Employment Standards TRIBUNAL

An appeal

- by -

Kaslo and District Public Library, Eva J.A. Kelemen and Annie Reynolds
("KDPL, Ms. Kelemen and Ms. Reynolds")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Shafik Bhalloo

FILE No.: 2012A/70

DATE OF DECISION: August 16, 2012

DECISION

SUBMISSIONS

Eva J.A. Kelemen	on her own behalf and on behalf of Kaslo and District Public Library
Annie Reynolds	on her own behalf and on behalf of Kaslo and District Public Library
Joe Johnston	on behalf of Kaslo and District Public Library
Ed Wall	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Kaslo and District Public Library ("KDPL"), Eva J.A. Kelemen ("Ms. Kelemen") and Annie Reynolds ("Ms. Reynolds") (collectively the "Appellants"), pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director of Employment Standards (the "Director") issued May 17, 2012.

2. On December 6, 2011, the Appellants made an application to the Director under section 72 of the *Act* for a variance of the provisions of section 35 of the *Act* (maximum hours of work before overtime applies).

3. The Director's delegate denied the application, finding that the application did not meet the requirements of section 73(1)(b) of the *Act*.

4. The Appellants contend that the Director erred in law and failed to observe the principles of natural justice in making the Determination.

5. Pursuant to section 36 of the *Administrative Tribunals Act* (the "*ATA*"), which is incorporated in section 103 of the *Act* and Rule 17 of the Tribunal's *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. None of the parties seek an oral hearing on this appeal and, in my view, this appeal can be adjudicated on the basis of the section 112(5) "record", the written submissions of the parties and the Reasons for the Determination.

ISSUE

6. The issues in this appeal are twofold, namely:

    (i) Did the delegate err in law in denying the Appellants' application for a variance of section 35 of the *Act*?

    (ii) Did the delegate fail to observe the principles of natural justice in making the Determination?

THE FACTS

7. The Appellants applied pursuant to section 72 of the *Act* to vary the provisions of section 35 of the *Act* (maximum hours of work before overtime applies). In the application, the Appellants requested that Ms. Kelemen and Ms. Reynolds be permitted to work up to ten (10) hours in a day before overtime applies to meet the requirements of unscheduled work, such as programs, events, meetings, training sessions and administrative time. The Appellants argued that this would allow Ms. Kelemen and Ms. Reynolds, who are both part-time employees working 20 and 16 hours per week respectively, to schedule administrative time more efficiently, respond to *ad hoc* requirements such as evening author events and training opportunities as well as spend more time at home in pursuit of what KDPL described as the "Kootenay" lifestyle.

8. The delegate, after considering the provisions of section 73(1)(1.1), 2, and 4 of the *Act*, denied the Appellants' application for a variance on the basis of the following reasons:

> The director is responsible for enforcing minimum standards of employment of employees covered by the Act. Before the Director will grant a variance application, the applicants must demonstrate two things: that a majority of affected employees understand and approve of the application and, equally importantly, that the variance is not inconsistent with the purposes of the Act. The Director will not grant a variance solely on the basis that a majority of the affected employees have agreed to it. The application must also demonstrate that the relaxation of minimum employment standards in such things as daily overtime is balanced by an improvement in other factors such as meeting work and family responsibilities, so that the proposed work schedule remains consistent with the purposes of the Act. Simple opportunity for employment is not of itself a sufficient benefit to justify a variance.
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> This variance request is tantamount to a request for an overtime waiver. Neither employee is scheduled for more than 24 hours per week, thus both have the opportunity to meet family responsibilities and pursue other interests. Responding to ad hoc requirements such as programs, events, meetings, and training sessions is simply an operational requirement of the employer. All employers in British Columbia must meet the operational requirements of their businesses within the confines of the Act. Certainly the administrative duties of the employees can be scheduled in a way that does not incur overtime hours.
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> …
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> This application does not identify a benefit to the employees which is sufficient to justify the requested alteration of their entitlement to a minimum employment standard.
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> Based on my investigation, I find that the application from Kaslo and District Public Library and Eva J.A. Kelemen and Annie Reynolds does not meet the requirements of section 73(1)(b) of the Act, in that it is not consistent with the intent of the Act. I therefore, decline to grant the variance as requested.

SUBMISSIONS OF THE APPELLANTS

9. I have reviewed the Appellants' appeal submissions carefully and while I do not intend to reiterate those submissions verbatim here, I note that the Appellants for the most part argue that the delegate has fettered his discretion and either failed to give consideration or effect to relevant considerations or taken an unnecessarily narrow or limited view of facts and provisions of the *Act* relevant to the variance application.

10. The Appellants also disagree with the conclusion of the delegate in the variance application as unreasonable, stating that the conclusion has the effect of "(i)mposing *ad hoc* administrative duties upon a volunteer board" and ignores the physical limitations the employer is faced with, namely, there is "only one small office" and "most working hours must correspond to 'open public' hours".

