

An appeal

- by -

Victoria Confederation of Parent Advisory Councils  
("VCPAC")

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

**FILE No.:** 2001/185

**DATE OF DECISION:** August 17, 2001

## DECISION

### OVERVIEW

This is an appeal pursuant to Section 112 of the Employment Standards Act (the "*Act*") brought by the Victoria Confederation of Parent Advisory Councils ("VCPAC") of a Determination issued on February 26, 2001 by the Director of Employment Standards (the "Director"). The Director denied an application made by VCPAC and 33 employees under Section 72 of the Act to vary the provisions of Section 34 (Minimum Daily Pay) for School Crossing Guards. The application asked that the minimum daily pay period be reduced from 4 hours to 1.5 hours, for two 45 minutes shifts.

The Director found that the application did not "identify a benefit to the employees which is sufficient to justify the requested alteration of their entitlement to a minimum employment standard." The Director found the application was inconsistent with the intent of the *Act*.

### ISSUE

Should the VCPAC variance request have been granted?

### LEGISLATIVE FRAMEWORK

The Director may grant variances to alter pay or other requirements in the *Act*, if satisfied that a majority of the affected employees are aware of the effect and approve the variance and if the variance is consistent with the *Act*.

Sections 72 and 73 of the *Act* and Section 30 of the *Regulation* govern applications for variances. Appendix A to this decision sets out those sections, plus Sections 2, 4 and 34 of the *Act*.

### FACTS

In approximately 1996, the Greater Victoria School District 61 reviewed crossing guard activities. Crossing guards are required for 45 minutes, morning and afternoon, to set up crossing markers, escort children across the road, and remove the crossing markers. Of the 18 elementary schools employing crossing guards, only 3 filed Employer Payroll and Contract Labour Reports with the Workers' Compensation Board. None of the schools took or remitted payroll deductions. Pay rates were not consistent and some were below minimum wage requirements. Most schools did not address safety and training issues. Within the 18 schools, crossing guards were paid by Parent Advisory Councils, by the municipality, or by private funding. There is no legislative authority requiring provision of school crossing guards, or other method of ensuring safety of children travelling to and from school.

To address the problems, the Victoria Confederation of Parent Advisory Councils (VCPAC) agreed to become a non profit society and to manage a Crossing Guard Pilot Project for two years. VCPAC originally had the goal of ensuring long term stability for the crossing guard program by transferring the role of employer to the School District, Municipality or the Regional District. Currently, three of the five municipalities provide VCPAC adequate funding and VCPAC is working with the remaining two.

On October 10,1997, the Director granted a variance application, on a pilot basis, to allow employees to be paid a minimum of 1.5 hours at the regular wage rate. The variance applied to adult crossing guards only. The variance expired on June 30th 1999 and was extended for another two years. In October 2000, VCPAC and employees submitted the current application.

It is not clear to the Tribunal whether the current long range proposal includes the goal of transferring the program. The Tribunal is not aware of the proposed duration of the variance.

In November 2000, VCPAC approached the Employment Standards Tribunal seeking a recommendation to Cabinet for an exclusion from Section 34 of the *Act*. Since VCPAC does not represent all crossing guards in BC, the Tribunal was unable to proceed with that request.

## **ARGUMENT**

### *Appellant*

VCPAC submitted that the Director did not consider all the circumstances relevant to the variance application. It says VCPAC, as a non-profit society dependent on outside funding, does not have funds to pay more than 1.5 hours per day. VCPAC, municipalities, the School District, Trustees, and Provincial Government have worked to create the current program, which received a variance for its pilot project. Requiring higher compensation could result in the program failing. Without the program, school crossing guards may not be provided at all, may be provided as volunteer labour, may not receive training, or may be provided without statutory minimums, such as WCB, EI or CPP coverage.

Crossing guards are retirees, homemakers, or self-employed people who live near the intersections. They are volunteers who supplement their income by this small stipend. The intersections are mainly in inner-city schools in high traffic areas.

