Employment Standards TRIBUNAL

An appeal

- by -

Brooke Radiology Associates/Remtek Enterprises Inc.
("Brooke/Remtek")

- 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

ADJUDICATOR: David B. Stevenson

FILE No.: 2000/871

DATE OF DECISION: March 12, 2001

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Brooke Radiology Associates/Remtek Enterprises Inc. ("Brooke/Remtek"), on its own behalf and on behalf of certain employees, of a Determination of the Director of Employment Standards (the "Director") dated November 28, 2000. The Determination denied a request for a variance to the provisions of Section 40 of the *Act*.

The appeal challenges the validity of the conclusions reached by the Director in denying the request for a variance.

ISSUE

The issue is whether Brooke/Remtek has shown there any error in the decision of the Director to deny the request for a variance.

FACTS

Brooke/Remtek and certain of its employees sought a variance to the provisions of Section 40 of the *Act*, requesting that:

1. Karen da Silva have a permanent shift rotation of Friday only - 10 hours per day and Saturday a s a 5.0 hour day.

2. Lori Wawryk have a permanent shift rotation of Wednesday and Thursday - 10 hours per day; and

3. Pamela Grossman have a permanent shift rotation of 8.5 hours per day Wednesday, Thursday and Friday.

The request was that all hours be worked at straight time.

Each of the employees was also employed on a part-time basis at lower mainland hospitals, working under a collective agreement which provides for 10 hours days.

The Director reached the following conclusion:

> Section 40 of the *Act* sets out the provisions for overtime wages for employees not on a flexible work schedule. In the request for the above grievances there is no net gain for the employees. Variances are not normally granted for the above noted schedules as part time employees, these employees do not generally benefit

by the work schedule that extends hours of work in a day for extra time off during the week. The application is not consistent with the intent of the *Act*.

ARGUMENT AND ANALYSIS

Brooke/Remtek takes issue with the conclusion reached by the Director and argues that there is a net benefit to the employees, including: a reduction in commuting time, and the costs associated with that reduction in time, by having an earlier start time and later closing or finishing time; one additional day off a week based on a 36 hour work week - four extended days instead of five regular days; and the opportunity for increased income. Brooke/Remtek argues that the hours of work being requested is no different than those in the collective agreement under which the employees are employed when working in hospitals.

In reply to the appeal, the Director notes that the authority to grant a variance, while discretionary, is limited by the requirement that the variance be consistent with the intent of the *Act*. Subsection 73(1) of the *Act* 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*
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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*
>
> *(b) the variance is consistent with the intent of this Act.*

The Director also observes that the hours of work provided in the collective agreement was not a consideration in the decision to deny the request for a variance because, overall, the benefits extended to employees under the collective agreement are different than what is provided to them as an employee of Brooke/Remtek. I agree with the Director that the terms of the collective agreement is not a relevant factor in deciding whether a variance application is consistent with the intent of the *Act*.

One of the employees also filed a submission in support of the appeal, arguing that the flexibility provided by the requested work schedule "fulfills my needs for hours of employment, while at the same time benefiting the patient workload by decreasing waiting lists".

In reply, the Director says the benefit to patients from the longer workday is understandable, however the concern of the Director is whether there is any benefit to the employee in the context of the purposes of the *Act*. The Director says there is no objection to any of the employees working the longer hours proposed provided the statutory minimum requirements of the *Act* are met for any overtime hours.

This appeal must be dismissed.

Under subsection 73(1), the Director is given a discretion to vary a requirement of the *Act* specified in Section 72. The Tribunal, in *Jody L. Goudreau and another*, BC EST #D066/98, has said the following about the scope of review of an exercise of that discretion:

> The Branch is an administrative body charged with enforcing minimum standards of employment in the workplace of employees covered by the *Act*. It is deemed to have a specialized knowledge of what is appropriate in the context of carrying out that mandate. The Director is authorized to 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:
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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".
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> *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.

What Brooke/Remtek and the employees have indicated in this appeal is a disagreement with the conclusion of the Director. They have not shown the Director exercised her discretion in a manner that would necessitate intervention by the Tribunal.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated November 28, 2000 be confirmed.

DAVID B. STEVENSON

David B. Stevenson
Adjudicator
Employment Standards Tribunal