

**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 -

Sun Village Lodge Inc.  
("Sun Village")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Geoffrey Crampton

**FILE NO.:** 96/618

**DATE OF DECISION:** December 5, 1996

**DECISION**

**OVERVIEW**

This is an appeal by Sun Village Lodge Inc. (“Sun Village”), under Section 112 of the *Employment Standards Act* (the “Act”), against Determination # CDET 004209 which was issued by a delegate of the Director of Employment Standards on October 3, 1996.

The Determination refused an application by Sun Village (under Section 72(d) of the *Act*) to the Director of Employment Standards for a variance of Section 34 (minimum daily hours) of the *Act*.

There is no real dispute about the facts of this dispute. I have been able to decide this appeal on the basis of the parties’ written submissions.

**ISSUE TO BE DECIDED**

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

**FACTS**

The reasons given by the Director’s delegate for denying Sun Village’s application for a variance is set out in the Determination as follows:

Section 73(1) of the Act provides:

“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.”

It appears from our telephone conversation that the purpose for the variance is due to the nature of your business. 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.

In my opinion you proposed variance is not consistent with the intent of the Employment Standards Act. Accordingly, I must deny your request.”

Sun Village is a senior citizen's home with approximately 110 residents. The reasons given by Sun Village for its appeal can be summarized as follows:

- Certain of the jobs, such as serving the evening meal to 110 seniors, filling in between shifts, and emergency situations requiring a few minutes cannot justify a four hour minimum work period.
- All employees have signed the variance request each year for several years and the variance has been issued.
- All of the employees have been completely satisfied with the arrangement.
- An immediate problem is that one of the students didn't return to school this year. She was counting on work at the Lodge.
- The week-ends would be another problem. Without the variance, the students would have to work four hours on the week-ends. Besides not having work for them to do for four hours, the students do not want to spoil their Saturday evenings or Sunday nights by working four hours.
- One of our elderly employees comes in for two hours shifts and she does not want to work longer and she is completely happy with this arrangement. If a student calls in sick, we can fill-in with regular staff but they do not want to spoil their day off with a four hour shift; but they are happy to help out for two hours.

## **ANALYSIS**

Sun Village applied for a variance under Section 72(e) of the *Act's* provisions respecting hours of work and overtime. Section 72 states:

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 definition of "temporary layoff";
- b) section 17(1) (paydays);
- c) section 25 (special clothing);
- d) section 31(3) (notice of a change of 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).

Under Section 73 of the *Act*, the Director is given the authority to vary a requirement specified in Section 72.

Section 73 of the *Act*, also 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*.” The Director’s delegate refused the application because of her view that the application did not satisfy this condition.

The first condition is satisfied: All of the employees who will be affected by the variance are aware of it’s effect and approve the application. However, I am not convinced that the second pre-condition in Section 73 has been met.

The issues in this appeal are similar to those raised in an earlier decision of the Tribunal: see *ARC Programs Ltd.* (1996) BCEST # D030/96 in which the following analysis was set out:

An applicant for a variance must make its 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 this *Act*.”

...

ARC’s application to the Director 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 *Act* except to the extent that the Director’s determination varies them. Even then, the variance will not be granted unless it is consistent with the intent of the *Act*. A party, such as ARC, which submits that it requires such substantial freedom from the *Act*’s requirements is truly seeking exclusion

from certain parts of the *Act*, not a variation in the way in which those parts are applied to its operations.

Sun Village's application for a variance under Section 72 of the *Act* would, in my view, undermine one of the key purposes of the *Act* - to ensure that employees receive at least basic standards of compensation and conditions of employment. It would be unfair both to Sun Village's employees and to other employers who compete with Sun Village if the variance sought were to be granted.

**ORDER**

I order, under Section 115 of the *Act*, that Determination # CDET 004209 be confirmed.

---

**Geoffrey Crampton**  
**Chair**  
**Employment Standards Tribunal**

GC:nc