The VCPAC program is unique. The difficulties which prompted the program are not unique. Many other districts are interested in starting similar programs if this program is successful. Many other districts are continuing to operate outside the legal requirements.

VCPAC looks to its Municipalities for funding and is concerned that they would not be willing to pay for hours that are not needed at the crossings.

### *Director*

Crossing guards are paid \$10.16 per hour, \$15.24 per day, and an average of \$286.50 per month. The Determination took into consideration that the proposed minimum is less even than that permitted by Section 34(2)(b), which is minimum pay for 2 hours if the employee is sent home without beginning work. Additionally, these employees have double costs of getting to and from work.

The Determination stated that payment for 45 minute shifts “does not appear to accurately reflect the setting up and taking down of crossing markers, and does not compensate employees if for some reason they are obliged to stay longer than 45 minutes (for example if a class begins earlier or ends later than normal).”

The Determination considered Sections 2 and 4 of the *Act*, the Director’s role to enforce minimum standards of employment, and that only the Director has authority to grant a variance. The Determination included the following analysis:

. . . the Director will not exercise her authority unless and until it can be shown that the employees benefit by the requested relaxation of minimum employment standards. That employees accept an arrangement, given the prohibition set out in s. 4 and the process set out in ss. 72 and 73, does not decide the issue. If employee acceptance were sufficient, the Legislature would not have created ss. 4 or 73(1). The application must meet the Director’s view of the intent of the *Act*. Simple opportunity for employment, in the Director’s view, is not of itself sufficient benefit to justify a variance.

The Director interviewed a majority of the employees and was unable to identify any benefits to the employees to compensate for the relaxation of the minimum standards established in the *Act*, “as provided by the requirement in Section 73(1)(b) for consistency with the intent of the *Act*.”

The Director was prepared to grant a variance on the basis of 2 hours per day, but VCPAC declined because it did not have the funding in place to cover the increase in hours.

In submissions to the Tribunal, the Director noted that payment of WCB, EI and CPP premiums are statutory requirements, not benefits arising from the requested variance.

## ANALYSIS

The appeal questions the Director’s exercise of discretion and whether the Director failed to consider relevant factors and circumstances.

The discretion given to the Director under Section 73 of the *Act* is broad and generous. The following statement, from *Joda M. Takarabe and others*, BC EST #D160/98 confirms the approach taken by the Tribunal when asked to interfere with an exercise of discretion by the Director under Section 73(1):

In *Jody L. Goudreau et al* (BC EST # D066/98), the 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 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 *Boulis v. Minister of Manpower and Immigration* [(1972), 26 D.L.R. (3d) 216 (S.C.C.)] the Supreme Court of Canada decided that statutory discretion must be exercised within “well established legal principles”. In other words, the Director must exercise her discretion for bona fide reasons, must not be arbitrary and must not base her decision on irrelevant considerations.

There is no suggestion in this appeal that the Director abused her power or acted in bad faith, that she made a mistake construing the limits of her authority or that there was any procedural irregularity when exercising discretion.

The substance of the appeal raises a question about whether the Director failed to give consideration or effect to relevant considerations. Although the appeal is not expressly framed in terms of whether the Director fettered her discretion, that issue permeates the appeal. VCPAC says, in effect, the Director took an unnecessarily narrow view of factors relevant to the variance

request. In dealing with this issue, we appreciate the comments of Southin, J.A. in *Saunders Farms Ltd. v. British Columbia (Liquor Control and Licensing Branch, General Manager)*, (1995) 122 D.L.R. (4th) 260 at 261:

At the heart of the appellant's case is the principle that a tribunal upon whom, by statute, a discretion is conferred may not fetter its discretion save to the extent the statute expressly or implicitly authorizes. The principle is easy enough to state. But, in truth, it is a principle vague in its limits with a good deal of the chancellor's foot in its application.

As noted in the above reference to *Re Joda M. Takarabe and others, supra*, the onus is on VCPAC to show the Tribunal would be justified in interfering with the exercise of discretion. As well, when assessing if the Director has improperly fettered her discretion in some way, the Tribunal will confine itself to an examination of the Determination.

As noted above, VCPAC has questioned whether the Director considered all the relevant circumstances. It is not clear from the face of the determination that she did.

While the Determination concluded the application did not meet the intent of the *Act*, when the Determination is examined in its entirety, the rationale for that conclusion remains unclear. Given the requirement in Section 81 of the *Act* to provide the reasons for a Determination, it is not enough to simply state the conclusion. There must be a degree of analysis sufficient to identify the considerations that comprised the conclusion.

The Director found that a compensating benefit was required. That is clear. What is not clear is how that was concluded and how the various purposes outlined in Section 2 factored into the decision. It is also not clear why the Director would find a 2 hour minimum meets the intent of the *Act* but not the 1.5 hours requested. Did the Director consider other sections of the *Act* or *Regulation*?

Clearly this employment anticipates only minimal hours of employment. Is that sufficient to say that a variance will not be granted? Or is that sufficient to say a variance should be granted? Does the duration of the proposed variance affect considerations of legislative intent? Are there public policy issues to consider? Is VCPAC's concern that, without the variance, crossing guards will not be provided, or provided inadequately, justified? Is VCPAC's ability to pay a factor to be considered under Section 2? Are there indicia of public policy or legislative intent to be gleaned from looking at the exclusions in Section 34 of the *Regulation* such as noon hour supervisors, teacher's aides, supervision aides, etc.?

These are some considerations that lead the Tribunal to conclude that the Director did not consider all relevant factors in reaching her decision on whether this application was consistent with the intent of the *Act*. The Director cannot simply say that no variance will be granted unless the application shows the employees will benefit from the relaxation of minimum standards. That response does not adequately address the intent of the *Act* and is an improper fettering of discretion by the Director.

**ORDER**

Pursuant to Section 115 of the *Act*, the Determination dated February 26, 2001 is cancelled and the matter referred back to the Director.

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**Michelle Alman**  
**Adjudicator**  
**Employment Standards Tribunal**

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**David B. Stevenson**  
**Adjudicator**  
**Employment Standards Tribunal**

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**Gwendolynne Taylor**  
**Adjudicator**  
**Employment Standards Tribunal**

**EMPLOYMENT STANDARDS TRIBUNAL**  
**Victoria Confederation of Parent Advisory Councils**  
**Appendix A**

**Minimum daily hours**

- 34** (1) If an employee reports for work on any day as required by an employer, the employer must pay the employee for
- (a) at least the minimum hours for which the employee is entitled to be paid under this section, or
  - (b) if longer, the entire period the employee is required to be at the workplace.
- (2) An employee is entitled to be paid for a minimum of
- (a) 4 hours at the regular wage, if the employee starts work unless the work is suspended for a reason completely beyond the employer's control, including unsuitable weather conditions, or
  - (b) 2 hours at the regular wage, in any other case unless the employee is unfit to work or fails to comply with Part 3 of the *Workers Compensation Act* or a regulation under that Part.
- (3) Despite subsection (2) (a), a school student reporting for work on a school day is entitled to be paid for a minimum of 2 hours at the regular wage in the circumstances described in that subsection.

**Application for variance**

**72** An employer and any of the employer's employees may, in accordance with the regulation, join in a written application to the director for a variance of any of the following:

- ...
- (e) section 34 (minimum daily hours);

**Power to grant 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.
- (2) In addition, if the application is for a variance of a time period or a requirement of section 64 the director must be satisfied that the variation will facilitate
- (a) the preservation of the employer's operations,
  - (b) an orderly reduction or closure of the employer's operations, or
  - (c) the short term employment of employees for special projects.



- (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.
- (4) On being served with a determination on a variance application, the employer must display a copy of the determination in each workplace, in locations where the determination can be read by any affected employees.

### **Purposes of this Act**

- 2 The purposes of this 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;
  - (c) to encourage open communication between employers and employees;
  - (d) to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act;
  - (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.

### **Requirements of this Act cannot be waived**

- 4 The requirements of this Act or the regulation are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.

## **EMPLOYMENT STANDARDS REGULATION**

### **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.