BC EST #D152/98

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

Ambulance Paramedics of British Columbia, CUPE Local 873
on behalf of
John A. Horsfield,Mark Clavor and Geoff P. Waygood
("the Paramedics")

of a Determination issued
by
the Director Of Employment Standards
(the "Director")

PANEL: Alf Kempf
David Stevenson
Geoffrey Crampton

FILE NO.: 97/810

DATE OF DECISION: April 15, 1998

DECISION

OVERVIEW OF FACTS

This is an appeal, under section 112 of the *Employment Standards Act* (the "*Act*"), by the Paramedics against a Determination which was issued on October 17,1997 by a delegate of the Director of Employment Standards ("the Director").

The Paramedics submitted complaints to the Director on July 17 and September 26, 1997.

The central point of the Determination was a finding by the Director that:

> CUPE Local 873 wishes to use the Director's authority to resolve an issue which remains unresolved after several rounds of collective bargaining. I am also satisfied that the purpose of these complaints to gain some advantage in collective bargaining. I am, therefore, of the view that rather than fostering healthier labour relations between the BCAS and CUPE Local 873, an investigation into these complaints would have the opposite effect. I am, therefore, refusing to investigate these complaints under s.76(2)(c) of the ESA as the complaints are not made, in good faith.

CUPE Local 873 is the trade union of which the Paramedics are members and which represents them in this appeal. The Paramedics are employees of the British Columbia Ambulance Service ("BCAS"), formerly the Emergency Health Services Commission. There are four grounds on which the Paramedics make this appeal:

(i) the complaints were made in good faith;
(ii) the Act applies to the complaint;
(iii) the merits of this dispute is not before any other court, tribunal arbitrator; and
(iv) there is no grievance on this matter under the collective agreement.

The Paramedics' complaints raised the following issues:

(i) an alleged refusal by BCAS to pay "all earnings" to full-timeemployees within 8 days of the end of each pay period; and

(ii) a "continuing practice" by BCAS of recovering monies from employees' wages without the permission of the affected employees.

Rick Atkinson (Director, Health & Welfare - CUPE Local 873) states in his letter which accompanied the Paramedics' complaints:

> "It should be noted that the issue of pay periods is not relevant to our part-time members totaling 2500 as they are paid all earnings in accordance with the Act. The issue of illegal wage recoveries has been dealt with through the grievance procedure, but despite Employer assurances to the contrary, the practice continues."

The Determination sets out, beginning at page 3, the following reasons for refusing to investigate the complaints:

> Attached to the four complaints is correspondence between CUPE Local 873 and the BCAS (and its predecessor, the Emergency Health Services Commission) dating to 1987, concerning the timely payment of wages under the former and current ESA. That correspondence indicates the timely payment of overtime wages has been the subject of grievances and negotiations between CUPE Local 873 and the BCAS. It is also evident from the correspondence that CUPE Local 873 is employing various means to persuade the BCAS to change its method of paying overtime wages to full-time members, to meet the requirements of the ESA. The issue for the Director is whether these complaints are part of a strategy in collective bargaining with the BCAS and, if so, whether the ESA should be used in this manner.
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> The Director, as the statutory regulator, is required to ensure the purposes of the ESA (as set out in section 2) are met through fair, impartial and strategic complaint investigation as well as investigations conducted on the Director's own motion. To maintain this integrity, it is imperative that the Director's statutory authority not be enlisted by disputing parties who seek to use that authority for a purpose other than what it was intended. The Director's authority cannot be used by employers or employees (or trade unions representing employees) as a means to achieve ends beyond those contemplated in the ESA. For example, the Director will not grant or will cancel a variance under s.73 if an employer uses the variance to adversely affect the working conditions of the affected employees. Similarly, the Director will not conduct investigations into a complaint, when the purpose of filing the complaint is punishment or gaining concessions from an employer.
>
> I take as an undisputed fact that the BCAS and CUPE Local 873 have poor labour relations. By this, I mean there a number of outstanding issues which have not been resolved to either party's satisfaction. The issue of the timely payment of overtime wages is one unresolved issue. However, when an offer was made on May 8, 1997, to CUPE Local 873 to meet with the parties in an effort to seek a solution, including a variance, that suggestion was rejected. I was advised by you that a variance would only be considered by CUPE Local 873 after the Director had first determined that

the BCAS had contravened the ESA. It was clear that the purpose of the complaint was to use the ESA as a means for gaining a "win" on this issue.

