

An appeal

- by -

Victoria Confederation of Parent Advisory Councils  
("VCPAC")

- 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

**ADJUDICATOR:** M. Gwen Taylor  
David B. Stevenson  
Kenneth Wm. Thornicroft

**FILE No.:** 2003/011

**DATE OF DECISION:** June 13, 2003

## DECISION

### APPEARANCES

The Victoria Confederation of Parent Advisory Councils (“VCPAC”) appealed a Determination issued by the Director of Employment Standards (“Director”) on February 26, 2001, denying a variance application. The application requested a variance of the provisions of Section 34 (Minimum Daily Pay) for School Crossing Guards to reduce the minimum daily pay period from 4 hours to 1.5 hours, for two 45 minutes shifts. The Director found that the application did not “identify a benefit to the employees which is sufficient to justify the requested alteration of their entitlement to a minimum employment standard.” The Director found the application was inconsistent with the intent of the Act.

On appeal, the Tribunal issued a decision dated August 17, 2001, referring the case back to the Director on the grounds that the Director had fettered her discretion and taken an unnecessarily narrow view of facts relevant to the variance application.

The Director responded to the Tribunal’s referral back, by submission dated February 21, 2003. The Tribunal received further submissions from VCPAC and the Director.

For the reasons that follow, the Tribunal finds that the Director has addressed the issues raised in the referral back and given thorough and proper reasons for denying the variance. Accordingly, the Tribunal dismisses VCPAC’s appeal and confirms the Director’s decision to deny the application for variance.

### THE REFERRAL BACK

This decision should be read with the previous decision, which sets out the facts, legislative framework and full arguments of the parties.

In the August 17, 2001 decision, the Panel stated:

¶ 26 As noted above, VCPAC has questioned whether the Director considered all the relevant circumstances. It is not clear from the face of the determination that she did.

¶ 27 While the Determination concluded the application did not meet the intent of the Act, when the Determination is examined in its entirety, the rationale for that conclusion remains unclear. Given the requirement in Section 81 of the Act to provide the reasons for a Determination, it is not enough to simply state the conclusion. There must be a degree of analysis sufficient to identify the considerations that comprised the conclusion.

¶ 28 The Director found that a compensating benefit was required. That is clear. What is not clear is how that was concluded and how the various purposes outlined in Section 2 factored into the decision. It is also not clear why the Director would find a 2 hour minimum meets the intent of the Act but not the 1.5 hours requested. Did the Director consider other sections of the Act or Regulation?

¶ 29 Clearly this employment anticipates only minimal hours of employment. Is that sufficient to say that a variance will not be granted? Or is that sufficient to say a variance should be granted? Does the duration of the proposed variance affect considerations of legislative intent? Are there

public policy issues to consider? Is VCPAC's concern that, without the variance, crossing guards will not be provided, or provided inadequately, justified? Is VCPAC's ability to pay a factor to be considered under Section 2? Are there indicia of public policy or legislative intent to be gleaned from looking at the exclusions in Section 34 of the Regulation such as noon hour supervisors, teacher's aides, supervision aides, etc.?

¶ 30 These are some considerations that lead the Tribunal to conclude that the Director did not consider all relevant factors in reaching her decision on whether this application was consistent with the intent of the Act. The Director cannot simply say that no variance will be granted unless the application shows the employees will benefit from the relaxation of minimum standards. That response does not adequately address the intent of the Act and is an improper fettering of discretion by the Director.

## ARGUMENT

In the February 21, 2003 reply, the Director gave lengthy consideration to the factors raised by the Tribunal, provisions of the Act, other similar work that has been granted exclusion, the Director's policy and reason for it, and submitted that the decision to deny the application was well founded. The Director discussed the purposes set out in section 2, with reference to Professor Mark Thompson's report, *Rights and Responsibilities in a Changing Workplace: A Review of Employment Standards in British Columbia*. The Director discussed policy considerations underlying sections 2, 4 and 34 and the effect of a variance. The Director reviewed evidence considered in the original investigation, specifically, the employee interviews.

The Director stated:

The Director must ultimately decide at what point the variance application in hours would not serve as adequate work hours in the day taking into consideration the working population in general not just the individuals that may be working at the time of the granting of the variance. The purposes of the Act clearly require the director to consider all of the employees in British Columbia.

The fundamental question is whether granting this variance would compromise the purpose of section 34. This issue is dealt with below.

The Director then gave detailed consideration of section 34, the facts, previous tribunal decisions, and policy considerations. The Director had been prepared to grant a variance from 4 hours to 2 hours, but was not satisfied that there would be any benefit to the employees in reducing the minimum daily pay to 1.5 hours.

VCPAC submitted that the Director continued to err by taking an unreasonable interpretation and fettered view. VCPAC maintains that the Director has taken an unreasonable and narrow interpretation of some of the section 2 purposes, takes issue with the Director's statement that one purpose of the Act is to set 'minimum' standards, whereas section 2(a) refers to 'basic' standards, and submits that the Director incorrectly interpreted section 4 as limiting the discretion to grant a variance. VCPAC disagrees with the Director's interpretation and application of the terms "fair" and "equitable" and argues that not all benefits need be monetary in nature. VCPAC submits that the Director gave more credence to the specifics than to the intent of the Act. (This is not intended to be a full recital of VCPAC's submissions.)

VCPAC submitted that nothing has changed since the Director granted the initial variance in 1997.

Both parties addressed the issue of whether the VCPAC application is more in the nature of an exclusion than a variation. This is not an issue which arises in this appeal. VCPAC has viewed their circumstances as requiring a variance, not an exclusion, and the Director has correctly considered the matter as a variance.

## **ANALYSIS & DECISION**

The Tribunal noted in the referral back that the legislation gives the Director a broad discretion to decide applications for variation (s. 73). The Tribunal will not interfere with that exercise of discretion unless there 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. Absent those considerations, the Director has the right to be wrong and the Tribunal will not substitute its views for those of the Director.

The Tribunal found that the Director had not provided sufficient reasons, did not consider all of the relevant factors, and had improperly fettered her discretion. The Director has now provided full reasons with reference to the legislation and public policy. Where policy was taken into consideration, the Director has demonstrated that consideration has also been given to the particulars of this case. In that way, the Director's reasoning is clear in discussing how policy is applied and demonstrates that she has not improperly fettered her discretion by applying policy without regard to the specifics of the case.

VCPAC does not agree with the Director's interpretation of some legislative provisions, or the policy discussion and rationale. The Tribunal has fully considered VCPAC's submissions and finds that they do not raise issues or errors that would justify the Tribunal interfering with the Director's exercise of discretion.

Although the Director was prepared to grant a variance to 2 hours, that was not acceptable to VCPAC and it was not put forward as an alternative either to the Director or on appeal. In the result, the Director denied the application for variance, which means that the 4 hours provision of section 34 continues to apply, until the recent amendment.

## **ORDER**

The Tribunal dismisses VCPAC's appeal and confirms the Director's decision to deny the application for variance for the reasons given in the original Determination dated February 26, 2001, as supplemented by the Director's report dated February 21, 2003.

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M. Gwen Taylor  
Adjudicator  
Employment Standards Tribunal

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David B. Stevenson  
Adjudicator  
Employment Standards Tribunal

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Kenneth Wm. Thornicroft  
Adjudicator  
Employment Standards Tribunal

**EMPLOYMENT STANDARDS TRIBUNAL**  
**Victoria Confederation of Parent Advisory Councils**  
**Appendix A**

**Minimum daily hours**

- 34** (1) If an employee reports for work on any day as required by an employer, the employer must pay the employee for
- (a) at least the minimum hours for which the employee is entitled to be paid under this section, or
  - (b) if longer, the entire period the employee is required to be at the workplace.
- (2) An employee is entitled to be paid for a minimum of
- (a) 4 hours at the regular wage, if the employee starts work unless the work is suspended for a reason completely beyond the employer's control, including unsuitable weather conditions, or
  - (b) 2 hours at the regular wage, in any other case unless the employee is unfit to work or fails to comply with Part 3 of the Workers Compensation Act or a regulation under that Part.
- (3) Despite subsection (2) (a), a school student reporting for work on a school day is entitled to be paid for a minimum of 2 hours at the regular wage in the circumstances described in that subsection.

**Application for variance**

- 72** An employer and any of the employer's employees may, in accordance with the regulations, join in a written application to the director for a variance of any of the following:

...

- (e) section 34 (minimum daily hours);

**Power to grant variance**

- 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.
- (2) In addition, if the application is for a variance of a time period or a requirement of section 64 the director must be satisfied that the variation will facilitate
- (a) the preservation of the employer's operations,
  - (b) an orderly reduction or closure of the employer's operations, or

- (c) the short term employment of employees for special projects.
- (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.
- (4) On being served with a determination on a variance application, the employer must display a copy of the determination in each workplace, in locations where the determination can be read by any affected employees.

### **Purposes of this Act**

**2** The purposes of this Act are as follows:

- (a) to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment;
- (b) to promote the fair treatment of employees and employers;
- (c) to encourage open communication between employers and employees;
- (d) to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act;
- (e) to foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia;
- (f) to contribute in assisting employees to meet work and family responsibilities.

### **Requirements of this Act cannot be waived**

**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.

## **EMPLOYMENT STANDARDS REGULATION**

### **How to apply for a variance**

- 30**
- (1) To apply under section 72 of the Act for a variance, a letter must be delivered to the director.
  - (2) The letter must be signed by the employer and a majority of the employees who will be affected by the variance and must include the following:
    - (a) the provision of the Act the director is requested to vary;
    - (b) the variance requested;
    - (c) the duration of the variance;
    - (d) the reason for requesting the variance;
    - (e) the employer's name, address and telephone number;
    - (f) the name and home phone number of each employee who signs the letter.