EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act

- by -

Randellin Dewhirst operating Yellow Cafe and Laura-Lee Fisher
("Dewhirst, Fisher")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

Adjudicator: Hans Suhr

File No.: 96/373

Date of Decision: **August 16, 1996**

DECISION

OVERVIEW

This is an appeal by Randellin Dewhirst ("Dewhirst") who operates the Yellow Cafe and by Laura-Lee Fisher ("Fisher") who was employed at the Yellow Cafe against Determination # 002503 issued on June 5, 1996 by a delegate to the Director of Employment Standards ("Director").

The Determination addressed the question of whether the Director should grant Dewhirst a variance under Section 72 of the *Act*, thereby relieving Dewhirst and Fisher from compliance with the provisions of Section 34 (minimum daily hours).

The facts are not in dispute. I have completed my review of the written submissions made by Dewhirst, Fisher and the information provided by the Director.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether the variance which is being sought by Dewhirst is consistent with the intent of the *Act*.

THE APPLICATION FOR VARIANCE

The variance application is by Dewhirst who operates the Yellow Cafe and is supported by Fisher, an employee.

The application is based on the cyclical nature of its operation and the fact that the employee, Fisher, agreed to work only 2 hours per day rather than face lay-off.

THE DIRECTOR'S POSITION

Section 73 of the *Act* provides that as a pre-condition to granting a variance, the Director must be satisfied that the application is "consistent with the intent of the *Act*." As I have mentioned, the Director's delegate refused the application because of the view that the application by Dewhirst did not satisfy this condition.

The fundamental point of difficulty with the application was that it did not set forth any direct benefit to the employee in return for the reduction in the minimum daily hours of work. The reason for denying the application was described in the following terms in the Determination :

> "The request is denied due to the fact that the employee would receive no benefit from a reduction of the minimum requirement of 4 hours pay. A request for a

variance to meet an operational benefit for an employer does not meet the intent of the Act. A minimum standard will not be reduced unless the employee directly benefits from the reduction. (see Sec. 34 (1) & (2), Sec. 4 and Sec. 73 (1) of the Employment Standards Act."

ANALYSIS

Dewhirst's application is for a variance under section 72 of the *Act's* provisions respecting hours of work and overtime. The material part of section 72 for my purpose provides as follows:

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:

(a) a time period specified in the definition of "temporary layoff";
(b) section 17 (1) (paydays);
(c) section 25 (special clothing);
(d) section 31 (3) (notice of a change in shift);
(e) section 34 (minimum daily hours);
(f) section 35 (maximum hours of work);
(g) section 36 (hours free from work);
(h) section 40 (overtime wages for employees not on a flexible work schedule);
(i) section 64 (notice and termination pay requirements for group terminations).
(emphasis added)

Under section 73 of the *Act,* the Director is given the authority to vary a requirement specified in section 72. This includes the authority to vary the requirements which Dewhirst submits are inappropriate in its particular circumstances: minimum daily hours of work (s.34).

Section 73 of the *Act* provides the Director with a discretion to grant this request but it is not an unfettered discretion. Under section 73, in order to accept the application, the Director must be 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.

There is no dispute that the first condition is satisfied. The submission of Fisher reflects that she would be affected by the variance, is aware of its effect and approves of the application.

Section 34, among others, is a provisions which is important to the *Act's* assurance to employees in British Columbia that they will receive at least "basic standards of compensation and conditions of employment" (section 2). Dewhirst must make the application in light of the fact that the provisions of the *Act* are "minimum requirements" and any agreement between an employer and its employees to waive these provisions is "of no effect" (section 4). Although the parties cannot themselves waive a minimum standard of the *Act,* this is not to say that the Director cannot do so if this is justified under sections 72 and 73. Indeed, the Director has been given that express authority by the *Act.* Sections 72 and 73 provide a means whereby the Director is authorized to vary the minimum requirements of the *Act* in proper cases. However, the Director's authority is circumscribed by the requirement that the variance be "consistent with the intent of the *Act.*"

In this respect, the fundamental flaw in Dewhirst's application is that it does not disclose any reasonable basis upon which the Director could grant a variance of sections 34. The application does not provide a direct benefit to the employee in return for the reduction in the minimum daily hours of work which can be substituted for the assurances which the *Act* provides to employees as minimum standards.

The Director is, in effect, being asked to return the issue of hours of work and overtime to the parties. This request misconceives the purpose of section 72 in the overall context of the *Act.*

The application by Dewhirst under section 72 more closely resembles an application for exclusion from the *Act* rather than for a variance of its provisions. It does not provide a concrete proposal which can be made the subject of a variance. Parties who secure a variance remain subject to the provisions of the *Act*, except to the extent covered by the variance granted by the Director.

There is no doubt that Dewhirst's application is brought with the support of the employee and that both Dewhirst and the employee believe that the operation of the business and employee contentment will be enhanced by its application. However, the Director has decided that what Dewhirst seeks under section 72 is not consistent with the provisions of the *Act.*

I conclude therefore, on the basis of the information provided, that the variance applied for is not consistent with the intent of the *Act* and the appeal must be dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that Determination No. CDET 002503 be confirmed.

____

Hans Suhr, Adjudicator
Employment Standards Tribunal

:jel