It is my finding that CUPE Local 873 wishes to use the Director's authority to resolve an issue which remains unresolved after several rounds of collective bargaining. I am also satisfied that the purpose of these complaints is to gain some advantage in collective bargaining. I am, therefore, of the view that rather than fostering healthier labour relations between the BCAS and CUPE Local 873, an investigation into these complaints would have the opposite effect. I am, therefore, refusing to investigate these complaints under s.76(2)(c) of the ESA as the complaints are not made in good faith.

ISSUE TO BE DECIDED

Has the Director erred in determining to refuse, under section 76 of the *Act*, to investigate the Paramedics' complaints?

ANALYSIS

We begin our analysis by noting that the Director is charged with administering and enforcing the minimum standards of employment which are set out in the *Act*. In that context, the Director is deemed to have specialized knowledge that assists and enables her, or her delegates (see Section 117 of the *Act*), to implement her statutory mandate. In implementing that statutory mandate, the Director is authorized to exercise discretion in applying her specialized knowledge.

For convenience, we will set out the provisions of Section 76 of the *Act*:

> **76. Investigation after or without a complaint**
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> (1) Subject to subsection (2), the director must investigate a complaint made under section 74.
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> (2) The director may refuse to investigate a complaint or may stop or postpone investigating a complaint if
>
> (a) the complaint is not made within the time limit in section 74 (3) or (4),
> (b) this Act does not apply to the complaint,
> (c) the complaint is frivolous, vexatious or trivial or is not made in good faith,
> (d) there is not enough evidence to prove the complaint,
> (e) a proceeding relating to the subject matter of the complaint has been commenced before a court, tribunal, arbitrator or mediator,

(f) a court, tribunal or arbitrator has made a decision or award relating to the subject matter of the complaint, or
(g) the dispute that caused the complaint is resolved.

(3) Without receiving a complaint, the director may conduct an investigation to ensure compliance with this Act.

In a recent decision (*Jody L.Goudreau et al,* BCEST #D066/98) the Tribunal set out its views about the extent to which, and under what circumstances, it will review the exercise of the Director's discretion:

> 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 a 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. Wednesbury Corp.* [1948] 1 K.B. 223 at 229
>
> Absent any of these considerations, the Director even has the right to be wrong.
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> 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.

We note that the Paramedics do not assert that the Determination resulted from an abuse of power or that there was a procedural irregularity.

We are perplexed by the finding made by the Director's delegate that the complaints are "...not made in good faith." We can find no evidence in the material before us which would allow us to make such a finding. Further, we do not think it appropriate for the Director to speculate about the motivation for the Paramedics' decision to make complaints under the *Act*. In our view, the proper disposition of these complaints does not turn on a

question of *bona fides*, rather it turns on the question of the appropriate mechanism (statutory complaint or collective agreement grievance) for deciding the merits of the complaints. The Paramedics' submission of January 21, 1998 makes this point, at page 9:

> The Union recognizes that an arbitrator and the Employment Standards Branch (sic) have joint jurisdiction over a s.17(1) matter and, on that point, the Union agrees with the Director's submission. The Union also agrees that there is a statutory direction that all matters under parts 4, 5, 7 and 8 of the Employment Standards Act are to be adjudicated by an arbitrator if the parties cannot agree pursuant to s.43(2)(b). The Union does not agree with the Director when it implies in its submission that an arbitrator is the preferred route for an adjudication of a s.17 complaint. On the contrary, we say that the legislative preference for an adjudication of a s.17 matter is with the Branch itself because of its expertise. The legislation has specifically designated certain sections to be adjudicated by the grievance procedure, the implication being that other sections, while they can be handled by an arbitrator, are within the jurisdiction of the Branch and should be handled by the Branch.

In our view, this is the nub of the issue which we must decide in this appeal. When we consider the purposes of the *Act* (as set out in Section 2) and all of the material which has been placed before us, we agree with the Director that the merits of these complaints should be dealt with through the collective agreement grievance procedures. We agree with the Paramedics' submission that the Director and arbitrators have joint jurisdiction over section 17 matters. It is not unreasonable, in our view, for the Dircetor to decide, given the peculiar circumstances of the dispute between BCAS and the Paramedics, that she would decline to exercise her discretion and , instead, allow the dispute to be resolved through grievance arbitration.

We note that the relationship between BCAS and CUPE, Local 873 is a collective bargaining relationship. While we recognize that these complaints pertain to rights and responsibilities which arise from the *Act*, in our view it is not reasonable and not consistent with the purposes of the *Act* to decide only one portion of what is a larger issue in the collective bargaining relationship between the BCAS and CUPE, Local 873.

We agree with the Director's submission of December 4, 1997 that "...(t)he broad subject of this dispute has been the terms and conditions of the payment of wages" and that the complaints "...form part of a larger dispute between the parties" which goes back to August, 1987 or earlier. The dispute centres on the timeliness of when payment is made and the Paramedics' complaints do not seek payment of unpaid wage amounts.

Section 89(g) of the *Labour Relations Code* gives an arbitrator the authority to "...interpret and apply any Act intended to regulate the employment relationship of the persons bound by a collective agreement..." Therefore, in our view, an arbitrator appointed to hear and decide a grievance concerning the merits of the Paramedics' complaints could render an

award which "interprets and applies" Part 3 of the *Act* in the context of the parties' collective bargaining relationship.

While Section 72(b) of the *Act* allows the Director to grant a variance of Section 17(1) of the *Act*, the same result could be achieved either through the resolution of a grievance (if necessary, by way of an arbitration award which draws on or relies on certain legal principles such as *laches* or *estoppel*) or through the process of collective bargaining to renew the parties' collective agreement.

The documents before us confirm the Paramedics' submission that the complaints were not "...before a court, tribunal, arbitrator or mediator" at the time that they were submitted to the Director on July 17, 1997. However, there is nothing in the Paramedics' submissions which speaks to the reasons, if any, why they have not exercised the grievance arbitration rights under the collective agreement to seek a resolution of these complaints. Despite Mr. Atkinson's letter of July 17th being somewhat contradictory on this point, the Paramedics confirm in their submission that there is no grievance between the parties on this matter despite unsuccessful attempts to negotiate a mutually satisfactory resolution. Further, neither party has raised the matter in collective bargaining.

We note that these complaints do not raise any "meet or exceed" issues under sections 43, 49, 61 or 69 of the *Act*.

We disagree with the Paramedics that the Director is attempting to engage in "legislative redrafting" in exercising her discretion and deciding not to investigate the complaints. Further, we can find no ground to support their submission that the Director "...want(s) the legislation to read that the Director has the discretion to issue a variance without the approval of the employees." As noted above, we agree that the heart of the matter before us is whether it is a proper exercise of the Director's discretion for her to decide that "...she should not take jurisdiction of this matter because it is already part of a larger proceeding between the parties and, therefore, is more appropriately handled by an arbitration board."

The Paramedics submit that the director has made a mistake in construing the limits of her authority or that she has considered irrelevant matters (or has not considered relevant matters). They also say that the Director has concurrent jurisdiction with arbitrators on disputes concerning Section 17 of the *Act*. As we read this Determination, we do not see the director as having abandoned her jurisdiction to make a determination in all complaints where the dispute arises from a collective bargaining relationship. She retains, through the proper exercise of her statutory discretion, the power to investigate complaints where she considers it appropriate and consistent with the purposes of the *Act*.

To conclude our reasons we return to the four-part test which we set out above as the "yardstick" against which we must decide this appeal. The Paramedics' appeal has not established, on the balance of probabilities, that: the Director made a mistake in exercising her statutory authority or that the Determination was unreasonable, as we have defined that

term above. As noted earlier, the Paramedics do not allege an abuse of power or a procedural irregularity by the Director.

When we consider all of the facts and circumstances of this appeal, we find that it was not unreasonable for the Director to make the Determination that she made on October 17,1997. The dispute between BCAS and the paramedics concerning section 17 of the *Act* is inextricably linked to several other collective bargaining issues which can be resolved only through collective bargaining and/or grievance arbitration. We do not consider it to be consistent with the purposes of the *Act*, nor the parties' interests, for us to allow or to approve a bi-furcated dispute-resolution process.

ORDER

We order, under Section 115 of the *Act*, that the Determination issued by the Director on October 17, 1997 be confirmed.

Geoffrey Crampton
Chair
Employment Standards Tribunal

Alf Kempf
Adjudicator
Employment Standards Tribunal

David Stevenson
Adjudicator
Employment Standards Tribunal