EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

Jody L. Goudreau and Barbara E. Desmarais, employees of
Peace Arch Community Medical Clinic Ltd.
("Goudreau" and "Desmarais")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE NO.: 97/937 & 97/938

DATE OF DECISION: February 19, 1998

DECISION

OVERVIEW

This decision addresses two appeals filed pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) of a Variance Determination issued December 5, 1997 by a delegate of the Director of Employment Standards (the "Director"). The appeals have been filed by Jody L. Goudreau ("Goudreau") and Barbara E. Desmarais ("Desmarais"), both of whom are employees of Peace Arch Community Medical Clinic Ltd. The Variance Determination denied a request from the employer which would have allowed Goudreau and Desmarais to work a 12 hour shift without reference to the standards contained in Section 40 of the *Act*.

Both individuals challenge a factual conclusion reached by the Director. They say the conclusion that there were two employees working only one 12 hour shift a week was wrong. Desmarais says while she does work one 12 hour shift a week, she also works two 5 hour shifts a week, averaging 22 hours each week. Both also say the Director was wrong in concluding the benefits derived from working the 12 hour shift were not an adequate "trade off" against the overtime standards in the *Act*.

ISSUE TO BE DECIDED

The issue is simply whether the Director erred in denying the Variance Application for Goudreau and Desmarais.

FACTS

Peace Arch Community Medical Clinic Ltd. made an application on July 9, 1997 for a variance of Section 40 of the *Act* that would have allowed 12 hour shifts to be paid at straight time for two part time employees, Goudreau and Desmarais, and for employees performing vacation or sick time relief. The application was denied. The Director concluded the application was not "consistent with the intent of the *Act*" as it had the potential effect of giving employers (generally) an opportunity of hiring several part time employees to a reduced work week without application of the standards contained Section 40 of the *Act*.

Goudreau works an average of one 12 hour shift a week and Desmarais works an average of one 12 hour and two 5 hour shifts a week. The Director concedes a factual error in the Determination and accepts the hours of work of Desmarais were incorrectly stated. While conceding the factual error, the Director says it does not change the result, as Desmarais is still a part time employee working an average of less than 30 hours a week.

Both Goudreau and Desmarais say the variance is justified by the personal benefit they derive from working one 12 hour shift, as opposed to potentially working two shifts on different days. Both also cite the potential for increased personal costs related to travel or, alternatively, for decreased income if their hours of work are reduced to avoid overtime standards.

Goudreau also says that from a work perspective, it is easier to replace her if she is ill or on holiday. Desmarais also says there should be no difference in the application of the Act between a person who works an average of 30 hours a week, and for whom, apparently, a variance may be granted and her, who works an average of 22 hours a week, and for whom a variance was not be granted.

ANALYSIS

The *Act* allows an employer and its employees to make an application for a variance of those matters listed in Section 72, which includes, in subsection 72(h), overtime wages for employees not on a flexible work schedule. The authority to grant a variance, provided the application meets the requirements of Section 30 of the Regulation and satisfies a certain statutory threshold, is vested exclusively in the Director under Section 73 of the *Act*, which states:

> *73. (1) The director may vary a time period or requirement specified in an application under section 72 if the director is satisfied that*
>
> *(a) the majority of 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 this Act.*
>
> *(2) In addition, if the application is for a variance of a time period or a requirement of section 64 the director must be satisfied that the variation will facilitate*
>
> *(a) the preservation of the employer's operations,*
>
> *(b) the orderly reduction or closure of the employer's operations, or*
>
> *(c) the short term employment of employees for special projects.*
>
> *(3) The director may*

> *(a) specify that a variance applies to only one or more of the employer's employees,*
>
> *(b) specify an expiry date for a variance, and*
>
> *(c) attach any condition to a variance.*
>
> *(4) On being served with a determination on a variance application, the employer must display a copy of the determination in each workplace, in locations where the determination can be read by any affected employees.*

For the purposes of these appeals, there is one significant matter of note in that section: the power to grant a variance is discretionary. Subsection 72(1) must be read to say that even where an application is approved by a majority of informed employees and is consistent with the intent of the *Act*, the director is not compelled to grant it and retains a discretion to deny it. That conclusion is reached because the word "may" appears in subsection 72(1), as opposed, for example, to the word "must", which is used in subsection 72(2). As a matter of statutory interpretation, the former is to be construed as permissive and empowering while the latter is to be construed as imperative.

This poses an interesting dilemma about the scope of review of an exercise of discretion by the Director under Section 73 of the *Act*.

The Branch is an administrative body charged with enforcing minimum standards of employment in the workplaces of employees covered by the *Act*. It is deemed to be have a specialized knowledge of what is appropriate in the context of carrying out that mandate. The Director is authorized by the statute to exercise a discretion under Section 73, applying the special knowledge of the branch, to allow or deny variances from the minimum standards. The Tribunal will not interfere with that exercise of discretion unless it can be shown the exercise 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. Unreasonable, in this context, has been described as being:

> . . . a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably".
> **Associated Provincial Picture Houses v. Wednesbury Corp.** [1948] 1 K.B. 223 at 229

Absent any of these considerations, the Director even has the right to be wrong.

Section 81 of the *Act* requires the Director to include, in a determination, the reasons for it. When assessing an argument that the Director has considered immaterial factors or failed to consider material factors, the Tribunal will confine itself to an examination of the relevant determination.

Goudreau and Desmarais do not allege an abuse of power, mistake in construing the limits of her authority or any procedural irregularity on the part of the Director. They do say The Determination is wrong and that material factors were either not taken into consideration or were given insufficient weight. I do not conclude that the factual error made in the Determination affects it in any way. It is evident the result would have been the same had Desmarais' average hours of work been properly identified. It did not change the essence of the reason for the denial, which was that she was a part-time employee with less than 30 hors of work in a week.

Apart from general circumstances relating to the purposes and policies of the *Act*, the Director seems to have been influenced to deny the Variance Application by two considerations: first, that the individuals were part-time employees with less than an average of 30 hours work in a week; and second, that allowing a variance to work 12 hours a day for 1 or 2 days a week at straight time might lead to an untenable situation where employers could avoid the overtime standards of the *Act*.

Both of those considerations were properly matters the Director should have considered and were material factors in denying the Variance Application. The Director also considered the "benefit" to the individuals from the variance. That consideration was also both proper and a material factor. She concluded that the "benefit" did not outweigh the first two considerations that caused her to deny the variance. I may disagree with her, but that does not justify canceling the Determination. I cannot find the Director committed any reviewable error in denying the Variance Application and accordingly, the appeals are dismissed.

ORDER

Pursuant to Section 115 of the *Act*, the Variance Determination issued December 5, 1997 is confirmed.

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David Stevenson
Adjudicator
Employment Standards Tribunal