

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 -

Employees of Passage Transition House.
(Northern Society for Domestic Peace)

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 95/173

DATE OF DECISION: April 3, 1996

DECISION

OVERVIEW

This is an appeal by the employees of Passage Transition House (operated by Northern Society for Domestic Peace) under Section 112 of the *Employment Standards Act* (the “Act”), against Determination #CDET 001148. The Determination was issued by a delegate of the Director of Employment Standards on February 12, 1996.

The Determination denied an application for a variance to Part 4 of the *Act* - Hours of Work and Overtime. The application for a variance sought the Director’s approval of a 12-hour work schedule for employees at Passage Transition House. In this appeal, the employees request the Tribunal to approve the 12-hour work schedule.

This decision was made following a review of the written submissions made by the employees, the Determination and the information provided by the Director.

FACTS

On August 3, 1995 Carol Seychuk, Executive Director of the Northern Society for Domestic Peace, submitted an application to the Employment Standards Branch requesting a variance of the *Act* for two separate reasons:

1. to allow all employees working at Passage Transition House to work 12-hour shifts; and
2. to allow it to pay 3-hours pay [rather than 4 hours pay as required under Section 34(2)] to employees who attend staff meetings.

This appeal is concerned only with that part of the Determination which denies the request for a variance to permit 12-hour shift schedules for all employees.

All employees affected by the variance application have indicated their support for this appeal by co-signing the appeal.

The employees who work at Passage Transition House function as a “modified collective” so that all full-time, part-time and relief staff have input into decisions affecting employment issues and work schedules. Decisions are reached by consensus, whenever possible. When consensus is not reached, the Executive Director makes decisions.

The staff at Passage Transition House consists of the following:

- 1 Full-time Childcare Worker
- 1 Full-time Worker
- 1 Full-time Support Worker
- 4 Part-time Support Workers
- 5 Relief Support Workers

Employees have worked 12-hour shifts for approximately two years.

The 12-hour shift schedule for full-time workers consists of 4 days “ON” followed by 5 days “OFF”. This cycle repeats itself every nine weeks. Only the full-time employees are scheduled 4 ON/5 OFF. Part-time employees are scheduled to work between one and three 12-hour shifts each week. Relief staff work whenever a “blank” appears in the schedule or to replace absent full-time or part-time employees.

ISSUE TO BE DECIDED

Is the variance sought by Northern Society for Domestic Peace consistent with the intent of the *Act*?

THE DETERMINATION

In the Reason Schedule which is attached to the Determination, the Director’s delegate gives the following reasons for rejecting the variance application:

- Section 40 of the *Act* requires that employees who work more than 8 hours in a day and more than 40 hours in a week must be paid overtime wages;
- Section 37 of the *Act* and Appendix 1 of the *Regulation* permit flexible work schedules under certain circumstances;
- All of the flexible work schedules contained in Appendix 1 of the *Regulation* “...require that every employee affected by the schedule work between 35 and 40 hours per week on average throughout the cycle”;
- This application for a variance includes 12-hour shift schedules for part-time employees, thereby bringing the proposed schedule outside the intent of the *Act*; and
- While recognizing that it is not the intent of this employer to avoid paying overtime wages to part-time employees through creative scheduling, the proposed shift schedule could be used to deprive part-timers of overtime wages. The proposed shift schedule provides no additional benefit to part-

time employees to compensate them for removing their entitlement to overtime wage rates under Section 40 of the *Act*.

THE EMPLOYEES' APPEAL

In making this appeal, the employees argue that:

- The proposed shift schedule has “...proven to be of benefit to the employees and to the clients that use Passage Transition House”;
- Employees are more effective at work when they work 12-hour shifts;
- Several consecutive days off work help employees to “re-energize and to maintain a healthy mental attitude towards...demanding, high-stress and crisis-oriented work”;
- Clients find it easier to relate to two employees per day than three per day;
- Two shift changes per day permits a more effective level of service to clients; and
- Because the workplace functions as a collective, the “employer” is not involved in scheduling employees. The proposed 12-hour schedule is the result of consensus amongst all employees, allowing each employee to work as many hours as they wish.

ANALYSIS

Section 2 of the *Act* sets out the various purposes for which the legislation was enacted. The following purposes have particular relevance to this appeal: to ensure minimum standards of compensation and conditions of employment; to promote fair treatment of employees and employers; and to assist employees to meet work and family responsibilities.

Section 4 establishes the *Act* and *Regulation* as minimum requirements which cannot be waived by an agreement between an employer and employees.

Section 73 of the *Act* gives the Director the power to grant a variance if it is “...consistent with the intent of this *Act*.”

Professor Mark Thompson discusses variances at pages 127-130 of his Report, “Rights and Responsibilities in a changing Workplace” where he recommends the following principles for granting a variance:

1. The variance should not undermine the purposes and protections of the *Act*;

2. The Ministry should be satisfied that the employees affected are aware of the application for a variance and of its possible effect on them;
3. A majority of employees affected by the variance should agree to its terms; and
4. Variances should contain time limits and apply only to a single employer with the Ministry having authority to determine the extent of the variance.

Only one of these four principles is an issue in this appeal: is the proposed 12-hour shift schedule consistent with the intent of the *Act* or does it undermine its purposes and protections?

The Director's delegate is not opposed to the 12-hour shift schedule for full-time employees. As stated in the Reason Schedule, the "problem with the application of this employer is that it includes part-time staff." For that reason, the delegate concludes that the variance application "...falls outside the intent of the *Act* ." This conclusion is reinforced by the delegate's view that the flexible work schedules set out in Appendix 1 of the *B.C. Regulation 396/95* "...require that every employee affected by the schedule work between 35 and 40 hours per week on average."

However, given the unique composition of the work-force at Passage Transition House, it is clear that a variance which applied only to full-time employees would be of limited practical value since there are only three full-time employees.

There is nothing in Section 73 to prevent the Director from considering and approving a work schedule which is not found in Appendix 1 of the *Regulation*. However, the Director must be satisfied that the proposed schedule is consistent with the intent of the *Act*.

Appendix 1 establishes the following requirements for shift cycles:

- schedules may begin on any day of the week;
- the shift cycle must remain constant;
- cycles must repeat over a period of up to 8 weeks; and
- affected employees must work an average of between 35 hours and 40 hours per week at the employee's regular wage.

The proposed shift schedule repeats every 9 weeks and part-time employees would not work between 35 hours and 40 hours per week on average.

This appeal has the unanimous support of all employees affected by the variance application. They believe that both their work and their family responsibilities will be enhanced by the proposed work schedule. But, the proposed work schedule does not meet the basic standards of compensation for most of the affected employees - those who are part-time or relief workers. Appendix 1 of the *Regulation* contains flexible work schedules for full-time employees only. It

also contains a requirement that **each** employee affected by the flexible schedule must work, on average, between 35 and 40 hours per week. If the *Regulation* were intended to allow part-time employees to work flexible work schedules I would expect to see at least one example of a part-time flexible work schedule in Appendix 1. There are none. Similarly, the shift cycle requirement that employees work between 35 and 40 hours per week applies to **each** employee. If the Legislature had intended to make flexible work schedules available to part-time employees the shift cycle requirements in Appendix 1 would have stated that clearly.

I conclude, therefore, that the Director's delegate has not erred in exercising the discretion given to him under Section 73 of the *Act* and this appeal must be dismissed.

ORDER

I order, under Section 115(1) of the *Act*, that Determination #CDET 001148 be confirmed.

Geoffrey Crampton
Chair
Employment Standards Tribunal

GC:sf