BC EST #D300/96

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 -

Prince George Family Services Society
("PGFSS")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Norma Edelman

FILE NO.: 96/453

DATE OF DECISION: **October 23, 1996**

DECISION

OVERVIEW

This is an appeal by Prince George Family Services Society ("PGFSS"), pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against Determination No. CDET 003329 issued by a delegate of the Director of Employment Standards on July 12, l996. The Director's delegate denied PGFSS's application for a variance to Section 34 (minimum daily hours) of the *Act* on the basis that it was not consistent with the intent of the *Act.*

ISSUE TO BE DECIDED

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

FACTS AND ARGUMENTS

PGFSS provides counselling services to individuals and families as a result of referrals from the Ministry of Social Services. It employs 1 full-time and 9 part-time family and youth care workers who are contracted to provide services to children and families. The contracts vary from 2 1/2 hours to 7 hours per week per contract.

On April 17, l996, PGFSS and its employees submitted an application to the Employment Standards Branch requesting a variance to Section 34 (minimum daily hours) of the *Act* which would reduce the minimum daily hours from 4 to 2 hours per day. In their application PGFSS and its employees state that most contracts with children and youth require after school appointments and 2 hours is usually the allotted time per session. They state that client needs are a priority and they are mindful of their clients' personal commitments when scheduling appointments. They want the variance in order to carry out their employment duties effectively. The variance would also be to their benefit, given most work part-time due to other employment or because they go to school or have child-care responsibilities.

On July 12, 1996, the Director's delegate denied the application. In the Reason Schedule attached to the Determination, the Director's delegate stated: "The intent of ...the *Act* is to allow a variance that directly benefits an employee who is giving up a minimum standard under Section 34. There is no obvious compensation benefit for the employees to lose their entitlement to a minimum standard in this application. It is, therefore, contrary to the intent of the *Act.*"

PGFSS appealed the Determination on August 1, l996. In its reasons for the appeal PGFSS stated that it administers 37 contracts involving over 60 clients and each worker sets her/his own schedule. It would be impossible for the Executive Director to coordinate the schedules to ensure that the workers work a minimum of 4 hours each day, particularly given the tendency for clients to cancel, miss or reschedule sessions on short notice. PGFSS further stated that, in any event, the priority in scheduling is to schedule according to the client needs and availability, which is usually less than 4 hours per day. As well, many of the workers want to limit their hours given they have other employment, or go to school or have child-care responsibilities.

PGFSS also argued that an earlier Tribunal decision, **ARC Programs Ltd. (BC EST #D030/96)**, is not applicable to this case. In conclusion, it stated it is not attempting to obtain "cheap hours" or to not pay for hours worked. It is responding to the practical realities of its work in the scheduling of hours. Its employees want to work for PGFSS because of the flexibility of hours, given their other commitments. This is not a situation where it has "artificially truncated hours and the employees personal and other employment opportunities suffer as a result...to the contrary, the employees prefer work days involving less than 4 hours." Further, it is not contrary to the intent of the *Act* to allow the variance. PGFSS pointed out that it was granted a similar variance in June, l988.

Subsequent to the filing of this appeal, the Director's Program Advisor forwarded a further submission to the Tribunal which confirmed that the application by PGFSS had been correctly denied as the variance that was sought by PGFSS was to meet its operational requirements and not the specific needs of the employees. The Program Advisor stated that it is the Branch's policy that in order to vary Section 34 there must be a benefit to the employees and in this case there would be no such benefit. He also gave the following example of a situation where the Branch would grant a variance on the minimum daily hours: The employers hours of operation are nine to five. The employer has the ability to schedule at least four hours of work. The employee attends a post-secondary institution until 2:30 pm, Monday to Friday. Thus, the employee is only able to work 2 hours on weekdays. The Branch would grant this variance as it is to the employees benefit to be able to work for two hours rather than none at all.

In reply, PGFSS stated that the Program Advisor "...fails to comprehend that our employees support the variance for the same reasons as stated by him, "It is to the employees benefit to be able to work for two hours rather than none at all."

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 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 this variance approve of the application. At issue in this appeal is the second condition. Is the proposed variance consistent with the intent of the *Act* or does it undermine its purposes and protections?

In my view, PGFSS's application does not disclose any reasonable basis upon which the Director could grant a variance to Section 34. 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 reasoning set out in the **ARC Programs** decision is applicable to this case. This application arises due to the operations of the employer which make it difficult for the employees to be guaranteed at least four hours of work each day. I am not convinced, based on the information provided on this appeal, that this application arises because the employees are unable to work more than two hours per day. The reason that the employees of PGFSS face working zero hours versus two hours per day has to do with the operations of PGFSS and not the needs of the employees.

There is no doubt that PGFSS'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 this application. However, the Director has now decided that what they seek is not consistent with the provisions of the *Act.* I can find no reason to conclude otherwise. Therefore, on the basis of the information provided, I find that the variance applied for is 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 No. CDET 003329 be confirmed.

Norma Edelman
Registrar
Employment Standards Tribunal