

An appeal

- by -

GoodLife Fitness Centres Inc.
(“Good Life”)

- 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.: 2014A/84

DATE OF DECISION: September 26, 2014

DECISION

SUBMISSIONS

Kyle Hamilton

counsel for GoodLife Fitness Centres Inc.

Tami L. Wilson

on behalf of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), GoodLife Fitness Centres Inc. (“GoodLife”) has filed an appeal of a determination issued by the Director of Employment Standards (the “Director”) on June 5, 2014 (the “Determination”).
2. On December 18, 2013, GoodLife made an application to the Director under section 72 of the *Act* for a variance of the provisions of section 34(1) of the *Act* (minimum daily hours) as it relates to individuals employed in the role of group exercise instructors.
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. GoodLife contends that the Director failed to observe the principles of natural justice in making the Determination.
5. By way of a remedy, GoodLife is seeking the Employment Standards Tribunal (the “Tribunal”) to change or vary the Determination, or to cancel it or to refer it back to the Director.
6. Pursuant to section 114 of the *Act*, the Tribunal has discretionary power to dismiss all or part of an appeal without seeking submissions from the parties. In this case, I considered GoodLife’s appeal based on the appeal application and written submissions of GoodLife’s counsel, the Reasons for the Determination (the “Reasons”), and the section 112(5) “record” that was before the Director when the Determination was made. I decided not to dismiss the appeal under section 114 of the *Act*, and by way of a letter dated September 3, 2014, asked the Director to provide written submissions on the merits of the appeal. The deadline for the submissions was set at 4:00 p.m. on September 17, 2014. On September 9, 2014, the Tribunal received correspondence dated September 8, 2014, from the Director advising that the Director has no further submissions to make.
7. Pursuant to section 36 of the *Administrative Tribunals Act* (the “*ATA*”), which is incorporated in the *Act* pursuant to s. 103, and Rule 8 of the Tribunal’s *Rules of Practice and Procedure* (the “*Rules*”), the Tribunal may hold any combination of written, electronic and oral hearings. In this appeal, none of the parties are requesting an oral hearing and, in my view, the appeal can be adjudicated on the basis of the “record”, the written submissions of the parties, the Determination and the Reasons.

ISSUE

8. Did the Director fail to observe the principles of natural justice in making the Determination by failing to consider material facts and failing to provide her analysis in coming to her decision?

THE FACTS

9. On December 18, 2013, GoodLife filed a variance application with the Director requesting a variance with regard to the minimum daily hours of work set out in section 34 of the *Act* from the statutory two (2) hours to ½ hour minimum for all its group exercise instructors (the “Instructors”), and sought the variance to be in place for a maximum permitted period of two (2) years.
10. The majority of the Instructors that would be affected by the variance knew about the variance application and agreed with it.
11. In support of the application, GoodLife made the following submissions:
 - [GoodLife] offers a number of group exercise classes to its clients, which classes last between 15 and 90 minutes in length;
 - Instructors are paid an hourly wage rate between \$19.00 and \$50.00 per hour, with most instructors being paid between \$25.00 and \$40.00 per hour;
 - most Instructors have career and/or family commitments in addition to their employment as group exercise Instructors;
 - most Instructors teach classes for one or more of the following reasons:
 - (i) personal reward and enjoyment;
 - (ii) to augment their primary income stream with the second income stream that these classes provide; and
 - (iii) the flexibility in being able to schedule teaching time around their other commitments.
 - classes are scheduled either before or after regular working hours or over Instructors’ lunch hours, based on Instructor availability as provided by the Instructors;
 - most Instructors choose to teach only one class on any given day;
 - typically, Instructors are not available to be at the club for much longer than the duration of their scheduled class; and
 - requiring Instructors to stay at the club for a minimum of 2 hours every time that they only taught one class per day would create a hardship for many (if not most) of the Instructors.
12. GoodLife further argued that the variance sought would further the purposes of the *Act* set out in section 2(b), (e) and (f).
13. GoodLife also argued that requiring Instructors to remain at the club for 2 hours every class would create a hardship on Instructors who are trying to balance career and family responsibilities in addition to teaching a group exercise class. Most Instructors would not be able to do so, and would be forced to stop teaching classes.
14. GoodLife also argued that the alternative solution of paying Instructors for 2 hours of work, whether or not they are at the club for 2 hours, would create an inequity and unfairness amongst the employees, as an Instructor who taught two 60-minute classes in one day would be paid the same amount as one who taught a 30-minute class. This would be contrary to the purposes of the *Act* set out in section 2(b).

15. GoodLife also argued that either of the foregoing alternatives would create situations whereby Good Life would have difficulty retaining talented and qualified Instructors.
16. In the Reasons, the delegate considered section 73 of the *Act*, and noted that, although the agreement of the employees is a necessary condition, it is not sufficient to the granting of a variance. The delegate concluded that the application had also to be consistent with the *intent and purposes* of the *Act* as set out sections 2 and 4.
17. The delegate also went on to state that the Director would 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 minimum daily pay or 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*.
18. The delegate also noted that simply having an opportunity for employment is not, of itself, a sufficient benefit to justify a variance.
19. Having set out the applicable principles in a variation application, the delegate then went on to conclude that GoodLife's application for variance was more like a request for an exemption from the requirements of section 34(1) of the *Act* and reasoned as follows:

There is no dispute that a majority of Employees that will be affected by the variance know about and agree to the application.

Most Employees teach part time fitness classes. The most common class taught is for 60 minutes. However, the Employer also offers classes of between 15 minutes and 90 minutes in length.

The Employees' hours of work vary depending on their own availability, and the classes they are selected to teach. Many Employees have other jobs.

The Employer effectively says the two hour minimum daily pay is unfair and unreasonable in these circumstances. They say Employees appreciate the flexibility of shorter hours of work.

The Employer is requesting that the minimum daily pay requirement be reduced to a half hour per day for all group exercise instructors.

Two hours is a relatively short period of time to be paid on any given day. One half hour of pay per day is a very significant reduction in the minimum daily pay requirement. I find that the application for a variance to permit the payment of a half hour minimum daily pay per day instead of two hours does not meet the purpose and intent of the Act. (italics mine)

...

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.

Based on my investigation, I find that the application from GoodLife Fitness Centres Inc. and the group exercise instructors 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*.

SUBMISSIONS OF GOODLIFE

20. As indicated previously, the sole ground of appeal invoked by GoodLife is that the delegate failed to observe the principles of natural justice in making the Determination.
21. I have carefully reviewed counsel's submissions and, while I do not intend to reiterate them in full here, I do intend to summarize them very briefly.

22. Goodlife refers to the decision in *Joda M. Takarabe et. al.* (BC EST # D160/98) wherein the Tribunal relied on the decision in *Jody L. Goudreau et al* (BC EST # D066/98) which set out the circumstances in which the Tribunal would interfere with the Director's exercise of her discretion in administering the *Act*. Based on the latter decision, it argues that the Director, while correctly citing the relevant sections of the *Act* in the Determination and setting out the considerations that must be taken into account when deciding whether or not to grant a variance, failed to consider material facts and provide any analysis of how she applied the law to the facts of the application before her, and thus acted unreasonably or in breach of natural justice.
23. Goodlife then goes on to argue that the Director failed to consider the following relevant factors in GoodLife's application in making the Determination:
- (a) most Instructors in BC are paid a wage rate between \$25 and \$40 per hour;
 - (b) classes are offered outside of regular working hours to fit around both client and Instructor need;
 - (c) typically Instructors will teach before or after regular work hours or over their lunch hours and are typically unavailable to be at the club for much longer than the duration of their scheduled class;
 - (d) most of the [GoodLife's] Instructors have other career or family commitments and would be unable to teach a class and receive an often essential second income stream if they were required to attend at the club for two hours every class;
 - (e) many Instructors are only available to teach one class on any given day; and
 - (f) requiring Instructors to stay at the club for two hours every time they teach class would create a hardship for many of GoodLife's Instructors given their career and family commitments.
24. Goodlife argues that the above factors are important and relevant with regard to whether or not the requested variance meets the intent and purposes of the *Act*.
25. With respect to GoodLife's contention that the Director failed to provide any analysis on which she based her decision, GoodLife notes that the Director simply stated that "two hours is a relatively short period of time to be paid on any given day. One half hour of pay per day is a very significant reduction in the minimum daily pay requirement", and that the application for a variance "does not meet the purpose and intent of the *Act*". Goodlife relies on the Tribunal's decision in *Victoria Confederation of Parent Advisory Councils*, (BC EST # D436/01) to argue that the Director's conclusion above is lacking a degree of analysis sufficient to identify the considerations that comprised that conclusion.
26. Goodlife also submits that the Director fails to set out how she concluded that "the application for a variance to permit the payment of a half hour minimum daily pay per day instead of two hours does not meet the purpose or intent of the *Act*" and how the limited facts that the Director considered and the various purposes outlined in section 2 of the *Act* factored into that conclusion.
27. Goodlife also submits that the Director's decision appears to have essentially ignored GoodLife's argument addressing how Goodlife's application complies with three of the stated purposes of the *Act* in section 2.
28. Finally, Goodlife relies on the Tribunal's decision in *Sun Peaks Mountain Resort Association* (BC EST # D434/01) to argue that, in this case, the Director has failed to consider the features of the particular employment, the compensation and conditions of the employment as a whole, or the impact on GoodLife to operate without a variance, and asks the Tribunal to cancel the Determination and grant the variance or, in the alternative, request the Director's Determination be cancelled and the matter be referred back to the Director to more thoroughly consider the facts and considerations set out in GoodLife's variance application.

SUBMISSIONS OF THE DIRECTOR

29. As indicated earlier, the Director, by way of correspondence dated September 8, 2014, advised the Tribunal that the Director has no further submissions to make.

