

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 -

ARC Programs Ltd.
("ARC")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 95/025

DATE OF DECISION: March 21, 1996

DECISION

OVERVIEW

This is an appeal by ARC Programs Ltd. (“ARC”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against Determination #CDET 000217 issued on November 28, 1995 by the Director of Employment Standards (“the Director”).

The Determination addressed the question of whether the Director should grant ARC a variance under Section 72 of the *Act*, relieving ARC and its employees from compliance with the provisions of Section 34 (minimum daily hours), Section 35 (maximum hours of work), and Section 40 (overtime wages for employees not on a flexible work schedule). The Director refused ARC’s application because of her determination that the variance which it sought was not consistent with the intent of the *Act*.

The facts are not in dispute. I have been able to decide this application on the basis of the parties’ written submissions. The Director was invited to make a written submission in response to ARC’s appeal. A copy of the director’s submission was sent to ARC and to the affected employees. A response to the Director’s submission was received from ARC and from the employees affected by the variance application.

ISSUE TO BE DECIDED

The issue in this case is whether the variance which is sought by ARC is consistent with the intent of the *Act*.

THE APPLICATION FOR A VARIANCE

ARC’s application is based on the special nature of its operations and the demands which this places on its employees. Seven employees are affected by the variance application, all of whom are counsellors in one of two community programs. The *Changes Program* is funded by the Ministry of Health and the Ministry of Attorney General. This program provides treatment services for youths demonstrating difficulty with “substance-misuse”. The *Choices Program* is funded by the Ministry of Attorney General. It provides community-based intervention services for young offenders.

The purpose of the application for a variance is to provide ARC’s employees with the flexibility to, in effect, schedule their own work hours in such a way as to best meet client and personal needs. Although I will not repeat all of the detail here, ARC’s written submissions disclosed that the workload of its counsellors is in part cyclical and in part very unpredictable. To a large extent, the counsellors must respond to clients’ need for services. They wish to do so by working longer hours when this is necessary and taking time off when they are best able to do so.

Their employer is content to have the employees create their own schedules so long as it is not obliged to pay overtime rates when employees schedule themselves to work overtime hours. (ARC will pay for overtime hours which it itself is responsible for scheduling). Neither, submits ARC, can it afford the reduced client service which would result from having employees bank hours on an overtime basis.

For their part, the employees unanimously support the application. They submit that the variance would not only help them to meet client demands but would also help them to meet personal and family commitments.

In order to achieve the objectives mentioned above, ARC and its employees desire a flexible schedule, which is not limited to a maximum of eight hours per day and a minimum of four hours per day. Instead, they wish to be permitted to average the work week to 40 hours per week, calculated on a monthly basis. This coincides with the fact that they are paid a monthly salary based on a 40 hour week. They submit that the Director's refusal to grant the variance has the effect of discriminating against ARC's employees.

THE DIRECTOR'S POSITION

Section 73 of the *Act* provides that as a pre-condition to granting a variance, the Director must be satisfied that the application is "consistent with the intent of the *Act*." As I have mentioned, the Director (through the Industrial Relations Officer who served as her delegate) refused the application because of her view that ARC's application did not satisfy this condition.

The fundamental point of difficulty with ARC's application was that it did not propose any particular work schedule. The reason for denying ARC's application was described in the following terms in the Determination:

"The application does not provide a specific proposed schedule, rather, you propose to ...balance their hours per week on a monthly basis, to the 40 hour/week rate..., effectively waiving the provisions of the *Act* regarding hours of work.

In my opinion, your proposed variance is not consistent with the intent of the *Employment Standards Act*. Accordingly, I must deny your request."

In her submission to the Tribunal, the Director reiterated that ARC's application was not consistent with the intent of the *Act*. Sections 2, 3 and 4 of the *Act* describe the fundamental purposes of the *Act* - the establishment of minimum legal standards of compensation and conditions of employment for all provincially regulated employees. In the Director's submission, the intent of the *Act* is to ensure that, apart from those employees excluded from the operation of the *Act* by regulation, all employees enjoy these basic standards in their workplaces. The impact of ARC's application is to allow the employer and employees to agree to waive the *Act*'s standards. That, says the Director, is prohibited by Section 4 of the *Act*. Moreover, Section 31 of the *Act* provides employees with the right to know their hours of work in advance of the shift. Under ARC's proposal, this could not occur.

In further support of the Determination, the Director pointed to the flexible work schedules in Appendix 1 of the Regulations and noted the significant differences between ARC's proposal and the schedules. As a result, while sympathetic to ARC's funding concerns, the Director rejected the notion that the level of business income should determine compensation levels and conditions of employment for employees who are subject to the *Act*.

