

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 -

Terrace Kitimat Bldg. Maint. Ltd.
("Terrace Bldg. Maint.")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorna Pawluk

FILE NO.: 97/3

DATE OF DECISION: May 16, 1997

DECISION

OVERVIEW

This is an appeal by Terrace Kitimat Bldg. Maint. Ltd. ("Terrace Bldg. Maint.") pursuant to section 112 of the *Employment Standards Act* (the "Act") against Determination CDET 004914 of the Director of Employment Standards (the "Director") issued on December 6, 1996. In this appeal, the employer claims that it is entitled to a variance under section 72 from the minimum hours of work set out in section 34 of the *Act*.

ISSUE TO BE DECIDED

The issue is whether Terrace Bldg. Maint. is entitled to a variance under section 72 of the *Act* from the minimum hours of work set out in section 34 of the *Act*.

FACTS

Terrace Bldg. Maint., the employer, provides maintenance and janitorial services on a contract basis. The employer and two employees applied for a variance under section 72 for an exemption from the minimum hours of work in Section 34. One of the employees has since resigned, leaving only Craig Ralideau ("Ralideau") who works as a janitor at various contract locations. Terrace Bldg. Maint. says that since it lost its largest contract, it was no longer able to offer more than two hours a day employment to Ralideau. They say it is not feasible to organize the work into four hour parcels as the contracts require only 2 to 3 hours per day to complete the tasks. The days worked are based on a schedule approved by the client.

The Director's delegate refused the application for variance since "[n]either the employer nor the employee could provide a clear explanation as to how the granting of this variance would benefit the employee." The variance was refused as it "should not be granted to suit the needs of an employer or to allow an employer a competitive advantage in their industry."

ANALYSIS

Section 34 of the *Act* fixes minimum wages to be paid to an employee, requiring payment of a four hour minimum regardless of hours work less than that:

34(1) *If an employee reports for work on any day as required by an employer, the employer must pay the employee for*

(a) *at least the minimum hours for which the employee is entitled to be paid under this section, or*

(b) *if longer, the entire period the employee is required to be at the workplace.*

34(2) *An employee is entitled to be paid for a minimum of*

(a) *4 hours at the regular wage, if the employee starts work unless the work is suspended for a reason completely beyond the employer's control, including unsuitable weather conditions, or*

(b) *2 hours at the regular wage, in any other case unless the employee is unfit to work or fails to comply with the Industrial Health and Safety Regulation of the Workers' Compensation Board.*

The purpose of the minimum hours guarantee is to ensure that employees are not called into work with the expectation of a full shift only to be told to go home, without any work -- or pay, for the day. It also prevents an employer from forcing an employee to come to work for a period of time too short to cover the costs incurred in reporting to work. The guarantee also recognizes the disruption to an employee caused by disorganized scheduling.

Section 72(e) of the act permits the employee and employees to jointly apply to the Director of Employment Standards for a variance from the requirements in section 34.

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 . . .

(e) section 34 (minimum daily hours) . . .

Section 30 of the Regulation specifies what must be included in the written request, including the relevant provision of the *Act*; the variance requested; the duration of the variance; the reason for the request; the employer's and employee's name and phone numbers; and employer's address.

Section 73 outlines the conditions upon which a variance may be granted by the Director:

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 consistent with the intent of this Act.*

....

(3) *The director may*

(a) *specify that a variance applies only to one or more of the employer's employees,*

(b) *specify an expiry date for a variance, and*

(c) *attach any conditions to a variance*

Under section 73(3), the Director is permitted to limit the scope of the variance to include only one or more employees, to specify an expiry date for the variance, or to attach conditions. The ability to exempt employers from certain provisions of the *Act* recognizes the need for flexibility and adaptability in the modern economy; however, this recognition must be balanced against the unequal positions of employers and employees.

Section 2 outlines the purposes of the *Act*:

- (a) *ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment,*
- (b) *promote the fair treatment of employees and employers,*
- (c) *encourage open communication between employers and employees,*
- (d) *provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act,*
- (e) *foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia, and*
- (f) *contribute in assisting employees to meet work and family responsibilities.*

Section 2 must also be read in light of the court's admonition in *Helping Hands Agency Ltd. v. Director of Employment Standards*, unreported, British Columbia Court of Appeal, Vancouver Registry CA018751 that the purpose of the *Act* is to "give protection to employees for the payment of their wages" and "to afford protection to the payment of an employee's wages which may not be available to the employee at common law." This suggests that any exemption from the minimum standards set out in the *Act* must be narrowly construed. Where there is any doubt as to the efficacy and fairness of an exemption, the application under section 72 must be denied.

Section 73 confers a broad discretion on the Director to grant a variance: the Director is given the discretion to determine when the provisions of subsection 73(1)(a) and (b) are met and even where the requirements of subsection 73(1)(a) and (b) are met, the section is permissive and not mandatory. The variance was refused, in part, because it would give an unfair advantage to competitors and because no clear benefit accrued to the affected employee. Given the broad discretion conferred on the Director, these considerations may be used to refuse the variance, and this Tribunal will not substitute its discretion for those of the Director under the broad discretion conferred by section 73.

ORDER

Pursuant to Section 115 of the *Act*, the Determination is confirmed.

Lorna Pawluk
Adjudicator
Employment Standards Tribunal