Employment Standards TRIBUNAL

An appeal

\- by -

Individual Pursuits Program Ltd. operating as Rosco group home
and
Employees
("Rosco")

\- 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. Gwendolynne Taylor
FILE No.:	2002/078
DATE OF DECISION:	June 4, 2002

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") brought by Individual Pursuits Program Ltd., operating as Rosco Group Home ("Rosco"), and employees of Rosco, from a Determination issued on January 28, 2002 by the Director of Employment Standards (the " Director"). The Director denied an application made by Rosco and 16 employees under Section 72 of the *Act* to vary the provisions of Section 40 (Overtime wages for employees not on a flexible work schedule).

The application sought approval of a proposed 6 month work schedule and sought relaxation of the daily overtime requirements so that overtime rates on shifts in excess of 8 hours per day would not apply.

The Director found that the application was not consistent with the intent of the *Act* by not providing overtime pay for employees who, on average, work more than 40 hours per week and by not providing a discernable benefit to employees who regularly do not work shifts of more than 8 hours per day.

ISSUE

Did the Director err in refusing to grant the variance application?

LEGISLATIVE FRAMEWORK

The Director may grant variances to alter pay or other requirements in the *Act*, if satisfied that a majority of the affected employees are aware of the effect and approve the variance and if the variance is consistent with the *Act*.

Sections 72 and 73 of the *Act* and Section 30 of the *Regulation* govern applications for variances. Appendix A to this decision sets out those sections, plus Sections 2, 4 and 40 of the *Act*.

FACTS

The Rosco Group Home opened in 1996. The employees have been involved in creating their own work schedules.

In the Determination the Director set out that there are 5 employees who regularly work shifts in excess of 8 hours and 12 employees who may be required to work shifts in excess of 8 hours. The proposed 6 month work schedule consisted of shifts ranging from 6 to 24 hours.

The proposed schedule would result in the affected employees "giving up daily overtime, and in some cases weekly overtime, in return for extra days off and corresponding savings in travel time and costs." (see p. 2 of the Determination) Additionally, the application would enable other employees to periodically work shifts in excess of 8 hours.

The Director considered the shifts of five employees who would regularly work shifts in excess of 8 hours, less than 5 days per week and weekly hours from 17 hours to 49 hours. The Director also looked at a specific employee who would work more than 40 hours per week. The Director said:

> Given that even fliexible work schedules provided in the Act provide for the payment of overtime rates of pay for average hours greater than 40 hours per week, I must conclude that this application does not meet the intent of the Act as it relates to the minimum requirements to pay overtime for weekly hours worked greater than 40.
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> In addition, the subject application would provide that other employees who do not regularly work shifts of more than 8 hours may be required to do so on an as needed basis. I accept this circumstance as indicative that other employees not regularly covered by the sought variance would be periodically required to work shifts of more than 8 hours per day so as to meet the operational needs of the employer, without receiving any discernable benefits other than the simple opportunity to work.

The employee referred to in the first paragraph of the quote is one of the applicants and one of the appellants and has been employed at Rosco working these shifts since it opened.

It is apparent that the Director has issued at least one Variance in the past. A copy of the cover sheet for a Variance dated February 2, 1998, was provided in the appeal by Rosco. Three employees are named in that Variance and two of them (including the one just mentioned) are involved in the current application.

The Director did not make mention of previous Variances in the Determination. From the tone of the letters supporting the appeal, it seems that Rosco has operated on the proposed shifts since its inception.

ARGUMENT

Appellant

In the appeal, the manager of Rosco states that the application is from the staff. He acknowledges that he does not want to pay overtime unless an employee exceeds 2080 hours per year. He notes that staff are not required to work the longer shifts but that they want the shifts to save money and time in transportation and have more days off.

Five employees plus the Shop Steward submitted letters in support of the appeal. Most of these employees have been employed at Rosco for many years. They raise issues of personal benefits in working shifts in excess of 8 hours; they talk about fitting in education and other work responsibilities as well as personal family commitments. They also refer to benefits to the clients of the group home.

The following quotes from an employee letter are consistent with the concerns raised by others. In this letter the employee, Jeff Nienaber, asks the Tribunal to find that the application is insightful, logical and consistent with the *Act*. It is apparent that he had reference to section 2 of the *Act* - the purposes - and gave his reasons for saying the application was consistent with those purposes.

