BC EST #D157/97

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 -

Royal Canadian Legion Branch #11
("Branch #11")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 074/97

DATE OF DECISION: April 16, 1997

DECISION

OVERVIEW

This is an appeal, under Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination issued by a delegate of the Director of Employment Standards (the "Director"). The Determination denied an application by The Royal Canadian Legion Branch #11 ("Branch #11"), under Section 72 of the *Act*, for a variance of Section 40 (overtime wages for emp loyees not on a flexible work schedule).

ISSUE TO BE DECIDED

Is the variance application by Branch #11 consistent with the intent of this *Act*?

FACTS

Branch #11 applied, under Section 72 of the *Act*, for a variance of Section 40 (overtime wages for employees not on a flexible work schedule). The reason for the variance application was set out in a letter dated January 3, 1997 from Neil Jarvie, the president of Branch #11, as follows:

> *We currently have two bartenders who work two 4.5 hour shifts and two 9 hour shifts in one week. We are requesting that up to 9 hours per day be paid at regular time. Because of our hours of operation, the minimum number of hours worked in one day is 8.5. The bartenders are paid an extra ½ hour as they are unable to leave the premises for the required lunch break.*

The two bartenders who are affected by the variance application (Rhonda Cameron and Don Orenchuk) support the application by Branch #11.

The Determination denied the application for a variance because:

> *Overtime variances are not granted to part-time employees because these employees do not receive a specific benefit in terms of their work schedule.*

Branch #11 gives the following reasons for its appeal of the Determination:

> *Our bartenders, Don Orenchuk and Rhonda Cameron are paid ½ hour in lieu of a meal break as they are not able to leave the premises. When our secretary, Glenda Hunter, spoke to you last week, you indicated that this was not necessary as long as they were able to eat a meal while they are working. Therefore, this would reduce their working hours to 8.5 from 9. As per the Employment Standards Act, we would be required to pay overtime on the extra ½ hour. At an overtime rate of $10.50 the employees would be paid an extra $5.25 for each 8.5 hour shift worked. If they were to be paid 9 hours at regular time, they would receive an extra $7.00 for each 9 hour shift worked. To be paid as per our request, the bartenders would receive an extra $1.75 per shift. It is for this reason that we are appealing the Determination.*

ANALYSIS

Section 73 of the *Act* allows the Director to grant a variance if:

> *(i) a majority of the employees affected by the variance give their informed consent; and*
> *(ii) the variance is consistent with the intent of the Act.*

The two employees who are affected by the variance application have indicated their support for the variance being granted. Thus, the first criterion above has been satisfied and the only issue to be decided is whether the variance would be consistent with the intent of the *Act.*

Section 2(a) describes one of the central purposes of the *Act* as being to ensure that *"...employees in British Columbia receive at least basic standards of compensation and conditions of employment."* For this reason, Section 4 prohibits the requirements of the *Act* from being waived by stipulating that any agreement to waive any requirement of the *Act* is of no effect.

Through its variance application, Branch #11 is asking the Director's permission to vary Section 40 of the *Act*. The only reason given by Branch #11 for its application is to avoid the payment of overtime wages to the two bartenders. Branch #11 argues that each bartender would receive an additional $1.75 per shift if they were to be paid according to the payment scheme proposed in the variance application.

An application for a variance should involve some sort of *quid pro quo*. That is, an employee should receive some benefit in exchange for the loss of a statutory entitlement. This philosophy is inherent in the "meet or exceed" provisions set out in sections 43,49, 61 and 69 of the Act whereby parties to a collective agreement can, in effect, "trade-off" certain statutory entitlements so long as, overall, the employees receive at least the same level of benefits as would be the case if the Act was strictly applied.

However, the Director's delegate did not make any specific finding about whether there was or was not a *quid pro quo* for the two employees affected by this variance application. The rationale given by the Director's delegate was of a very general nature:

> *Overtime variances are not granted to part-time employees because those employees do not receive a specific benefit in terms of their work schedule.*

I am not at all certain that I know what that statement means.

Section 32 of the *Act* states:

> *Meal breaks*
>
> *32(1) An employer must ensure*
>
> *a) that no employee works more than consecutive hours without a meal break, and*
>
> *(b) that each meal break lasts at least a ½ hour.*
>
> *(2) An employer who requires an employee to be available for work during a meal break must count the meal break as time worked by the employee.*

This means that when Branch #11 schedules its employees for a 9 hour shift and requires them to be available for work during their meal breaks, they must be paid for 9 hours.

Section 35 of the *Act* (Maximum hours of work) requires the payment of overtime wages for hours of work in excess of 8 hours in a day. Section 40(1) of the *Act* requires the payment of *"1½ times the employee's regular wage for the time over 8 hours"* worked in a day.

Thus, the *Act* requires Branch #11 to pay its employees a minimum of $66.50 for a 9 hour shift during which it requires the employees to be available for work during meal breaks.

(8 hrs x $7.00/hr + 1 hr x $10.50/hr = $66.50)

The variance application seeks to pay the employees for 9 hours at their regular wage rate. This would result in wages totaling $63.00 per shift ($7.00 x 9hrs = $63.00) or a difference of $3.50 for each 9 hour shift. This result would not give the employees any benefit in exchange for the loss of a statutory entitlement.

For all of these reasons I conclude that the Director's delegate did not err in denying the application for a variance.

ORDER

I order, under Section 115 of the *Act*, that the Determination should be confirmed.

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Geoffrey Crampton
Chair
Employment Standards Tribunal