

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act

- by -

The Axys Group Ltd.
(" Axys ")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE NO.: 96/152

DATE OF DECISION: May 15, 1996

DECISION

OVERVIEW

This is an appeal by Axys and various employee groups of its companies pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against Determination No. CDET 001031 issued by the Director of Employment Standards (“Director”) on February 6, 1996.

The Determination addressed the question of whether the Director should grant the Axys group of companies and its employees a variance under section 72 of the *Act*, thereby relieving Axys and its employees from compliance with the provisions of section 35 (maximum hours of work).

The facts are not in dispute. I have completed my review of the written submissions made by Axys; V. Riehl, G. Henson, C. Banderkhove, L. Giles (on behalf of the employees) and the information provided by the Director.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether the variance which is being sought by Axys and its employees is consistent with the intent of the *Act*.

THE APPLICATION FOR A VARIANCE

The variance application is by Axys Group Ltd. which consists of the following companies:

Axys Environmental Consulting Ltd.
Axys Analytical Services Ltd.
Axys Environmental Systems Ltd.
Axys Group Services Ltd.
Seastar Chemicals Ltd.

The application by Axys is based on the cyclical nature of its operations and the fact that the rates which can be charged for their services do not include overtime premiums.

The purpose of the application for a variance is to provide Axys’ employees with more security of employment during periods of low activity and to permit the employees the flexibility to, in effect, schedule their own work hours in such a way to best meet the demands of the workplace and personal needs. The employees would wish to work extra hours when they choose and then take time off when it is convenient to them. The employer is content to have the employees basically create their own schedules so long as those schedules would fit within the monthly averaging period being sought by the application in order to minimize the payment of overtime.

The employee groups, by a large majority support the application and in fact, those employee groups are party to the appeal. They submit that the flexibility that the monthly averaging of hours would afford them would benefit not only the company but help them to meet personal and family commitments.

In order to achieve the objectives outlined above, Axys and its employees desire a flexible schedule, which is not limited to a maximum of 8 hours per day and 40 hours per week. Instead they wish to be permitted to average their work on a monthly basis calculated on a monthly standard of hours ranging from 150 to 172.5 hours.

THE DIRECTORS 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 refused the application because of the view that Axys’ application did not satisfy this condition.

The fundamental point of difficulty with Axys’ application was that it did not set forth any proposed work schedule. The reason for denying Axys’ application was described in the following terms in the Determination :

“The company does not propose to establish a set schedule of hours for its employees, either on a daily or some other periodic basis. Rather, what it seeks is the authority to schedule work on an ad hoc basis to allow it to meet the variable demands of its clients, and pay overtime only when a monthly standard has been met.

In my view, this is not consistent with the intent of the *Act* in relation to the payment of overtime on a daily basis or weekly basis, or on some other basis tied to a regular schedule of daily hours and days of work.”

The Director’s submission to the Tribunal reiterates the position taken with respect to an earlier appeal, *ARC Programs Ltd. BC EST #D030/96*, which also concerned a variance application. Specifically, the Director stated that the 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*, that is, 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 basis standards in their workplaces. The impact of Axys’ application is to allow the employer and the 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 Axys’ proposal, this could not occur.

In further support of the Determination, the Director pointed to the flexible work schedules in Appendix 1 of the Employment Standard Regulation (“Regulation”) and noted the significant differences between Axys’ proposal and the schedules. As a result, while sympathetic to Axys’ concerns with respect to the cyclical nature of its business and the wishes of the employees, the Director rejected the notion that these concerns should determine the compensation levels and conditions of employment for employees who are subject to the *Act*.

ANALYSIS

Axys’ 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 my purpose provides as follows:

Application for variance

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 Axys submits are inappropriate in its particular circumstances: 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 Axys’ 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 this Act.

There is no dispute that the first condition is satisfied. The submissions reflect that a substantial majority of all of the employees who will be affected by the variance are aware of its effect and approve of the application.

Section 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). Axys 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 the *Act*."

In this respect, the fundamental flaw in Axys' application is that it does not disclose any reasonable basis upon which the Director could grant a variance of sections 35 and/or 40. The 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, being asked to return the issue of hours of work and overtime to the parties. This request misconceives the purpose of section 72 in the overall context of the *Act*.

The application by Axys 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 provisions of the *Act*, except to the extent covered by the variance granted by the Director.

There is no doubt that Axys' application is brought with the support of a substantial majority of its employees and that both Axys and its employees believe that the operation of the companies and employee contentment will be enhanced by its application. However, the Director has decided that what Axys seeks under section 72 is not consistent with the provisions of the *Act*.

I conclude therefore, on the basis of the information provided, that the variance applied for is not consistent with the intent of the *Act* and the appeal must be dismissed.

ORDER

Pursuant to Section 115 of *Act*, I order that Determination No. CDET 001031 be confirmed. The application by Axys is therefore, dismissed.

“Hans Suhr”

Hans Suhr
Adjudicator
Employment Standards Tribunal

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