

**BCEST #D380/98**

**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 -

Hermit Holdings Ltd. operating as Holiday House Ltd.  
and Hermit Holdings Ltd. operating as Holiday House Motel  
("Holiday House" or the "Employer")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Ib S. Petersen

**FILE NO.:** 98/499 and 98/500

**DECISION DATE:** October 16, 1998



Based on my investigation of the application, I have determined this variance cannot be granted.

This Application is inconsistent with the intent of the *Employment Standards Act*, as the employer does not have any employees at this time. Part 9, 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: (e) section 34 (minimum daily hours). As the employer does not have any employees at this time an application cannot be considered."

July 17, 1998 the delegate issued the second Determination:

"On June 9, 1998 the ... Director received an application from Hermit Holdings Ltd. (operating as Holiday House Motel) and the following employees Tanya Cogswel, Olivia McLeod and Winifred Williams.

The Application is under Section 72 of the *Employment Standards Act*. The applicants seek a variance of Section 34.

Based on my investigation of the application, I have determined this variance cannot be granted.

Variances to the Minimum Daily Guarantee, like all variances, must be consistent with the intent of the *Employment Standards Act*.... The intent of the *Act* is to establish a set of minimum legal standards of compensation and conditions of employment for Provincially regulated industries. To vary these minimum standards requires compelling reasons or facts. Granting this variance so that the Employer can hire additional staff is not sufficient reason."

## **ANALYSIS**

Variances are dealt with in Part 9 of the *Act* and Part 7 of the *Employment Standards Regulation* (the "*Regulation*"). Section 72 of the *Act* provides in part:

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72. 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:

(e) section 34 (minimum daily hours);

Moreover, Section 73 of the *Act* provides certain guidelines with respect to an application for a 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.

(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.

An application for a variance is brought by delivering a letter to the director (Section 30(1) of the *Regulation*). This letter must be signed by the employer and a majority of the employees affected by the proposed variance. Moreover, the letter must include the provision of the *Act* the director is requested to vary, the variance requested, the duration of the variance, the reason for requesting the variance, the employer's name, address and telephone number, and the name and home telephone number of each employee who signs the letter (Section 30(2) of the *Regulation*).

An application of this nature is different from the typical appeals that come before the Tribunal involving disputes between employers and employees. Here the Director is not adjudicating a dispute between two parties, rather the Director is one of the parties and is exercising an administrative rather than an adjudicative function. The Director must exercise her discretion in the context of an administrative function within "well-established legal principles". As such, the Director "must exercise her discretion for bona fide reasons, must not be arbitrary and must not base her decision on irrelevant considerations" (see, for example *Takarabe et al.*, BCEST #D160/98).

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On the facts of this case, I find that the delegate did exercise his discretion within established legal principles in the case of the July 3 Determination. While the delegate clearly erred with respect to the date of the application, indicating that the application for a "blanket variance" was dated March 12, when it, in fact, was dated April 29, he did not err in dismissing the application. The *Act* contemplates that an application be made in a certain manner and that the Employer has employees in respect of which the application is made. Even if the Employer in this case had an employee working at the time, the application was for a "blanket variance" for, in effect, un-named employees. As such, the appeal must fail.

In the July 17 Determination, the delegate also erred with respect to the date of the application. Nevertheless, the Determination referred to the employees in respect of which the application was made. The Determination set

out the reason for dismissing the application, a requirement for compelling reasons to depart from the minimum standards provided in the *Act*. In my view, the Employer's application did not comply with the requirements for making a variance application.

**ORDER**

Pursuant to Section 115 of the Act, I order that the Determinations in this matter, dated July 3 and July 17, 1998 be confirmed .

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Ib Skov Petersen  
**Adjudicator**  
**Employment Standards Tribunal**