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 -

Telav Inc. and
Les Services de Traduction Simultanee International Ltee.
("Telav/ISTS")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorna Pawluk

FILE NO.: 98/111

DATE OF DECISION: July 8, 1998

DECISION

OVERVIEW

This is an appeal by Telav Inc. and Les Services de Traduction Simultanee International Ltee. ("Telav/ISTS" or the "employer") under Section 112 of the *Employment Standards Act* (the "*Act*") from a Determination dated January 29, 1998 by the Director of Employment Standards ("the Director").

ISSUE TO BE DECIDED

The issue is whether the Director erred in refusing to grant Telav/ISTS a variance under section 72 of the *Act.*

FACTS

On July 17, 1997, Telav/ISTS applied to the Director under section 72 of the *Act* for a variance from the requirements of sections 36 and 40 of the *Act.* Section 36 specifies the hours an employee is entitled to be away from work and section 40 requires payment of overtime for hours worked in excess of 8 per day or 40 per week. The employer, which provides translation and other services at conferences across Canada and the United States, wanted an exemption for hours spent by employees traveling for work.

After completing an investigation, the Director's Delegate concluded that the variance should not be granted. She determined that two conditions had to be met before discretion under section 73 would be exercised:

> Is the variance consistent with the intent of the *Act* and
> Are a majority of the affected employees aware of the effect of the variance and do they approve of the application

The Delegate noted that sections 2, 3 and 4 describe the "fundamental purposes" of the *Act* and that the "purposes include the establishment of minimum legal standards of compensation and conditions of employment for all provincially regulated employees". She reasoned that not paying the employees overtime would "in no way assist" in meeting the purposes of the *Act* and that only the employer not the employees would benefit from the variance:

> The granting of this variance would encourage travel time to be worked in addition to the normal workday rather than within the day. This could hinder employees from meeting family responsibilities, which is one of the purposes of the *Act* found in Section 2.

She also commented on the lack of a proposed fixed schedule for time worked. On the basis of *Arc Programs* B.C.E.S.T. #D039/96 she concluded that this was a critical flaw in the employer's application as it sought "to alter the minimum standards with no restrictions or limitations to the travel time hours and the proper compensation thereof". She also thought that the employer requested "an exclusion from Section 36 and 40 for a particular type of work, not a variance" and that the Director did not have such power. She noted that under section 109(1) of the *Act*, the Lieutenant Governor in Council has the authority to exclude certain "classes of persons" from the *Act* but that employees of a particular employer did not constitute a class.

The Determination indicated that the Delegate contacted, at random, 12 of 23 employees whose signatures accompanied the employer's application. She concluded that a majority of those contacted did not agree with the application but added that since the first requirement of section 73(1)(b) had not been met, it was unnecessary to determine "conclusively" whether a majority of the employees agreed with the application.

On behalf of the employer, Mr. Gall argues that the Delegate erred in finding the application inconsistent with the *Act*. He further maintained that while the employer disagreed with the suggestion that a majority of the affected employees did not agree with the application, no appeal was taken on this point since this was not the basis for the Determination. It is argued that the Determination was incorrect when it stated that no benefit flowed to Telav employees, in return for the benefit to the employer.

Mr. Gall notes that section 72(1)(b) requires that a variance be consistent with the intent of the Act; this requires examination not just of section 2 purposes but the *Act* in its entirety. Moreover, the Delegate referred to only one of the purposes enumerated in section 2(f), relating to employees meeting work and family responsibilities, and not to section 2(b), to "promote the fair treatment of employees and employers" and section 2(e), to "foster the development of a productive and efficient labour force that contributes fully to the prosperity of British Columbia". Mr. Gall elaborates:

> The variance sought in the case under appeal would promote the fair treatment of both the affected employees and the Employer, both of whom would benefit as a result, and would also foster the development of a productive and efficient labour force at Telav/ISTS, as it would enable them to work under terms and conditions of their own choosing.

The business of Telav/ISTS is service-based and thus hours of work and location of work are often dictated by the needs of the clients. Out of town assignments create opportunities for employees to travel and to work increased hours for increased pay; thus they are considered highly desirable work assignments. Telav/ISTS cannot pass the costs of overtime for travel time to its clients and would lose "a considerable volume" of work. Thus both the employer and employees benefit from increased flexibility.

Furthermore the Determination did not consider that the *Act* confers the right on employers and employees in a collective bargaining relationship to determine a number of terms and conditions appropriate to that particular workplace. The collective agreement formerly in place at Telav/ISTS had hours of work provisions "substantively identical" to those in the variance being sought here; the employer and employees wish to continue those arrangements. It is argued that the Legislature could not have intended such different treatment of employees in unionized and non-unionized work environments. Upholding the Determination would penalize these employees for having exercised their rights under the *Labour Relations Code*.