He states, in part:

> I am writing in response to the recently imposed disruption on my and my co-workers work schedules…. We have maintained condensed work-weeks for a long time without any cause

> for concern. Long ago it was established that anyone exceeding a yearly average of 2080 hours (40 hours per week) would be paid overtime for these. However, this does not usually happen because we prefer extra days off in lieu of an excessive number of hours worked.
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> No one is forced to work these extended shifts; we can take them in whole or in part – whatever we prefer. Our employer offers these options to promote our personal happiness and stress reduction. Sean Downey's (Manager/Contractor) operational needs can be met with or without this variance. He has no part in this appeal other than to act on our behalf. … This appeal is Sean's way of assisting his employees to continue to meet work and family responsibilities.
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> All of the employees affected by this variance are aware of its effect and approve of the application. This is not an agreement to waive any requirements of the Act, but is simply an acknowledgement that all requirements in "the intent of the Act" have been met. This is a productive and efficient labour force which daily contributes to the prosperity of British Columbia, and maintaining our morale is essential to maintaining the state of our economy.
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> With these statements, all facets of the Act (s. 73(1), s. 2, and s. 4) that I have been provided with are satisfied and there is no reason apparent to me at this time for which our requested variance was denied. … My frustration comes from the realization that this must mean the Act is no longer functioning to serve and protect the hardworking citizens of Canada.
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> …
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> Every person that this decision effects will be negatively impacted if the variance is not granted. Our clients rely on a consistent schedule, sudden changes can result in physical and emotional damage to them and therefore the staff who work with them – working with individuals prone to aggression is dangerous and stressful enough without added provocation.

Director

The Determination referred to sections 2 and 4 of the *Act*, the Director's role to enforce minimum standards of employment, and that only the Director has authority to grant a variance. The Determination included the following analysis:

> . . . the Director will not exercise her authority unless and until it can be shown that the employees benefit by the requested relaxation of minimum employment 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 Director's view of the intent of the Act. Simple opportunity for employment, in the Director's view, is not of itself sufficient benefit to justify a variance.

The Director responded to the appeal noting Rosco's argument that overtime is paid to an employee who works more than 2080 hours per year but noting that none of the affected employees would ever reach that condition. The Director says that, in essence, the employer is asking for an exemption rather than a variance.

The Director reiterated the original finding that the application is not consistent with the intent of the *Act*. As noted above, this appears to be captured in the sentence: "I must conclude that this application does

not meet the intent of the *Act* as it relates to the minimum requirements to pay overtime for weekly hours worked greater than 40".

ANALYSIS

The appeal questions the Director's exercise of discretion and whether the Director failed to consider relevant factors and circumstances.

The discretion given to the Director under Section 73 of the *Act* is broad and generous. The following statement, from *Joda M. Takarbe and others*, BC EST #D160/98 confirms the approach taken by the Tribunal when asked to interfere with an exercise of discretion by the Director under Section 73(1):

> In Jody L. Goudreau et al (BC EST # D066/98), the Tribunal recognized that the Director is "an administrative body charged with enforcing minimum standards of employment . . ." and ". . . is deemed to have a specialized knowledge of what is appropriate in the context of carrying out that mandate." The Tribunal also set out, at page 4, its views about the circumstances under which it would interfere with the Director's exercise of her discretion in administering the Act:
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>> The Tribunal will not interfere with the exercise of discretion unless it can be shown the exercise 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. Unreasonable, in this context, has been described as being:
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>>> . . . a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably". *Associated Provincial Picture Houses v. Wednesbury Corp*. [1948] 1 K.B. 223 at 229
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>> Absent any of these considerations, the Director even has the right to be wrong.
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>> Section 81 of the Act requires the Director to include, in a determination, the reasons for it. When assessing an argument that the Director has considered immaterial factors or failed to consider material factors, the Tribunal will confine itself to an examination of the relevant determination.
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> In *Boulis v. Minister of Manpower and Immigration* [(1972), 26 D.L.R. (3d) 216 (S.C.C.)] the Supreme Court of Canada decided that statutory discretion must be exercised within "well established legal principles". In other words, the Director must exercise her discretion for bona fide reasons, must not be arbitrary and must not base her decision on irrelevant considerations.

There is no suggestion in this appeal that the Director abused her power or acted in bad faith, that she made a mistake construing the limits of her authority or that there was any procedural irregularity when exercising discretion.

The substance of the appeal raises a question about whether the Director failed to give consideration or effect to relevant considerations. Although the appeal is not expressly framed in terms of whether the Director fettered her discretion, that issue permeates the appeal. Rosco and the employees say, in effect, the Director either did not consider, or took an unnecessarily narrow view of, factors relevant to the variance request. This issue was commented on by Southin, J.A. in *Saunders Farms Ltd. v. British Columbia (Liquor Control and Licensing Branch, General Manager)*, (1995) 122 D.L.R. (4th) 260 at 261:

At the heart of the appellant's case is the principle that a tribunal upon whom, by statute, a discretion is conferred may not fetter its discretion save to the extent the statute expressly or implicitly authorizes. The principle is easy enough to state. But, in truth, it is a principle vague in its limits with a good deal of the chancellor's foot in its application.

As noted in the above reference to Re *Joda M. Takarbe and others, supra,* the onus is on the appellants to show the Tribunal would be justified in interfering with the exercise of discretion. As well, when assessing if the Director has improperly fettered her discretion in some way, the Tribunal will confine itself to an examination of the Determination.

As noted above, Rosco and the employees have questioned whether the Director considered all the relevant circumstances. It is not clear from the face of the Determination that she did.

In *Sun Peaks Mountain Resort Assn.* (Re), [2001] B.C.E.S.T.D. No. 450; BC EST #D434/01, the Tribunal made the following comments about determining "intent":

¶24 It is clear from a reading of the Act as a whole that the main purpose and objective, and the fundamental statement of the intent of the Act, is that found in Section 2(a) - to ensure employees are provided with basic standards of compensation and conditions of employment. As the Tribunal has noted in several decisions, adopting the comments of the Supreme Court of Canada in Machtinger v. HOJ Industries Ltd., [1992] 1 SCR 986, the Act is remedial legislation governing employment and should be read in a way that encourages employers to comply with the minimum requirements found in the Act and extends protection of the Act to as many employees as possible. As noted above, a variance that derogates from the basic standards of compensation and conditions of employment is not consistent with the intent of the Act. Having said that, however, it is wrong to suggest that Section 2(a) expresses the full intent of the Act.

¶ 25 Such a suggestion would ignore the other statements of purpose found in Section 2 of the Act. Of particular note in the context of the variance application made by the Association (as they will be in many variance applications) are the objectives of promoting fair treatment for employees and employers, fostering a productive and efficient workforce and contributing in assisting employees to meet work and family responsibilities. The Legislature must have intended those statements of purpose be given some effect in the context of administering the Act. There is nothing in the reasons for the Determination indicating these matters have been considered or, if they have, what effect they have or have not been given. These are necessary elements to any Determination, particularly one that denies a variance.

While the Determination concluded the application did not meet the intent of the *Act*, 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.

I find that the Determination lacks analysis. The Director found that a compensating benefit was required. However, it is not clear how possible benefits were weighed in light of the various purposes outlined in section 2. The Director's decision rests on a finding that the application is not consistent with the intent of the Act. However, the Director failed to discuss the section 2 purposes or to analyze the positive or negative factors raised by the employees in support of the variance. The Director has provided a paucity of information or analysis from which to draw conclusions. Further, the Director's finding on the intent of the *Act* rests on the specific provisions that the appellants are asking to vary.

The Director has issued a Variance in the past. It sounds as though this employer has operated on long shifts without overtime since it began operation. Has there been some recent change that causes the Director to view the situation differently now than before? Are there employees who opposed the application? Why does the Director find that the benefits mentioned by the employees are not adequate to support the application? How do those benefits fit with the purposes outlined in section 2?

These are some considerations that lead me 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*.

On another point, although this was not raised by the appellants, I think the Director may have made a mistake in assuming that employees not regularly covered by the variance may be required to work longer shifts, without overtime pay. My reading of the material indicates that there is no "requirement" by the employer for any employee to work in excess of 8 hours.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated January 28, 2002 be cancelled and the matter referred back to the Director.

M. Gwendolynne Taylor
Adjudicator
Employment Standards Tribunal

APPENDIX A

Overtime wages for employees not on a flexible work schedule

40 (1) An employer must pay an employee who works over 8 hours a day and is not on a flexible work schedule adopted under section 37 or 38

(a) 1 1/2 times the employee's regular wage for the time over 8 hours, and

(b) double the employee's regular wage for any time over 11 hours.

(2) An employer must pay an employee who works over 40 hours a week and is not on a flexible work schedule adopted under section 37 or 38

(a) 1 1/2 times the employee's regular wage for the time over 40 hours, and

(b) double the employee's regular wage for any time over 48 hours.

(3) For the purpose of calculating weekly overtime under subsection (2), only the first 8 hours worked by an employee in each day are counted, no matter how long the employee works on any day of the week.

(4) If a week contains a statutory holiday that is given to an employee in accordance with Part 5,

(a) the references to hours in subsection (2) (a) and (b) are reduced by 8 hours for each statutory holiday in the week, and

(b) the hours the employee works on the statutory holiday are not counted when calculating the employee's overtime for that week.

Application for variance

72 An employer and any of the employer's employees may, in accordance with the regulation, 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 regulation 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.