

An appeal

- by -

Palladian Developments Inc.
("Palladian")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2005A/182

DATE OF DECISION: December 5, 2005

DECISION

SUBMISSIONS

Blair J. Franklin, Barrister & Solicitor on behalf of Palladian Developments Inc.
Terri Walowina on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Palladian Developments Inc. (“Palladian”), pursuant to Section 112 of the *Employment Standards Act* (“the *Act*”), against a Determination of the Director of Employment Standards (“the Director”) issued September 21, 2005.
2. On August 4, 2005, Palladian made an application to the Director under section 72 of the *Act* for a variance of the provisions of section 40. Palladian further requested that the variance be backdated by nine months.
3. The Director’s delegate denied the application, finding that the application did not meet the requirements of section 73(1)(b) of the *Act*.
4. Palladian contends that the Director erred in law and failed to observe the principles of natural justice in making the Determination.
5. Although Palladian sought an oral hearing, I am satisfied that this matter can be decided based on the written submissions of the parties.

ISSUES

6. Did the delegate err in law in determining that Palladian was seeking an exclusion from section 40 rather than a variance, and in denying the application, in part, on the grounds that the variation was a violation of section 4 of the *Act*.
7. Did the delegate fail to observe the principles of natural justice in making the Determination by not reviewing the purposes of the *Act* set out in section 2 and failing to consider all the appropriate matters she should have considered in coming to her decision.

THE FACTS AND ARGUMENT

8. On July 7, 2005, Palladian and a majority of the employees affected by the variance applied to the Director for a variation of section 40 of the *Act*. The application requested that the employees not receive overtime wages if they work over 8 hours per day or over 40 hours per week and that the variance commence November 14, 2004 and run indefinitely.
9. The delegate considered section 73 of the *Act*, and noted that, while the agreement of the employees is a necessary condition, it was not necessarily sufficient to the granting of a variance. The delegate concluded

that the application had also to be consistent with the intent and purpose of the *Act* as set out in sections 2 and 4.

10. The delegate found that Palladian's application was for a waiver of section 40. The delegate also noted that a schedule of the employees' hours had not been included with the application.
11. The delegate determined that the application was a clear violation of section 4 of the *Act*. The delegate further determined that the application could not be granted retroactively, indicating that the starting day of a variance was the day the director granted it. The delegate noted that the application did not set out a "clear, consistent schedule of work for the employees. Variance application must include schedules, showing the shift cycle and the actual hours and days to be worked in the shift cycle."
12. The delegate concluded that

... the Director will not exercise her [sic] authority unless and until it can be shown that the employees benefit by the requested relaxation of minimum standards. That employees accept an arrangement, given the prohibition set out in s. 4 and the process set out in ss. 72 and 73, does not decide the issue. If employee acceptance were sufficient, the Legislature would not have created ss. 4 or 73(1). The application must meet the Directors' view of the intent of the *Act*. Simple opportunity for employment, in the Directors' view, is not of itself sufficient benefit to justify a variance.
13. Palladian's counsel argues that Palladian's application was clearly for a variance, not an exclusion, and that the delegate erred in finding that it was not. Counsel also contends that the delegate erred in law in finding that the variation was a violation of section 4 since it was expressly permitted by section 73(1.1).
14. Further, counsel submits that there is nothing in the *Act* preventing the Director from granting a variation retroactively.
15. Counsel also submits that there is nothing in the *Act* or the *Regulation* which requires an applicant to submit a schedule showing shift cycles and actual hours and days to be worked in the shift cycle and the delegate erred in law in denying the application in the absence of one.
16. Finally, counsel submits that the delegate erred in law in not considering the purposes of the *Act* set out in section 2, and in considering factors other than those in the *Act*. He submits that the delegate's conclusion that there was no benefit to the employees was patently wrong, and that the delegate did not contact the employees to determine whether there was any such benefit.
17. Palladian's counsel also submits that the delegate failed to observe the principles of natural justice in not considering factors set out in section 2 in arriving at her Determination. He relies on the Tribunal's decision in *Takarabe et al.* (BC EST #D160/98)
18. The delegate submits that the application was for an exclusion from the overtime provisions of the *Act*. The delegate says that such an application is, in effect, asking the employees to sign away their rights to overtime pay, which is a violation of section 4.
19. The delegate relies on the Tribunal's decision in *Armstrong* (BC EST #D026/97).