Finally, it is argued that the Determination is incorrect in stating that the application for a variance in this case is in substance one for an exclusion under sections 36 and 40 of the *Act*. The interpretation of the variance provisions given by the Determination is so narrow that only those identical to the flexible schedules permitted by section 37 of *Act* would be permitted. It is submitted that variances with respect to hours of work and overtime must be permissible in circumstances other than those dealt with by the flexible work schedule provisions in the *Act* and *Regulation*.

On behalf of the Director, Ms Beauchesne agrees that the intent of the *Act* must be discerned from the entire statute and that sections 2, 3 and 4 support the conclusion in the Determination. She further argues that an interpretation which encourages employers to comply with minimum standards in the *Act* should be favoured over one that does not.

The Director disagrees with the employer's submissions that the same flexibility must be shown employers and employees in unionized and non-unionized environments. The Delegate submits that the Legislature did not intend to treat union and non-union employers in the same way and that it is not necessary to consider section 43 when ascertaining the intent of the act in the context of a variance application. The "meet or exceed" test which applies to collective agreements has a much wider scope than the variance provisions and all provisions in the collective agreement when considered together are balanced against provisions in the *Act*. Disputes are then referred to arbitration via the grievance procedure. The variance provisions are more narrow and are confined to the sections named in section 72; the Director must confirm that the requirements of section 73 are met which do not apply to an employer and unions when applying the "meet or exceed test". Unions and employers can apply the meet or exceed test to Parts 5, 7 and 8, exemptions from these (with the exception of section 64) provisions are not available in a non-unionized work setting. Finally, the Director cites *Jody Goudreau and Barbara Demarais B.C.E.S.T. #D066/98* and argues that it stands for the proposition that the Director retains the discretion to deny a variance even if a majority of the affected employees approve and the application is consistent with the intent of the act. Moreover, the Tribunal will not interfere with the exercise of the Director's discretion unless an abuse of power, error in interpretation statutory authority, procedural error or unreasonable decision can be demonstrated.

Mr. Kaardal advises that he has been authorized by Darren Dreger, a Telav/ISTS employee who has been authorized by all the other employees to represent their interests in the appeal. On behalf of "Certain Employees", Mr. Kaardal argues that the proposed variance mirrors the former collective agreement in key aspects and thus the employees support this appeal. They challenge the Delegate's conclusion that the variance is inconsistent with the *Act* largely because no benefit flows to the employees: the variance will give employees an opportunity to obtain extra work, especially in the slow months in Vancouver, and to travel across Canada and the U.S. Travel allows the employees to take advantage of certain amenities in the new locations and to increase their professional competence by giving them an opportunity to use more complex equipment often used at outside venues. This work will be lost to other Telav/ISTS offices in provinces where overtime for travel is not required. Moreover, the reason cited by the Delegate − hindering employees from meeting family responsibilities − is "pure speculation". It is submitted that most employees do not have families and thus do not share the concern outlined in the Determination.

The proposed variance applies only to travel time and section 36(2) and 40 of the *Act*. All other day-to-day overtime requirements remain unchanged. Allowing variances based on the flexible work schedule is unduly restrictive and impractical given the nature of the work in this case and modern work conditions. This is not a case where there are no minimum standards and there is no sound policy reason for not allowing this variance since it involves the same provisions as the former collective agreement which was found to meet or exceed the minimum standards in the *Act*. The Letter of Intent provides for a limited variance of overtime requirements which contrasts with exclusions under section 34 which exempt certain persons entirely from Part 4 of the *Act*. Finally, it is noted that section 34 exempts commercial travelers who travel as part of their job. The Determination should consider the nature of the work and the industry in which it is being performed. Where employees are travelling by commercial transport they are still able to read or sleep but where a single employee is driving a company vehicle, the calculation of weekly overtime still applies.

In response, Ms Beauchesne disagrees with Mr. Dreger that there is unanimous support for the variance. She submits that the majority of employees she spoke to strongly disagreed with the variance and were concerned that their identity remain confidential. She repeats her earlier arguments that the application is inconsistent with the *Act* and reiterates that whether a majority of the employees agreed with the variance was not considered in the Determination. She maintains that if the Tribunal wishes to examine this matter further, an oral hearing is not appropriate; some other means which protects the identity of the employees should be found so they can express their true wishes.

ANALYSIS

Section 72 of the *Act* empowers the Director to grant a variance from various provisions in the *Act*: the time period used to define "temporary layoff"; paydays (section 17(1)); special clothing (section 25); notice of shift change (section 31(3)); minimum daily hours (section 34); maximum hours of work (section 35); hours free from work (section 36); overtime for employees not on a flexible work schedule (section 40); and notice and termination pay in group terminations (section 64). Section 73 outlines the requirements which must be met before a variance can be granted:

> 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 majority of the employees who will be affected by the variance are aware of its effect and approve of the application, and
>
> the variance is consistent with the intent of this Act.

