

An appeal

- by -

Ownership Identification Inc.
("OII")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Michelle Alman, Panel Chair
David B. Stevenson
Gwendolynne Taylor

FILE No.: 2001/146

DATE OF DECISION: August 17, 2001

DECISION

OVERVIEW

This is an appeal pursuant to section 112 of the *Employment Standards Act* (the "*Act*") of a Determination issued by a delegate of the Director of Employment Standards ("the Director") on January 29, 2001. The Determination concluded that Ownership Identification Inc. ("OII") was not entitled to a variance "deleting" the application of Section 34 (minimum daily hours), Section 35 (maximum hours of work), and Section 36 (hours free from work) of the *Act* to its employees indefinitely. The Director's delegate considered that to grant the requested variance would not be in keeping with the intent of the *Act*.

OII, the Director and certain of OII's employees made written submissions in this appeal. OII and certain of its employees offered reply submissions further to the Director's and certain others of the employees' submissions.

ISSUE

The issue to be decided is whether OII should have been granted the variance it sought.

THE VARIANCE APPLICATION

OII's variance application letter requested variances to Sections 34, 35 and 36 of the *Act* for its livestock inspector employees. It sought the variances for an indefinite period of time. The proposed variances were identical in that they sought "deletion" of the application of Sections 34, 35 and 36 of the *Act* to its livestock inspector employees. A variety of reasons were given for the proposed variances, including costs to OII, costs to the ranching and livestock industry, the Province's Ministry of Agriculture having previously disregarded those sections of the *Act*, and the parallel to activities and hours of excluded farm workers.

ARGUMENTS

OII appeals from the Determination, alleging initially that the Determination contained factual errors as to OII's variance application. In particular, OII alleges it met the requirements of Section 30(1) and (2) of the *Employment Standards Regulation* ("the *Regulation*") by supplying in its January 9, 2000 application letter and accompanying documents the specifics of the variance requested and the duration of that variance. OII also alleges that it did not argue in its application that its livestock inspector employees were farm workers covered under Section 34.1 of the *Regulation*. OII argues in essence that by its reference to Section 34.1 in its variance application letter, it sought to have the Director consider the parallel between the livestock inspection industry and the farming industry, and therefore be guided by Section 34.1's exclusion of farm workers from much of Part 4 of the *Act*.

OII also argues that, as stated in its variance application letter, the livestock industry may be jeopardized by a loss of the livestock inspection program because the costs of necessary inspections will be too high without relief from the cited provisions of the *Act*.

The Director's delegate in her submissions argues that while the majority of OII's employees appeared to agree with the variance application, the application did not meet the intent of the *Act* because there was no tangible benefit to the employees from the requested variance. She also argues that the Tribunal has previously affirmed that the Director has the discretion to deny a variance application where there is no benefit to the employees that would satisfy the intent of the *Act*: *Prince George Family Services Society*, BC EST #D300/96. She further states in her submissions that granting the variance to meet OII's operational needs is not consistent with the intent of the *Act*, and in support cites the Tribunal's decision in *Randellin Dewhirst operating Yellow Café and Laura-Lee Fisher*, BC EST #D212/96.

The Director's delegate also points out in her submissions that to grant OII's variance application would "represent an exemption from the minimum daily pay and overtime provisions of the *Act*" which the Director has no statutory authority to grant.

Certain of OII's employees make submissions in support of OII's appeal, arguing variously:

- that they support the variance application but ideally would prefer to be independent contractors rather than OII employees;
- that the employees knew and agreed they would work on a part-time, "as needed basis," when hired, and that OII's high overtime expenses might jeopardize their continued employment;
- that while previously employed as livestock inspectors by the Province's Ministry of Agriculture between 1968 and 1997, the Provincial government ignored the *Act's* requirements of payment for a minimum of four hours of work per shift or overtime wages for working in excess of eight hours per day or 40 hours per week; that when OII took over administration of livestock inspection programs, former provincial employees continued as independent contractors between September, 1997 and December, 2000; that from December, 2000 to the present, livestock inspectors became hourly waged OII employees; and that the variance should be granted as it addresses the industry's seasonal, essentially part-time but variable work demands, and the needs of most of the livestock inspectors to run their own livestock or ranch operations; and
- that without the variance, inspection fees would be too high to maintain the livestock inspection program, which would result in a loss of confidence in the integrity of the ranching industry.

In its reply submissions, OII argues that since it was designated by the Province's Ministry of Agriculture as its successor to administer livestock inspection programs, OII should be entitled to similar exemptions from the *Act* as were enjoyed by the Province. OII argues for alternative

relief, in the event of denial of its appeal, in the form of the Tribunal's recommendation to Cabinet to exclude livestock inspectors who are OII employees from Sections 34, 35 and 36 of the *Act*.

Certain other OII employees make reply submissions in opposition to OII's variance application appeal. They argue:

- that livestock inspectors employed by the Provincial government were historically denied entitlement to the *Act's* minimum standards and to their union membership rights; that the OII livestock inspection work does not support most employees full-time, but is regarded by most as supplemental income to their own ranching or other income; that OII's argument concerning the livestock ranching industry not being able to support the high cost of inspection services is suspect; that the livestock inspectors' role is mandated by Provincial law, and consequently there cannot be an elimination of at least a portion of the inspectors' duties without a change in the law; that OII employees have not had a pay increase since OII took over the inspection programs from the Provincial government in 1997; and that the two-thirds fee increase implemented by OII in 1997 upon its assumption of administration of some programs from the Ministry of Agriculture was absorbed readily by the industry, which is currently enjoying a greater increase in the value of livestock than has been evident for many years; and
- that OII is trying to force its employees to accept less pay than they are entitled to, without attempting to negotiate with them; and that livestock inspections are done in the main not for farmers but for livestock dealers.

THE FACTS AND ANALYSIS

OII describes itself in its variance application as a designee appointed by the then-Ministry of Agriculture, Fisheries and Food to register brands and administer a brand inspection program for cattle, bison and horses in British Columbia under the *Livestock Identification Act* and the *Livestock Identification Regulation*. OII lists its principals as livestock breeding and ranching industry organizations, and therefore characterizes itself as "basically a 'not for profit' organization with all the income that the Company receives coming from the charges that the producer pays for inspection services and brand registrations."

According to its self-description, OII's major role is "to verify ownership of animals at the time or sale or when being transported within BC or when leaving BC at the least possible cost to the producer." OII identified itself and the livestock industry as having:

"serious concerns as to whether or not the producer will be able to afford the increased cost involved to meet the requirements of the *Act* unless certain variances are allowed as permitted under Part 9 of the *Act*."

OII's variance application consisted of a letter and multiple submissions of identical documents, signed either in their entirety or in part by the majority of OII's 41 listed livestock inspector

employees. The accompanying documents set forth the livestock inspector employees' agreement with OII's proposals to "delete" Sections 34, 35 and 36 of the *Act* "from the requirements OII must follow in relation to the *Employment Standards Act*." The accompanying documents also referred to the various ways in which OII or its principals might possibly be negatively impacted by increased costs from having to comply with Sections 34, 35 and 36 of the *Act*. The documents made no mention of a time limit for OII's requested "deletion" of the application of Sections 34, 35 and 36 of the *Act* to its livestock inspector employees. The variance application letter requested that the variance be granted for an indefinite period of time.

Section 34 of the *Act* requires employers to pay workers for a minimum of four hours for any day on which an employee is called by the employer to report to work. Section 35 of the *Act* requires employers to pay overtime in accordance with Sections 40 or 41 of the *Act* if an employee works more than eight hours in a day or 40 hours in a week. Section 36 of the *Act* requires employers to ensure that employees have at least 32 consecutive hours free from work each week and, except in emergencies, at least eight consecutive hours free from work between shifts, or to pay double time for any hours worked during the 32 hour period the employee would otherwise be entitled to have free from work.

To obtain a variance from the foregoing provisions of the *Act*, an employer must comply with Section 72 of the *Act*, which states in relevant part:

- 72. *Application for variance***--*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);*
 - (f) section 35 (maximum hours of work);*
 - (g) section 36 (hours free from work)...*

Section 73(1) of the *Act* states:

- 73. *Power to grant a variance--(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.*

Section 30 of the *Regulation* sets out the particulars required for a variance application:

How to apply for a variance

- 30** (1) *To apply under section 72 of the Act for a variance, a letter must be delivered to the director.*

- (2) *The letter must be signed by the employer and a majority of the employees who will be affected by the variance and must include the following:*
- (a) *the provision of the Act the director is requested to vary;*
 - (b) *the variance requested;*
 - (c) *the duration of the variance;*
 - (d) *the reason for requesting the variance;*
 - (e) *the employer's name, address and telephone number;*
 - (f) *the name and home phone number of each employee who signs the letter.*

OII submitted with its appeal its variance application letter and accompanying documents. As previously noted, those documents request "deletion" of the application of Sections 34, 35 and 36 of the *Act* to OII's livestock inspector employees. OII's reasons for the requested "deletions" appear on the face of the documents its employees were requested to sign as indicating their agreement with the variance application. As also previously noted, OII requested that the variance be granted for an indefinite period of time.

Reviewing Sections 72 and 73 of the *Act* together with Section 30(2) of the *Regulation*, it is the panel's view that the Legislature delegated a clear discretionary authority to the Director in regard to variance requests. The requirement in the *Regulation* to include the duration of the proposed variance in an application indicates that the Legislature intended that the Director would have the authority to grant a variance for a limited time period. OII seeks an open-ended "deletion" of coverage of portions of the *Act* from its employees so that it can operate without costs which might be overly burdensome to its principals. In truth, OII's application is more in the nature of an application for an exclusion of its livestock inspector employees from coverage under Sections 34, 35 and 36 of the *Act*, than it is an application for a variance. OII recognizes this itself by making in its reply submissions a request for an exclusion recommendation as alternative relief.

The Determination did recite that OII argued in its variance application that its livestock inspectors were farm workers. This is not correct. The panel notes, however, that OII included in its application letter and accompanying documents significant mention of its argument concerning the parallels between farm workers and livestock inspectors. Following the factual error in the Determination's recital of OII's application argument, the Director's delegate correctly summarized OII's desired parallel, stating:

The application also argues that the livestock inspectors are farm workers as defined by the *Employment Standards Regulation* and so should be excluded from these provisions as farm workers are.

The panel is therefore satisfied that the Director's delegate correctly understood OII's application arguments, and that the error in factual recitation of OII's position was not significant to the final result in the Determination.

For the above reasons the panel finds that OII's appeal submissions concerning factual errors in the Determination lack merit.

The Determination set out the Director's discretionary authority under Section 73(1) of the *Act* to grant a variance if the Director is satisfied that it is supported by a majority of the applicant's employees and it meets the intent of the *Act*. The Determination stated that the Director would not exercise her discretion to grant a variance "unless and until it can be shown that the employees benefit by the requested relaxation of minimum employment standards." The Determination also stated that "Simple opportunity for employment...is not of itself sufficient benefit to justify a variance." To determine whether this interpretation of the *Act's* intent is correct requires both consideration of the relevant purposes of the *Act* and a review of the Director's exercise of her discretion in this case.

The *Act's* stated purposes in Section 2 include:

2. Purposes of this Act—*The purposes of the Act are as follows:*

- (a) to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment;*
- (b) to promote the fair treatment of employees and employers;*
- ...
- (e) to foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia;*
- (f) to contribute in assisting employees to meet work and family responsibilities.*

OII in its reply submissions agrees that it sought the requested variance for business reasons, and asserts that without the requested variance, the livestock inspection program's viability would be questioned by the livestock industry due to its high cost. Without the inspection program, OII predicts a loss of security for the livestock industry and its lenders, with significant potential harm flowing to the livestock producers of the province. OII also argues that it should be entitled to the same treatment regarding the *Act* as enjoyed by its predecessor, the Province's Ministry of Agriculture. The panel finds that these arguments, as well as the arguments of the OII employees concerning their desire to have flexibility in their hours of work arrangements in order to perform other work, have some merit when considered in light of the above-noted purposes of the *Act*. Because the Director's delegate has essentially stated that she limited her interpretation of the intent of the *Act* to consideration only of the *Act's* purpose in Section 2(a), the panel must review the Director's exercise of her discretion.

The panel is in agreement with the Tribunal's previous adoption of a restrained approach to a review of the Director's exercise of her discretion. As stated in *Joda M. Takarabe et al.*, BC EST #D160/98, quoting from the Tribunal's decision in *Jody L. Goudreau et al.*, BC EST #D066/98:

[T]he Tribunal recognized that the Director is 'an administrative body charged with enforcing minimum standards of employment...' and '...is deemed to have a specialized knowledge of what is appropriate in the context of carrying out that

mandate.’ The Tribunal also set out, at page 4, its views about the circumstances under which it would interfere with the Director’s exercise of her discretion in administering the *Act*:

The Tribunal will not interfere with the exercise of discretion unless it can be shown 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. Unreasonable, in this context, has been described as being:

...a general description of the 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 at 229.

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

Section 81 of the *Act* requires the Director to include, in a determination, the reasons for it. When assessing an argument that the Director has considered immaterial factors or failed to consider material factors, the Tribunal will confine itself to an examination of the relevant determination.

In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraph 53, the Supreme Court of Canada refined the approach to judicial review of an administrative body’s exercise of statutory discretion:

Administrative law has traditionally approached the review of decisions classified as discretionary separately from those seen as involving the interpretation of rules of law. The rule has been that decisions classified as discretionary may only be reviewed on limited grounds such as the bad faith of decision-makers, the exercise of discretion for an improper purpose, and the use of irrelevant considerations....A general doctrine of ‘unreasonableness’ has also sometimes been applied to discretionary decisions....In my opinion, these doctrines incorporate two central ideas—that discretionary decisions, like all other administrative decisions, must be made within the bounds of the jurisdiction conferred by the statute, but that considerable deference will be given to decision-makers by courts in reviewing the exercise of that discretion and determining the

scope of the decision-maker's jurisdiction. These doctrines recognize that it is the intention of a legislature, when using statutory language that confers broad choices on administrative agencies, that courts should not lightly interfere with such decisions, and should give considerable respect to decision-makers when reviewing the manner in which discretion was exercised. However, discretion must still be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the rule of law..., in line with general principals of administrative law governing the exercise of discretion, and consistent with the *Canadian Charter of Rights and Freedoms*....

(citations omitted).

The Tribunal in the *Athwal Transportation Co. Ltd.* decision, BC EST #D459/99, at page 9 said that the Tribunal should exercise the deference the Court exercises when reviewing the Director's exercise of discretion. In *Athwal* the Tribunal also discussed at page 8 the Director's exercise of her discretion in relation to the *Act's* stated purposes:

The elimination of the Director's ability to assess 'fair treatment' of both the employee and the employer eliminates one of the expressed purposes of the *Act*.

The Director should exercise her discretion consistent with the *Act*...Consistent application of the *Act* is important to its successful application in this province.

In the case at hand the panel finds that the Director's consideration of only one of the *Act's* purposes when interpreting the intent of the *Act* to rule on OII's variance application amounted to a fettering of her discretion. OII's appeal arguments raise indirectly some additional purposes of the *Act* that the Director seemed to reject as irrelevant in the Determination. The panel finds that this amounts to a failure to exercise the Director's discretion consistent with the *Act*. Were it not for one lingering concern, the panel would cancel the Determination and refer this matter back to the Director for further analysis of the intent of the *Act* in light of all of the *Act's* purposes. The panel will not adopt that course, however, because on the facts before us, OII's application is not an application for a variance at all; rather, it is an application for an exclusion of OII's livestock inspector employees from certain provisions of the *Act*.

Exclusions are granted by Cabinet pursuant to a recommendation from the Tribunal, as set out in Section 109(1)(a) of the *Act*:

Other powers of tribunal

- 109** (1) *In addition to its powers under section 108 and Part 13, the tribunal may do one or more of the following:*
- (a) *make recommendations to the Lieutenant Governor in Council about the exclusion of classes of persons from all or part of this Act or the regulations...*

The *Act* makes no delegation of authority to the Director to grant or consider exclusion applications. The power to make recommendations to Cabinet concerning exclusions from the *Act* or *Regulation* lies solely with the Tribunal. Accordingly, the Director could not have granted or considered OII's application and was wrong not to have denied it on that basis alone. The panel also denies OII's variance application appeal because we find that OII's variance application is an application for an exclusion from Sections 34, 35 and 36 of the *Act*.

The panel cannot determine from the variance application materials whether it would be appropriate for the Tribunal to make a recommendation to Cabinet to grant the requested exclusion, and therefore makes no ruling in that regard.

ORDER

Pursuant to section 115 of the *Act*, the Determination dated January 29, 2001 is varied to deny OII's application solely on the ground that it is an application for an exclusion, which the Director has no authority to consider.

Michelle Alman
Adjudicator
Employment Standards Tribunal

David B. Stevenson
Adjudicator
Employment Standards Tribunal

Gwendolynne Taylor
Adjudicator
Employment Standards Tribunal