EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the *Employment Standards Act* R.S.B.C. 1996, C. 113

- by -

Budget Rent-A-Car BC Ltd.
("Budget")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE NO.: 1999/302

DATE OF DECISION: July 15, 1999

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by Budget Rent-A-Car of BC Ltd. ("Budget") of a Determination which was issued on April 22, 1999 by a delegate of the Director of Employment Standards (the "Director"). The Determination denied an application by Budget to extend a variance of the provisions of Section 40 of the *Act* to part-time employees.

ISSUES TO BE DECIDED

The issue is whether Budget has demonstrated the conclusion of the Director to refuse to extend the variance to part-time employees is inconsistent with the *Act*.

FACTS

On March 10,1999, Budget was granted a variance of the provisions of Section 40 of the *Act* for full-time employees. The variance specifically excluded part-time and casual employees. On April 22, 1999, the Director issued a Determination explaining why the variance excluded employees working less than full-time hours.

The Director found the variance sought was not consistent with the intent of the *Act*, noting that the result sought by Budget would have part-time employees work 10 hour shifts on Saturday and Sunday without being paid daily overtime wages as required by Section 40 of the *Act*.

ANALYSIS

In this appeal, Budget argues that the Determination "negates the rights of both employer and employee to enter into a mutual written agreement to the Director to vary section 35 of the Act". Budget also says the absence of any definition in the *Act* and *Regulation* for part-time, casual or weekend shift employee "nullifies the determination that singles out one unidentified group of employees over another".

Section 73(1) of the *Act* authorizes the Director to vary certain provisions of the *Act* that are listed in Section 72. It reads:

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) a variance is consistent with the intent of this Act.*

It is correctly noted in the Determination that the Director has a discretionary authority under that provision. The Tribunal has stated in a number of decisions that it 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 her discretion within "well established legal principles" (see *Kevin Jager*, BC EST #D244/99 and cases cited therein).

The Director was influenced to deny the variance by two considerations. First, the *Act* contemplates that only full-time employees will be included in a work schedule variance. Second, the effect of the variance sought would allow a contracting out of the minimum requirements of the *Act* relating to overtime wages for the part-time employees, a result that is prohibited by Section 4 of the *Act*. Both of those matters are appropriate considerations. Against those considerations, the Director found no sufficient benefit would be gained by the part-time employees to outweigh the loss of the minimum overtime requirements established by the *Act*.

While Budget may disagree with the result, they have not shown any basis upon which the Tribunal should interfere with the refusal by the Director to grant the variance sought by them. I do not accept their argument that the Determination should be set aside because it negates the rights of an employer and an employee to mutually agree to vary the application of Section 35 of the *Act*. In fact, 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.

Finally, I do not accept the argument that the variance is either vague or singles out part-time employees. The reasons given by the Director to confine the application of the variance granted on March 10, 1999 to full-time employees, who are clearly identified as "those working a regular schedule of an average of three to four days per week depending

on the schedules noted above", are justifiable in the context of the objects and purposes of the *Act*. Nor do I agree that the reference to the variance not applying to "part-time, casual and weekend shift employee" nullifies the Determination. The Director has the authority under subsection 73(3)(a) to *"specify that a variance applies only to one or more of the employer's employees"*. The authority to limit application of the variance to full-time employees is an aspect of that authority. Quite simply, the Director has decided that the variance will not apply to any employee who is not a "full-time employee" as described in the variance. I do not view the reference to "part-time, casual and weekend shift employee" as being anything other than a statement adding greater certainty and clarity in identifying the group to whom the variance applies.

Budget has not shown the Director's decision is one with which the Tribunal should interfere and the appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated April 22, 1999 be confirmed.

David Stevenson
Adjudicator
Employment Standards Tribunal