Section 73(2) applies only to section 64 variance applications, not at issue here, and section 73(3) permits the director to attach certain limitations to the variance:

> The director may
>
> specify that a variance applies only to one or more of the employer's employees,
>
> specify an expiry date for a variance, and
>
> attach any conditions to a variance.

The section confers broad discretion on the Director in determining whether it is appropriate to grant the variance application, and places only two limitations on the discretion. The application must have the support of a majority of the affected employees in that they are required to "approve" of the application and "be aware of its effect". It is also necessary for the variance to be consistent with the intent of the *Act*.

The Determination stated that since the variance did not meet the intent of the *Act* as required by section 73(1)(b), it was not necessary to conclusively determine the question of employee support. Mr. Gall excluded this question from the grounds of appeal and the Delegate replied that if the Tribunal wished to canvass this issue, precautions to preserve employee anonymity should be taken. Since this question was not used as a basis for the Determination and therefore was not included as a ground of appeal, the Tribunal will not embark on an independent inquiry of this question. Thus, this decision will not address the adequacy of employee support as called for by section 73(1)(a). After considering section 73(1) and the facts of this case, I find that the Determination cannot stand because it fails to comply with the requirements of section 73(1)(b).

The lack of benefit flowing to the employees was the major reason for refusing the variance application:

> There is no benefit flowing to the employees of Telav/ISTS in return for the benefit the employer would receive from this variance. The granting of this variance would encourage travel time to be worked in addition to the normal workday rather than within the day. This could hinder employees from meeting family responsibilities, which is one of the purposes of the *Act* found in Section 2.

Actual problems were not identified, only the possibility that overtime travel could interfere with family responsibilities. Mr. Gall called this concern speculative and I agree. It is possible to argue that all work is potentially disruptive to family responsibilities since time spent at work could be spent with the family; this is true whether it takes place during the normal work day or addition to it, or whether it is paid at the regular or overtime rate. Thus it is difficult to understand this objection to the variance. Mr. Kaardal points out that many Telav/ISTS employees do not have families so that the reason cited for refusing the variance is not a concern to them. He also cites additional work and new professional challenges as important benefits flowing to these employees. While the Director does not need evidence of actual incompatibility with the *Act* before making a decision on a variance, more than mere speculation is needed. There must be some indication that the problem identified is a realistic likelihood in that particular workplace and not a speculative possibility. This is tantamount to a failure to consider section 73(1)(a) and thus is grounds to interfere with the discretion conferred on the Director by that section of the *Act*.

The Determination refers to sections 3 (scope of the act) and 4 (inability to contract out) of the *Act* but does not describe how they contribute to the identification of legislative intent required by section 73(1)(b). Without more than a simple reference to those provisions, it is difficult to understand how they were taken into account by the Delegate. And since identification of legislative intention requires examination of the *Act* as a whole rather than just section 2, the Determination also fails on this account.

A subsidiary concern for the Delegate is the fact that this variance does not include a proposed specific schedule for hours of work. The Determination cited *Arc Programs* B.C.E.S.T. #D030/96 as example of where the Tribunal upheld the refusal by the Director to grant a variance where a specific schedule was not proposed; since the Telav/ISTS application also failed to proposed a fixed schedule, it followed that the application should not be granted. But *Arc Programs Ltd.* does not stand for the proposition that a variance application will be refused unless it includes a fixed schedule. Rather, it was an example of where the Tribunal refused to interfere with the discretion exercised by the Director. There may be circumstances where the Director properly requires a fixed schedule, but this is not one such case. Such a requirement would ignore the changing needs of the workplace and the flexibility necessary to meet the demand of an increasingly fast-paced and competitive marketplace.

Nor does the wording of the *Act* support this interpretation. In particular, I note that section 40 provides for overtime for those employees on a fixed work schedule under sections 37 and 38. If all section 72 variance applications required a fixed schedule, there would be no need for the legislation to include sections 37, 38 and 40 since the application could be made under a general provision such as section 72. Given the additional avenue for increased hours of work in section 72, the Legislature must have intended some other type of work arrangement. There may be circumstances where the lack of a fixed work schedule is grounds to refuse the variance, but unlike *Arc Programs Ltd.* nothing in the Determination here convinces me that the lack of a fixed work schedule results in an arrangement contrary to the intention of the *Act*

ORDER

Pursuant to section 115 of the Act, I cancel the Determination dated January 29, 1998.

Lorna Pawluk
Adjudicator
Employment Standards Tribunal