ANALYSIS

ARC's application is for a variance under Section 72 of the *Act*'s provisions respecting hours of work and overtime. The material part of Section 72 for our purposes provides as follows:

72. An employer and any of the employer's employees may, in accordance with the regulations, join in a written application to the director for a variance of any of the following:
- (a) a time period specified in the definition of "temporary layoff";
 - (b) section 17 (1) (paydays);
 - (c) section 25 (special clothing);
 - (d) section 31 (3) (notice of a change in shift);
 - (e) section 34 (minimum daily hours);
 - (f) section 35 (maximum hours of work);
 - (g) section 36 (hours free from work);
 - (h) section 40 (overtime wages for employees not on a flexible work schedule);
 - (i) section 64 (notice and termination pay requirements for group terminations).

Under Section 73 of the *Act*, the Director is given the authority to vary a requirement specified in Section 72. This includes the authority to vary the requirements which ARC submits are inappropriate in its particular circumstances: minimum daily hours (s. 34), maximum hours of work (s. 35) and overtime wages for employees not on a flexible work schedule (s. 40).

Section 73 of the *Act* provides the Director with a discretion to grant ARC's request but it is not an unfettered discretion. Under Section 73, in order to accept the application, 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 is satisfied. All of the employees who will be affected by the variance are aware of its effect and approve of the application.

Section 34, 35 and 40, among others, are provisions which are important to the *Act's* assurance to employees in British Columbia that they will receive at least "basic standards of compensation and conditions of employment"(Section 2). 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*."

In this respect, the fundamental flaw in ARC's application is that it does not disclose any reasonable basis upon which the Director could grant a variance of Sections. 34, 35 and/or 40. To what standard is the Director asked to "vary" those provisions? ARC's application does not provide a schedule of work which can be substituted for the assurances which the *Act* provides to employees as minimum standards.

The Director is, in effect, asked to return the issue of hours of work and overtime to the parties. This request misconceives the purpose of Section 72 in the scheme of the *Act*.

An employer not covered by a collective agreement and its employees may attempt to secure flexibility in working conditions in a number of ways under the *Act*. Section 37 allows the employer to adopt a flexible work schedule as a matter of right, subject to establishing certain conditions and subject to the Director's ability to cancel the schedule under certain conditions. The five flexible work schedules available under this provision are set out in Appendix 1 of B.C. Regulation 396/95 .

Alternatively, the employer can apply to the Director under Section 72 for a variance of certain of the provisions of the *Act*. The Director may vary requirements of the *Act* if satisfied of the required employee support and that the variance is "consistent with the intent of the *Act*". There is nothing in Section 73 to prevent the Director from considering and authorizing a work schedule which is not found in Appendix 1 if the Director is satisfied that the schedule is otherwise consistent with the intent of the *Act*.

Finally, the Tribunal has the authority under Section 109(1)to make recommendations to the Lieutenant Governor in Council about the exclusion of "classes of persons" from all or part of the *Act* and regulations. In view of this language, I do not expect that individual employers will normally apply for an exclusion recommendation under Section 109. Instead, I expect that groups of employers which employ persons in the "class" for which an exclusion is sought will apply.

ARC's application to the Director under Section 72 more closely resembles an application for exclusion from the *Act* rather than for a variance of its provisions. It does not provide a concrete proposal which can be made the subject of a variance. Parties who secure a variance remain subject to the *Act* except to the extent that the Director's determination varies them. Even then,

the variance will not be granted unless it is consistent with the intent of the *Act*. A party, such as ARC, which submits that it requires such substantial freedom from the *Act*'s requirements is truly seeking exclusion from certain parts of the *Act*, not a variation in the way in which those parts are applied to its operations.

There is no doubt that ARC's application is brought with the full support of its employees and that both ARC and the employees believe that client service and employee contentment will be enhanced by its application. However, the Director has decided that what ARC seeks under Section 72 is not consistent with the provisions of the *Act*.

On a review of the submissions of the parties and the provisions of the *Act*, I conclude that ARC's application for review of the Determination must be dismissed. The Director has not erred in the exercise of her discretion under Section 73 of the *Act*.

ORDER

I order, pursuant to Section 115(1) of the *Act*, that Determination # CDET 000264 be confirmed. ARC's application is therefore, dismissed.

Geoffrey Crampton
Chair
Employment Standards Tribunal

March 21, 1996

Date

GC:jel