EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act S.B.C. 1995, C. 38

- by -

Interior Health Care Services Ltd.
("Interior")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Norma Edelman

FILE NO.: 96/535

DATE OF DECISION: **October 18, 1996**

DECISION

OVERVIEW

This is an appeal by Interior Health Care Services Ltd. ("Interior"), pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against Determinations Nos. CDET 003854 & 003855 issued by a delegate of the Director of Employment Standards on September 4, l996. The Director's delegate denied Interior's application for variances to Section 34 (minimum daily hours) and Section 35 (maximum hours of work) of the *Act* on the basis that they were not consistent with the intent of the *Act*.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether the variances being sought by Interior are consistent with the intent of the *Act*.

FACTS

In June of l996, Interior and various employees submitted an application to the Employment Standards Branch requesting variances to Section 34 (minimum daily hours) and Section 35 (maximum hours of work) of the *Act.*

On September 4, 1996, the Director's delegate denied the application. In the Reason Schedules attached to the Determinations, the Director's delegate stated the following:

> *(The Section 34) application states "the reason for our request is due to the nature of our industry". The intention of the Act is that variances be issued for the benefit of employees who genuinely prefer to work less than 4 hours a day.*

and

> *(The Section 35) application does not provide a specific proposed schedule, rather you propose to average eighty (80) hours over a two week period. This would effectively waive the provisions of the Act regarding hours of work.*

The Director's delegate concluded that Interiors' proposed variances were not consistent with the intent of the *Act.*

Interior appealed the Determinations on September 10, l996. In its reasons for the appeal it stated it wanted the variances due to "circumstances beyond (their) control" and "scheduling difficulties".

The workload of Interiors' employees is often unpredictable. They must respond to the health care needs of their clients and they have no control over these needs. Accordingly, Interior, with the support of a majority of its employees, wants to respond to this situation by allowing flexibility in the hours of work of employees in order to best meet client and personal needs. Interior wants its employees to be able to work and be paid for 2-3 hour blocks of service. It also wants its employees to be allowed to work more than 8 hours in a day, when necessary, and then take time off when they are best able to do so. This means, for the purposes of overtime, that it wants to average employees' hours of work over a 2 week period so that overtime becomes effective after 80 hours of work.

ANALYSIS

Sections 2, 3 and 4 of the *Act* describe the fundamental purposes of the *Act* - the establishment of minimum standards of compensation and conditions of employment for employees in British Columbia.

Section 73 of the *Act* gives the Director the power to vary certain minimum standards of the *Act.* The Director has the authority to grant a variance to Sections 34 and 35 of the *Act* if a majority of the affected employees approve of the application and if the application is "...consistent with the intent of this *Act.*"

In this case, there is no dispute that the first condition is met. A substantial majority of all the employees who will be affected by these variances approve of the application. At issue in this appeal is the second condition. Are the proposed variances consistent with the intent of the *Act* or do they undermine its purposes and protections?

In my view, Interiors' application does not disclose any reasonable basis upon which the Director could grant a variance to Section 34 & 35. The application more closely resembles an application for exclusion from the *Act* rather than for a variance of its provisions.

The application to vary Section 34 does not provide a direct benefit to the employee in return for the reduction in the minimum daily hours of work. The employer benefits by not having to pay a minimum of 4 hours of pay. The employee simply loses this minimum standard. The application to vary Section 35 does not provide a specific schedule of work. Indeed, it is not clear exactly what form of work schedule within a 2 week period the Director is being asked to approve. The *Act* and the *Employment Standards Regulation* does allow for certain flexible work schedules. These schedules, however, have constant cycles and days and hours of work. As well, employees must work an

average of between 35 hours and 40 hours per week. There are no approved schedules like the one proposed by Interior. I can only conclude that the *Act* and the *Regulation* never intended to allow a schedule where employees could work whatever hours they wanted to work, or needed to work, to average 80 hours in a two week period. This conclusion is supported by Section 31 of the *Act* which states that an employee has the right to know her/his hours of work in advance.

There is no doubt that Interior's application is brought with the support of the employees and that both believe that the operation of the business and employee contentment will be enhanced by its application. However, the Director has decided that what they seek is not consistent with the provisions of the *Act.* I can find no basis to conclude otherwise. Therefore, on the basis of the information provided, I find that the variances applied for are not consistent with the intent of the *Act* and the appeal must be dismissed.

ORDER

I order pursuant to Section 115 of the *Act* that Determination Nos. CDET 003854 & 003855 be confirmed

Norma Edelman
Registrar
Employment Standards Tribunal