a flexible work schedule). Specifically, the Director refused the grant an exemption that would have permitted two employees, Shelley Dyer and Tanya Howatt, to work shifts in excess of eight hours without being paid overtime pursuant to section 40 of the *Act.*

In his appeal, Armstrong challenges the "associated corporations" designation as well as the refusal to grant the requested variances.

I propose to deal with these two matters in turn.

THE "ASSOCIATED CORPORATIONS" DESIGNATION

Section 95 of the Act provides as follows:

> If the director considers that business, trades or undertakings are carried on by or through more than one corporation, individual, firm, syndicate or association, or any combination of them under common control or direction,
>
> > (a) the director may treat the corporations, individuals, firms, syndicates or associations, or any combination of them, as one person for the purposes of this Act, and
> >
> > (b) if so, they are jointly and separately liable for payment of the amount stated in a determination or in an order of the

> tribunal, and this Act applies to the recovery of that amount from any or all of them.

The Director's entire reasons for making the section 95 designation are set out below:

> AARM Dental Group operates as a group dental office. The business is operated through three dentists, all of whom are separately incorporated. They share common premises and some of the physical assets of the dental office. The dentists operate separate payrolls for their staff members.

In a letter dated December 18th, 1996, filed in support of his appeal, Armstrong advised that each dentist:

- treats his or her own patients and maintains a separate patient list;
- maintains separate patient billing records;
- hires (and fires) and determines the pay and benefits for their own staff;
- maintains separate books of account and banking records/accounts;
- is separately registered for the purposes of the federal goods and services tax, income tax and for provincial workers' compensation assessments; and
- holds a separate business licence.

Each of the three dentists has caused a "professional corporation" to be established and they all operate out of common premises on Hornby Street in Vancouver which are styled as the "AARM Dental Group". Although the dentists maintain separate dental practices, they do occasionally treat each other's patients. The three professional corporations have apparently entered into a "facility agreement" whereby the Flunkert and Fong companies pay a "facility fee" to the Armstrong company. Although it is not entirely clear in the material before me, it would appear that the Armstrong company owns the bulk of the AARM Dental Group's practice assets and that, in effect, Flunkert and Fong (through their companies) are paying some sort of lease fee for use of the premises and equipment. It would also appear that at least some of the AARM Dental Group staff provide services to (and in some cases have separate employment contracts with) more than one of the dentists in the AARM Dental Group. For example, Tanya Howard works for both Armstrong and Fong.

In my view, the key to section 95 is the phrase "under common control or direction". In other words, the various business entities that the Director proposes to "consolidate" into a single employer for purposes of the *Act* must all be controlled or directed by a single person or by a particular group of persons.

In the present case, all three dentists carry on a common business enterprise, namely, dentistry. Although each dentist maintains a separate patient list and books of account, there is some degree of integration among them. The dentists assist each other in terms of patient care; they arrange their separate schedules with the needs of the entire practice group in mind; they share at least some staff; the premises, and some of the equipment, are shared (even though this arrangement may be separately accounted for in a "Facility Agreement"). Indeed, this latter agreement, which formalizes the (primarily financial) terms and conditions upon which the premises and equipment will be shared, suggests that the entire AARM Dental Group is controlled and directed by all three dentists. Further, pursuant to the "Facility Agreement" "...Dr. Armstrong acts as 'managing doctor' in regards to a limited number of practice management decisions (strategic management, marketing, and management information systems)." (quoted from Armstrong's letter to the Tribunal dated December 18th, 1996). In other words, by agreement, Flunkert and Fong have given Armstrong the authority to "control and direct", on behalf of the group as a whole, certain managerial functions relating to the ongoing business affairs of the AARM Dental Group.

In light of the foregoing, I am satisfied that there was a proper basis for the Director to conclude that the AARM Dental Group was commonly controlled and directed by all three dentists (through their respective professional corporations). It must be recalled that the test set out in section 95 of the *Act* concerns the issue of common control or direction of the "consolidated" business enterprise; the fact that individual employees have entered into separate employment contracts with one or more of the constituent individuals or firms who collectively control or direct the business enterprise is but one factor to be taken into account.

The Director's primary focus when considering section 95 must be first, to determine whether or not a particular business enterprise is carried on by two or more individuals or firms and then, second, to determine if the consolidated enterprise is directed or controlled by a single individual or firm or by a common group of individuals or firms. If two related, or even independent, organizations join together (regardless of the particular legal form this "joining together" may take) and jointly control and direct a single business enterprise, then a section 95

order may be appropriate. In my view, this is precisely what has taken place in this instant case.

Accordingly, I would confirm the Director's Determination insofar as the section 95 designation is concerned.

THE VARIANCE REQUEST

Armstrong sought a variance with respect to the overtime provisions of the Act; specifically, he sought a ruling whereby both Shelley Dyer and Tanya Howatt would be obliged to work either 9, 9.5 or 10 hour shifts without receiving any overtime pay. Pursuant to section 40(1)(a) of the *Act,* an employee is entitled to be paid overtime at 1 1/2 times his or her regular hourly rate for any time worked over 8 hours and up to 11 hours in a day. Ms. Dyer normally works two 10-hour shifts each week; Ms. Howatt works from two to four days per week on a rotating schedule with shifts ranging from 8 to 10 hours in duration. As noted above, the Director refused Armstrong's variance request.

Pursuant to section 73 of the *Act,* the Director may grant a variance if:

> i) a majority of the employees affected by the variance give their informed consent; and
>
> ii) "the variance is consistent with the intent of [the] *Act".*

Both Ms. Dyer and Ms. Howatt are aware of, and consent to, the proposed variance and thus the first criterion has been satisfied. However, the Director refused to grant the variance because, in her view, the proposed variance failed to meet the second criterion.

It must be kept in mind that the central purpose of the *Act* is to establish minimum terms and conditions of employment for those employees subject to it. For this reason, and as noted by the Director, employees and employers are not free to "contract out" of the *Act* (see section 4). In essence, through the variance request, Armstrong is simply asking for permission to contract out of the *Act.* The only rationale advanced in favour of the variance is that it would allow the AARM Dental Group to "better serve the needs of our patients and our staff" (letter to Employment Standards Branch dated January 17th, 1996). However, the Director is *not* saying that Armstrong, or any of the employers, 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. This latter philosophy is inherent in the "meet or exceed" provisions set out in sections 43, 49, 61 and 69 of the *Act* whereby unionized employees can, in effect, "trade-off" certain statutory entitlements so long as, overall, the employees receive at least the same level of benefits as would be the case if the *Act* was strictly applied. I see no reason to set aside the Director's refusal to issue a variance.

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.

ORDER

Pursuant to section 115 of the *Act*, I order that Determination No. CDET 004532 be confirmed as issued.

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Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal