

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 -

Arcas Consulting Archaeologists Ltd.
("Arcas")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Paul E. Love
FILE NO.:	98/458
DATE OF DECISION:	September 15, 1998

DECISION

OVERVIEW

This is an appeal by Arcas of a Director's Determination which refused to authorize a variance for hours worked and overtime. The Director exercised her discretion in considering the application and determined that the variance was not consistent with the intent of the Act. The standard of review of the exercise of the Director's discretion is limited to a consideration of whether the decision was unreasonably wrong, or in excess of jurisdiction or an abuse of authority. The Director did consider all relevant considerations advanced and it could not be said that the decision was unreasonably wrong.

ISSUES TO BE DECIDED

Did the Director's delegate err in her exercise of discretion in determining that Arcas should be denied a variance?

FACTS

Arcas and its employees have applied jointly for approval of a variance from the hours or work and overtime provisions of the Act. The proposal has been approved by almost all the employees of Arcas (19 out of 21).

Arcas is in the business of carrying out archaeological field work. Much of this field work is carried out in remote locations. Arcas says it cannot carry out its field work in a productive or efficient manner if it must comply with the *Act*. Arcas says that it is faced with strong competition from Alberta firms and British Columbia firms that do not comply with the *Act*. The employees, who work in the remote locations apparently prefer to have their work scheduled so that they receive larger periods of time off so that they can have contact with their families. The employees would otherwise take

their time off in a camp setting and would not have sufficient time for visiting their families.

The Director issued a variance on May 12, 1997 which provide for a four week work cycle, consisting of five 11 hour days, one 7 hour day and one scheduled day off, followed by seven days off. There were also requirements for daily and weekly overtime.

In 1998, however, the Director's delegate refused to approve the variance sought as it was not in accordance with the intent of the *Act*. A summary of the proposal is set out below:

Days off

Minimum of 1 day off (midnight to midnight) after 10 consecutive days of work

Minimum of 3 days off (midnight to midnight) in any 21 day period

Overtime rates of pay are required to be calculated in the employee's regularly hour wage and are to be paid on a daily, weekly and four week cycle based as follows

Daily: - time and one half after 10 hours per day
- Double time after 11 hours per day and for all hours worked on days off

Weekly: - time and one half after 60 hours per week
- Double time after 72 hours per week

Four week Cycle

- Time and one half after 160 hour per four week cycle (ie. After 40 hours per week averaged over four weeks)

Double time after 192 hours per four week cycle (ie After 48 hours per week averaged over 4 weeks)

Employees are to receive all statutory holiday benefits under the Employment Standards Act.

Note: All travel is paid and is included in days worked.

This was modified on June 5, 1998 as a result of meetings with the Director's delegate as follows:

... Employees are to receive all Statutory Holiday benefits under the Employment Standards Act

The employer will adhere to the minimum hours free from work as specified under the *Employment Standards Act*, as follows:

(a) Daily - minimum eight consecutive hours off between shifts

(b) Weekly - minimum 32 consecutive hours off per week

Employees will work a four week cycle, with overtime rates of pay calculated on the employee's regular wage and paid on a daily and weekly basis as follows:

(a) Daily - time and one half after 10 hours per day
- double time after 11 hours per day and for all hours worked on scheduled days off

(b) Weekly - time and one half after 60 hours per week in any given week
- double time after 72 hours per week in any given week
- time and one half after 40 hours per week averaged over the four week cycle
- double time after 48 hours per week averaged over the four week cycle

All travel is paid and is included in days worked

The application does not set out the entitlement of the employees to any specific time off of work.

It is quite clear that the variance application does not accord to the employee their entitlements under the Act for overtime wages.

ANALYSIS

This is an application pursuant to section 72 of the Act for a variance of the maximum hours of work (s. 35) and overtime wages for employees not on a flexible schedule (s. 40).

The Director's power to grant variances is set out in s. 73 of the Act as follows:

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 employees who are 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.

The Act provides for a minimum set of standards to all employees in an employment relationship, unless excluded by regulation (s. 3). The Act is set up so that an employee cannot waive the provisions of the Act (s. 4). The Act does, however, provide that employees and employers can agree to apply for variances. It is common ground in this case that the employer and most of the employees wish to obtain a variance. I note that the Director retains a discretion to approve or not approve, even if the parties are in agreement. The Director is not required to rubber stamp the proposal of the parties.

It is also open to an industry to apply for an exemption. Members of the Tribunal hear the application, and a recommendation is made to the Lieutenant-Governor-in-Council. The Lieutenant-Governor-in-Council decides whether to grant an exemption from the Act. As the representative of Arcas points out, an exemption might be the long term solution for the industry.

In this application, however, I am limited to a review of the discretion exercised by the Director's delegate. The test to be applied when one reviews a discretion was set out in the submissions of the Director's counsel:

... the Tribunal will not interfere with ... [the Director's] exercise of discretion unless it can be shown that the exercise was an abuse of power, the Director made a mistake in construing the limits of her authority, there was a procedural irregularity or the decision was unreasonable

Re Goudreau, BC EST #D 066/98

The tribunal further considered that unreasonable in this context has been described as being,

a general description of things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration, matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said to be acting "unreasonably". Associated Provincial Picture Houses v. Wednesbury Corp., [1948] 1 K.B. 223 @229.

Absent any of these considerations, the director even has the right to be wrong.

I must be persuaded, by the appellant, that the exercise of discretion was flawed:

Re Wang, BCEST #D 161/98

It appears to me that the issue of whether to grant a variance from the hours of work provision and overtime provisions, is a matter that falls squarely within the jurisdiction of the Director. One cannot say that there has been any error of jurisdiction. There has been no abuse of power by the Director.

In my view the variance sought does not provide the employees with the minimum standards set out in the Act. The employees have traded overtime compensation

for time off. There is no structure which permits one to see if and when an employee will be getting time off. Under the present scheme an employee could work 10 hours per day for 6 days per week, with one week off during a 4 week cycle and not receive any overtime pay.

The director appears to have considered the arguments advanced by the employer that relate to the employer's business and ability to pay overtime(s. 2(e) of the Act), the employees wishes (s. 73(1)(a)) and the work and family responsibility interests of the employees (s. 2(f)). The Director appears to have ignored, quite properly, irrelevant considerations including the practice of Alberta companies, and employers who fail to comply with the Act in British Columbia. The Director's delegate appears to have addressed the merits of the application. I see no procedural irregularities or breach of the requirements of natural justice.

The sole issue appears to be whether it is "unreasonably wrong" for the Director to refuse an exemption where both the employer and employee consent to the application. It appears that this is a case where the Director thought the overriding purposes of the *Act* - to establish minimum legal standards of compensation and conditions of employment - was more important than to authorize a breach of the *Act*. Authorizing the variance would not facilitate the extending of the benefit of the statutory provisions of the *Act* to employees, although by trading away their statutory rights the employees might get longer periods of time off or a "family" benefit. Essentially the Director, in the exercise of a discretion is considering and balancing the various and competing policies and interests. That is the Director's job, it is not my job as an Adjudicator. I do not see anything unreasonable about the decision that the Director made in this case.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination in this matter, dated June 23, 1998 be confirmed.

Paul E. Love, Adjudicator
Employment Standards Tribunal