EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act, S.B.C. 1995, c. 38

-by-

Dave Wardrope

("Wardrope")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 97/54

DATE OF DECISION: March 18th, 1997

DECISION

OVERVIEW

This is an appeal brought by Dave Wardrope ("Wardrope") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination issued by the Director of Employment Standards (the "Director") on January 7th, 1997 and subsequently amended by way of a letter dated January 15th, 1997. The Director dismissed Wardrope's complaint on the basis that the *Act* did not apply to the complaint [see section 76(2)]

FACTS

According to the information set out in Wardrope's written complaint, dated July 22nd, 1996, he is employed as an Emergency Medical Assistant with the B.C. Ambulance Service. Wardrope's complaint was further particularized in an accompanying letter dated July 4th, 1996 addressed to the Employment Standards Branch. The relevant portions of this letter read as follows:

> In two areas, I feel that my employer is not meeting the minimum standards set under the Employment Standards Act. These two areas are:
>
> 1. the payment of overtime worked, when that overtime is put into a time-bank;
>
> 2. the limiting of employees' work weeks to an average of 40 hours per week maximum, or overtime rates to be paid for hours worked in excess of that...
>
> I have tried to work through proper channels--my union, as I am covered by a collective agreement. I have conveyed to them that I believe our employer is contravening the Employment Standards Act, and our collective agreement itself does likewise, by agreeing to these standards that fall below the minimum guaranteed by the Act. I have asked my union to address these areas in negotiations, and have them brought up to the minimum standards of the Act. My union has failed to negotiate this, and has signed recently a four-year agreement with

> my employer. This is why I am now addressing this complaint through this process.

As noted above, the Director dismissed the complaint for want of jurisdiction.

ANALYSIS

Part 4 of the Act (sections 31 to 43 inclusive) sets out minimum terms and conditions of employment regarding hours of work and overtime pay. The payment of overtime wages is dealt with in sections 40 and 41 of the *Act.* Section 42 deals specifically with the banking of overtime wages and "time banks". Thus, on the face of it, Wardrope's complaint falls within the ambit of Part 4 of the Act.

Section 4 of the *Act* provides that the terms and conditions of employment set out in the *Act* are "minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69". These latter four sections delineate the so-called "meet or exceed" exceptions, which can only apply when there is a collective bargaining agreement in force. Section 43 is particularly relevant to this case because this is the "meet or exceed" provision contained in Part 4 of the *Act* (*i.e.*, the Part governing "Hours of Work and Overtime" provisions)

Thus, the issues raised by Wardrope's complaint are, firstly, whether or not the collective agreement governing his employment does, in fact, conflict with the *Act* and, secondly, if so, whether or not all of the provisions of the collective agreement relating to the matters set out in Part 4, "when considered together, meet or exceed the requirements of this Part" [section 43(1)].

However, the Legislature has further provided that in the case of a dispute regarding the "meet or exceed requirements", the dispute is to be resolved through the grievance arbitration process rather than through the Determination/Appeal process set out in Parts 10 and 13 of the *Act.* Section 43(2)(b) of the *Act* provides as follows:

> 43. (2) If the hours of work, overtime and special clothing provisions of a collective agreement, when considered together, do not meet or exceed the requirements of this Part and section 25,

> (a) the requirements of this Part and section 25 are deemed to form part of the collective agreement and to replace those provisions, and
>
> (b) *the grievance provisions of the collective agreement apply for resolving any dispute about the application or interpretation of those requirements.* (emphasis added)

It is clear from the information set out Wardrope's complaint that his employment relationship is governed by a collective bargaining agreement. It is also clear that Wardrope's union does not wish to challenge the overtime or time bank provisions set out in that collective agreement.

In my view, if a union does not wish to avail itself of the grievance arbitration machinery to challenge the collective bargaining agreement provisions governing overtime and time banks, a bargaining unit member is not entitled to then proceed unilaterally to have the matter dealt with by way of a complaint under the *Employment Standards Act.* In circumstances where a trade union has determined not to proceed under section 43(2)(b) of the *Act*, a bargaining unit member's appropriate avenue for seeking redress lies in a complaint to the B.C. Labour Relations Board under section 12 of the *B.C. Labour Relations Code* (the "duty of fair representation" provision) rather than in a complaint under section 74 of the *Employment Standards Act.* In my view, the Director did not err in determining that Wardrope's complaint could not be dealt with under the *Employment Standards Act.*

I wish to note that I express no opinion as to the merits of any complaint that may be filed under section 12 of the *Labour Relations Code.*

ORDER

Pursuant to section 115 of the *Act*, I order that the Director's Determination in this matter, dated January 7th, 1997, as amended by letter dated January 15th, 1997, be confirmed as issued.

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Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal