

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 -

Jayne Dinsmore
("Dinsmore")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorna Pawluk

FILE NO.: 98/157

DATE OF DECISION: May 21, 1998

DECISION

OVERVIEW

This is an appeal by Jayne Dinsmore ("Dinsmore" or the "employer") under Section 112 of the *Employment Standards Act* (the "Act") from a Determination dated February 18, 1998 by the Director of Employment Standards ("the Director").

ISSUE TO BE DECIDED

The issue is whether the Director erred in refusing to grant Dinsmore a variance under section 73 of the requirements of section 34 of the *Act*.

FACTS

Dinsmore has a physical disability and employs two care attendants. She requires two hours of care in the morning, for getting out of bed, getting dressed and having breakfast. She also requires two hours of care in the evening, to have her dinner prepared and for assistance in going to bed. She has two attendants working for her, one in the morning and one in the evening.

Dinsmore lives on assistance from the government, the CSIL program, and receives a fixed amount per month. With part of the money she hires her attendants. She currently pays \$8.00 per hour but could pay more. Dinsmore notes that one of her employees recently quit working for her on weekends, for better paying work. According to information from her bookkeeper, Dinsmore will not be able to employ both attendants unless she receives a variance. She also says that her attendants prefer not to work a split shift; she also believes it will be difficult to find someone willing to take on a split shift. Dinsmore believes that a variance is her "only hope of balancing . . . CSIL funds properly and being fair to . . . [her] . . . employees." Both employees have written in letters indicating that they have "read and agree with" the variance application.

Dinsmore sought a variance from the Director who in the Determination dated February 18, 1998 refused the request:

In discussing the effect with the employees, both indicated that [they] are willing and capable of working 4 hours per day, but understand that based on the circumstances of the employer, that 4 hours work is not available. Therefore, it is clear that the employees do not prefer to work less than 4 hours a day, but do so based only on the lack of availability of work. There is no benefit to the employees for having the variance application

granted. Doing so would serve only to deny them the minimum standards set forth by the *Act*.

The Director made no submissions in this appeal.

ANALYSIS

Section 73 of the *Act* outlines the Director's power to grant a variance from certain minimum standards in the *Act*, including the time period specified in the definition of "temporary layoff", pay days, special clothing, notice of a shift change; minimum and maximum hours of work; hours free from work; overtime wages for employees not on a flexible work schedule; and section notice and termination requirements for group terminations. The employer here is seeking a variance under section 72(e) from the minimum hours of work specified in section 34.

- 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*.
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- (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.

Section 73(1)(a) requires the Director to be satisfied that a majority of the affected employees are aware of the variance's effect and approve of the application. This is a precondition to the exercise of the discretion granted by that section. This subsection calls for Director to ensure that the employees are fully aware of all issues relevant to the variance application and approve of it. And the employees cannot "approve" unless they have a full and complete understanding of all of the issues relevant to the variance. Once the Director is satisfied that all relevant questions have been canvassed, she can then make a fully informed decision under section 73(1)(a) as to whether the employee's approved of the application and were aware of its effect. If, after discussing all of the relevant issues with the employees, the Director is satisfied that the employees were not aware or did not approve, she is free to refuse the variance application. But this presupposes a full and complete discussion with the employees. That was not done here.

The Determination shows that the employees were aware of a number of relevant issues and understood that four hours a day was not available to them. But, as pointed out by the submissions of the employer, four hours of work was available to only one employee, but it would have to be performed in a split shift. The employer acknowledged the problem and said she did not think that these employees were willing to do this work on a split shift

basis. There is no indication in the Determination that the Director discussed this alternative with the employees. The major reason why the Director turned down the variance request was because there was no benefit accruing to the employees, but there could very well be a major benefit to them in avoiding the only other possible configuration of hours under the *Act* and that is avoiding a split shift. There are many disadvantages to a split shift but the major one is that it means an employee must report for work twice per day instead of once and incur the attendant inconvenience and expense. Thus the Director did not fully discharge her obligation to be satisfied that a majority of the affected employees were "aware" of the effects of the variance and approved of the application.

Given the broad discretion conferred on the Director by section 73(1), I will not award the variance but rather will remit that question to the Director, to consider in light of my comments above.

ORDER

Pursuant to section 115(1)(a) of the *Act*, I refer the Determination back to the Director.

Lorna Pawluk
Adjudicator
Employment Standards Tribunal