11. The Appellants also reiterate the argument made in the variance application regarding the flexibility the variance would afford Ms. Reynolds and Ms. Kelemen and add that the delegate has mischaracterized or misinterpreted the issue in the Determination. More particularly, the Appellants argue that it is not the employer that is seeking to impose overtime work requirements on Ms. Reynolds and Ms. Kelemen but instead it is these employees who would have the option to work overtime at straight time. More particularly, the Appellants argue the variance would allow the concerned employees "the option of completing time sensitive work to prevent coming into work on a normal day off, or electing to not work the extra hours that day and complete work on a non-scheduled work day."

12. I also note that the Appellants argue that the "employer is publicly funded organization that does not earn extra income from extra work of its employees" which effectively "limits the ability of the employer to pay overtime." The Appellants argue that the "employer has financial restraints that necessitates the employer to have a ban on overtime".

13. The Appellants have also alleged "bias" on the part of the delegate in the decision-making based on the Appellants' assertion that the delegate, in the "preliminary discussions", indicated that "(v)ariances do not apply to such part-time workers" and the delegate's dismissal of the variation application is "unreasoned".

SUBMISSIONS OF THE DIRECTOR

14. The Director submits, in response to the breach of natural justice allegation of the Appellants, that the latter have not argued they did not have an opportunity to present their evidence, nor have they argued the delegate was biased in his decision-making and therefore there is no denial of natural justice.

15. With respect to the error of law ground of appeal, the Director states that there is no statutory right to be granted a variance under the *Act*. Variances are granted at the Director's discretion, if the Director is satisfied that the majority of the employees approve of the variance and if the variance is not inconsistent with the purposes of the *Act*. In the case at hand, the Director submits that the variance requested is inconsistent with the primary purpose of the *Act*, namely, to ensure employees in British Columbia receive at least basic standards of compensation and conditions of employment. In the case at hand, the Director states that the Appellants applied for a variation to allow the employees concerned to work overtime on an *ad hoc* basis to respond to special programs, training opportunities and events. According to the Director, to permit the employer to impose overtime work at any time without requiring payment of overtime wages is inconsistent with purposes of the *Act* and offends section 4 of the *Act* as it waives the overtime provisions whenever the employer wishes to do so.

ANALYSIS

16. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

(a) the director erred in law;

(b) the director failed to observe the principles of natural justice in making the determination; or

(c) evidence has become available that was not available at the time the determination was being made.

17. In any appeal of a determination, the burden of establishing the grounds for an appeal rests with the appellant. In this case, the Appellants must provide persuasive and compelling evidence that there were errors of law in the Determination, as alleged, or that the delegate failed to observe the principles of natural justice.

18. Section 73 of the *Act* provides:

> 73 (1) The director may vary a time period or requirement specified in an application under section 72 if the director is satisfied that
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> (a) a majority of the employees who will be affected by the variance are aware of its effect and approve of the application, and
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> (b) the variance is not inconsistent with the purposes of this Act set out in section 2.
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> (1.1) The application and operation of a variance under this Part must not be interpreted as a waiver described in section 4.

19. Section 4 of the *Act* provides:

> The requirements of this Act and the regulations are minimum requirements and an agreement to waive any of those requirements, not being an agreement referred to in section 3(2) or (4), has no effect.

20. Having set out the relevant provisions of the *Act*, it is important to note that section 73 of the *Act* vests the Director with discretionary authority to approve or disapprove a variance application. The Tribunal will not interfere with the exercise of discretion by the Director unless it can be shown that there has been an abuse of power or jurisdictional error or that the Director has acted unreasonably or has failed to exercise his discretion within well-established legal principles.

21. The Tribunal, in *Joady L. Goudreau et al*, BC EST # D066/98, observed:

> 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 having a specialized knowledge of what is appropriate in the context of carrying out that mandate. The Director is authorized by the statute to exercise 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:
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> > …a general description of the things that must not be done. For instance, a person entrusted with 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
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> Absent any of these considerations, the Director even has the right to be wrong.
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> 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.

22. Having delineated the governing law in this appeal and having considered the submissions of the Appellants and the Director and reviewed the section 112 "record", I find the Appellants have failed to adduce persuasive and compelling evidence of any reviewable errors on the part of the delegate in the Determination. I note that while the delegate's reasons in denying the variation application are brief, I do not find them unreasonable. I find the delegate properly delineated and considered the law and policy considerations governing variation applications and weighed the particulars of this case in arriving at the decision he did. More particularly, the delegate, in the Reasons for the Determination, considered the arguments advanced by the Appellants regarding the employer's

business and inability to pay overtime, the employees' wishes and the work and family responsibility of the part-time employees concerned. In my view, it was open for the delegate to conclude as he did.

23. The applicable test in an appeal of a determination involving an exercise of discretionary power by the delegate is not whether this Tribunal would have arrived at the same conclusion as the delegate. The Tribunal will only interfere with a discretionary authority of the delegate where it can be shown on a preponderance of evidence that the delegate abused his power or made a mistake in construing the limits of his authority or engaged in any procedural irregularity or made an unreasonable decision. I do not find this to be the case here. I do not find any error of law or breach of natural justice. In the circumstances, I am dismissing the Appeal.

ORDER

24. Pursuant to Section 115 of the *Act*, I order the Determination dated May 17, 2012, be confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal