

An appeal

- by -

Lee Granberg and Patsy Granberg operating as Piscine Energetics

- 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

**TRIBUNAL MEMBER:** Carol Ann Hart

**FILE No.:** 2004A/73

**DATE OF DECISION:** July 5, 2004

## DECISION

### SUBMISSIONS

Patsy Granberg	on behalf of Piscine Energetics
Graham Jickling	on behalf of the Director

### OVERVIEW

This is an appeal by Lee Granberg and Patsy Granberg operating as Piscine Energetics ("Piscine Energetics") pursuant to section 112 of the *Employment Standards Act* (the "*Act*") of a Determination issued on March 12, 2004 (the "Determination") by a delegate of the Director of Employment Standards (the "Director").

The Determination addressed an application for a variance under section 72 of the *Act* relieving Piscine Energetics and its employees from compliance with the provisions of section 40 of the *Act* (overtime wages for employees not on a flexible work schedule).

The appeal is brought on the grounds that there was new evidence which was not available at the time the Determination was made.

### ISSUE

The issue in this case is whether the appeal should be allowed on the basis that there was evidence which had become available that was not available at the time the Determination was being made.

### THE FACTS

An application dated March 2, 2004 was made to the Director for a variance of Section 40 of the *Act* to permit employees to work longer shifts without being paid overtime rates, and hours in excess of forty hours per week.

Piscine Energetics conducts commercial fishing operations harvesting mysis from Okanagan Lake. In the submissions filed by Piscine Energetics, details were provided about the seasonal fishing operation. To briefly summarize, the work is conducted from April to October at night and is limited by weather conditions.

In the Determination, it was noted that the application did not meet the requirements of Subsections 73(1)(b) and 73(1.1) of the *Act*, as it was not consistent with the intent of the *Act*.

It was also decided by the Director's delegate that the application did not meet the requirements of Section 30 of the *Employment Standards Regulation* (the "*Regulation*"). The application did not include the variance requested; a proposed schedule; or the name and home telephone number of each employee. In addition, the majority of the employees who would be affected by the variance had not signed the application.

In this appeal, Piscine Energetics provided a document dated April 16, 2004 which six employees had signed to confirm that they supported the application for a variance. A proposed schedule was also provided.

## **ARGUMENT**

Piscine Energetics requested that the application for a variance be reconsidered based on the new evidence which was submitted with the appeal.

The Director's delegate argued that the appellant employer appeared to be making a new application for a variance through this appeal. He indicated that Piscine Energetics had been advised that a new application for a variance could be submitted for consideration, but noted that no such application had been received.

## **ANALYSIS**

The burden rests with Piscine Energetics to establish that the appeal of the Determination should be allowed.

Pursuant to Section 72 of the *Act* the Director may grant a variance of several provisions of the *Act* including Section 40 (overtime wages for employees not on a flexible work schedule). The relevant part of section 72 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:...

(h) section 40 (overtime wages for employees not working under an averaging agreement);...

Section 73 of the *Act* provides that the Director has authority to grant a variance of a requirement specified in section 72 of the *Act*. That provision states in part:

### **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....

The Director has discretion under section 73 of the *Act* to grant a variance subject to two conditions which are set out in Subsection 73(1). The first requirement is that the Director must be satisfied that the affected employees are aware of the effect of the variance and approve of its application. The second requirement is that the Director must be satisfied that the variance is not inconsistent with the purposes of the *Act* as set out in Section 2 of the *Act*.

The Director's delegate found that the application did not meet the requirements of Subsections 73(1)(b) and 73(1.1) of the *Act*, as it was not consistent with the intent of the *Act*. The Director's delegate also concluded that the application did not meet the requirements of Section 30 of the *Regulation* because the application did not include the variance requested; a proposed schedule; or the name and home telephone number of each employee. In addition, the majority of the employees who would be affected by the variance had not signed the application.

In this appeal, Piscine Energetics has attempted to provide the information required under Section 30 of the *Regulation* which was not provided to the Director's delegate during the investigation.

Subsection 112(1) of the *Act* sets out the grounds on which a determination may be appealed as follows:

**Appeal of director's determination**

**112 (1)** Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:

- (a) the director erred in law;
- (b) the director failed to observe the principles of natural justice in making the determination;
- (c) evidence has become available that was not available at the time the determination was being made.

In *Re Tri-West Tractor Ltd.* BC EST #D268/96 a party did not provide information which was reasonably available and relevant to the investigation, and that party later sought to introduce that information on appeal. The Tribunal wrote as follows:

This Tribunal will not allow appellants to "sit in the weeds", failing or refusing to cooperate with the delegate in providing reasons for the termination of an employee and later filing appeals of the Determination when they disagree with it. An appeal under Section 112 of the *Act* is not a complete re-examination of the complaint. It is an appeal of a decision already made for the purpose of determining whether that decision was correct in the context of the facts and the statutory provisions and policies. The Tribunal will not necessarily foreclose any party to an appeal from bringing forward evidence in support of their case, but we will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative process.

In my view, all of the new information presented in support of the appeal was available to Piscine Energetics at the time of the investigation. The new information submitted with the appeal was the result of a more thorough preparation than was done for the investigation. The appeal is an attempt to strengthen the case presented to the Director's delegate after the request for a variance was denied.

In order to succeed in an appeal on the basis that new evidence has become available, the appellant must not only show that the new information was not considered by the Director's delegate. The new information the party seeks to submit must have been unavailable at the time of the investigation. The appeal is not a second opportunity to bring forward the case which should have been presented to the Director's delegate.

I have determined that the Director's delegate did not err in the exercise of the discretion given to him under section 73 of the *Act*. The application of Piscine Energetics to appeal the Determination is dismissed.

**ORDER**

Pursuant to Section 115 of the Act, the Determination dated March 12, 2004 is confirmed.

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**Carol Ann Hart**  
**Member**  
**Employment Standards Tribunal**