ANALYSIS

30. GoodLife's appeal is grounded in section 112(1)(b) of the *Act*; that is, the Director failed to observe the principles of natural justice in making the Determination.
31. The onus of establishing the grounds for an appeal rests with GoodLife. GoodLife must provide persuasive and compelling evidence that the delegate failed to observe the principles of natural justice in making the Determination.
32. Section 73 of the *Act* provides:

Power to grant variance

- 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) 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 not inconsistent with the purposes of this Act set out in section 2.
- (1.1) The application and operation of a variance under this Part must not be interpreted as a waiver described in section 4.
33. Section 73 vests the Director with broad discretionary authority to approve or disapprove of variance applications. The approach taken by the Tribunal when asked to interfere with an exercise of discretion by the Director under section 73(1) of the *Act* is delineated in the following statement from *Joda M. Takarabe, supra*:

In *Jody L. Goudreau et al* (BC EST # D066/98), the Tribunal recognized that the Director is 'an administrative body charged with enforcing minimum standards of employment...' and '...is deemed to have a specialized knowledge of what is appropriate in the context of carrying out that mandate.' The Tribunal also set out, at page 4, its views about the circumstances under which it would interfere with the Director's exercise of her discretion in administering the *Act*:

The Tribunal will not interfere with the exercise of discretion unless it can be shown that 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 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. Wednesday 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.

In *Boulis v. Minister of Manpower and Immigration* [(1972), 26 D.L.R. (3d) 216 (S.C.C.)] the Supreme Court of Canada decided that statutory discretion must be exercised within ‘well established legal principles’. In other words, the Director must exercise her discretion for *bona fide* reasons, must not be arbitrary and must not base her decision on irrelevant considerations.

34. I note that GoodLife does not suggest in this appeal that the Director abused her power or acted in bad faith. The appeal questions whether the Director failed to properly consider all of the relevant considerations in GoodLife’s variance application and also questions the Director’s analysis, or lack of it, with regard to the factors taken into consideration in her decision.
35. As previously indicated, the onus is on GoodLife to show that the Tribunal, in this case, is justified in interfering with the exercise of discretion. In this regard, the Tribunal will confine itself to an examination of the Determination.
36. Having said this, I note that in *Sun Peaks Mountain Resort Association, supra*, the Tribunal made the following instructive comments in context of a variance application when determining intent of the *Act*:

It is clear from a reading of the *Act* as a whole that the main purpose and objective, and the fundamental statement of the intent of the *Act*, is that found in Section 2(a) – to ensure employees are provided with basic standards of compensation and conditions of employment. As the Tribunal has noted in several decisions, adopting the comments of the Supreme Court of Canada in *Machtiger v. HOJ Industries Ltd.*, [1992] 1 SCR 986, the *Act* is remedial legislation governing employment and should be read in a way that encourages employers to comply with the minimum requirements found in the *Act* and extends protection of the *Act* to as many employees as possible. As noted above, a variance that derogates from the basic standards of compensation and conditions of employment is not consistent with the intent of the *Act*. Having said that, however, it is wrong to suggest that Section 2(a) expresses the full intent of the *Act*.

Such a suggestion would ignore the other statements of purpose found in Section 2 of the *Act*. Of particular note in the context of the variance application made by the Association (as they will be in many variance applications) are the objectives of promoting fair treatment for employees and employers, fostering a productive and efficient workforce and contributing in assisting employees to meet work and family responsibilities. The Legislature must have intended those statements of purpose be given some effect in the context of administering the *Act*. There is nothing in the reasons for the Determination indicating these matters have been considered or, if they have, what effect they have or have not been given. These are necessary elements to any Determination, particularly one that denies a variance.

37. In the case at hand, while the Determination concluded that GoodLife’s variance application did not meet the purpose and intent of the *Act*, I find the accompanying reasons for that conclusion are unclear or lacking. It is not enough to simply state in the reasons the conclusion; reasons must contain a degree of analysis sufficient to identify the considerations that comprise the conclusion. Here, more specifically, the reasons lack sufficient analysis to identify what relevant considerations and purposes outlined in section 2 of the *Act* factored into the Director’s conclusion. I note, for example, the Director states that an application for a variance must “also demonstrate that the relaxation of minimum employment standards ... is balanced by an improvement in other factors such as meeting work and family responsibilities”, however, the Director does not address GoodLife’s following submission in the application:

... most of GroupLife's group exercise instructors have other career or family commitments and teach classes for the personal reward and enjoyment they get from it, as well as for the oftentimes essential second income stream these classes provide. They appreciate the flexibility in being able to schedule teaching time around their other commitments.

38. Overall, I find the Director fails to discuss in the Reasons the section 2 purposes in context of the facts in this case or to analyze the factors, positive or negative, GoodLife raises in support of its variance application or address those relevant considerations identified by counsel in GoodLife's appeal submissions that formed part of GoodLife's application for variance. To borrow the language in the Tribunal's decision in *Sun Peaks Mountain Resort Association, supra*, "(t)hese are necessary elements to any Determination, particularly one that denies variance". In the circumstances, I find GoodLife has made out a sufficient case for the Tribunal to interfere with the Director's exercise of discretion.

ORDER

39. Pursuant to section 115 of the *Act*, I order the Determination, dated June 5, 2014, be cancelled and the matter referred back to the Director.

Shafik Bhalloo
Member
Employment Standards Tribunal