20. While the delegate concedes that the *Act* is silent on the issue of retroactive variances, she submits that the reality is that a variance is an application between the employer, the employees and the Director, and granting a variance retroactively would be unfair to the employees. She says that “The employer is basically trying to avoid paying overtime wages found to be owed to their employees as a result of an audit performed by this branch precipitated by a confidential complaint”.
21. The delegate says that, while there is nothing in the *Act* or *Regulations* requiring the applicant to submit schedules, shift cycles and actual hours and days to be worked in each shift cycle, the Director has the obligation of approving variances, and must be able to determine how the employee’s hours are being varied. The Director has a policy of requiring a schedule to be provided with each application.
22. The delegate submits that the application does not ensure that Palladian’s employees receive at least basic standards of compensation, and that, on its face, the application does not show any benefit to employees.

ANALYSIS AND DECISION

23. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
- (a) the director erred in law
 - (b) the director failed to observe the principles of natural justice in making the determination; or
 - (c) evidence has become available that was not available at the time the determination was being made
24. The burden of establishing the grounds for an appeal rests with an Appellant. Palladian must provide persuasive and compelling evidence that there were errors of law in the Determination, as alleged, or that the delegate failed to observe the principles of natural justice.
25. Section 73 provides:
- (1) The director may vary a time period or requirement specified in an application under s. 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 not inconsistent with the purposes of this Act set out in section 2
 - (1.1) The application and operation of a variance under this Part must not be interpreted as a waiver as described in section 4.
26. Section 73 vests the Director with discretionary authority to approve or disapprove of variance applications. The Tribunal will not interfere with the exercise of discretion by the Director unless it can be shown that there has been an abuse of power or jurisdictional error or that the Director has acted unreasonably or has failed to exercise his discretion within “well established legal principles” (see *Kevin Jager*, BC EST #D244/99 and cases cited therein).

27. The central purpose of the *Act* is to establish minimum terms and conditions of employment for those employees subject to it, including overtime wages. For this reason employees and employers are not free to “contract out” of the *Act* (section 4).
28. The Director’s decision to deny the application was influenced primarily by the effect of the variance, which would have denied the employees overtime wages, a result that is prohibited by Section 4. That is an appropriate consideration for the Director to consider.
29. The delegate was unable to find any benefit to the employees to outweigh the loss of overtime requirements. Although Palladian disagrees with the Determination, they have not shown any basis upon which the Tribunal should interfere with the refusal by the Director to grant the variance. The application did not, on its face, set out any benefits to the employees. The sole reason for the application was to allow Palladian to avoid payment of overtime without any corresponding benefits to the employees.
30. As noted by the Tribunal in *Budget Rent – A- Car* (BC EST #D269/99):
- ...Section 4 of the *Act* specifically addresses the effect of such agreements and statutorily “negates” any agreement to avoid its minimum requirements:
4. *The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.*
- Section 4 would be rendered meaningless if the Director was simply required to “rubber stamp” agreements made between employees and employers to avoid the statutory obligation to pay overtime wages.
31. I see little in the facts to distinguish this application from that in *Armstrong* (BC EST #D 026/97) in which the Tribunal stated:
- Armstrong simply wishes to avoid paying overtime to his employees. Further, he has not advanced any compelling justification for his request. I agree with the Director that applications for variances should involve some sort of *quid pro quo*, that is, the employee should receive some other benefit in exchange for the loss of the statutory entitlement. This latter philosophy is inherent in the “meet or exceed” provisions set out in sections 43, 49, 61 and 69 of the Act whereby unionized employees 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. I see no reason to set aside the Director’s refusal to issue a variance.
32. In summary, I am unable to find that the delegate erred in law in denying the application. The delegate considered the *Act*, including its purposes, and applied the appropriate tests in exercising her discretion.
33. I am also unable to conclude that the delegate failed to observe principles of natural justice in considering factors she ought not have considered, or failed to consider factors she ought to have. I find that she exercised her discretion for *bona fide* reasons, and that her decision was not arbitrary or based on irrelevant considerations.
34. The appeal is denied.

ORDER

35. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated September 21, 2005, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal