

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 -

Barry Campbell
("Campbell")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Paul E. Love
FILE No.: 98/535
DATE OF DECISION: October 1, 1998

DECISION

OVERVIEW

This is an appeal by Campbell of a Director's Determination which found that Campbell was covered by a variance from the hours of work and overtime pay granted to the employer. Mr. Campbell argued that he was not covered by the variance.

ISSUES TO BE DECIDED

Was this employee covered by the variance?

FACTS

The Director issued a variance under s. 73 of the *Act* to Kemess Mines Inc concerning all hourly paid employees at the Kemess South Mine Site. The application for a variance was made on August 5, 1997 and was granted on February 25, 1998 to be effective on August 5, 1997. The employer sought a variance from sections 35, 36 and 40 of the *Act*.

At the time the application for variance was made there were 16 employees in the group that would be affected by the variance. At the time of the investigation by the Delegate the portion of the work force covered by the variance had increased to an additional 94 employees. The employer had all new employees who commenced with the employer, sign an application for variance. One of those new employees was Mr. Campbell.

On January 19, 1998 the Delegate was contacted by Mr. Campbell who indicated that he was not in favour of the variance. Mr. Campbell had signed previously the application for the variance. Mr. Campbell signed the variance application as one of the documents that he signed when he commenced with the employer. He was aware of the employer's application at the time that he commenced his employment.

The relevant portion of the variance reads as follows:

I am satisfied that a majority of the employees who will be affected by the variance are aware of its effect and approve of the application and the variance is consistent with the intent of this Act. A telephone survey was conducted of the affected employees. An attempt was made to contact each employee shown on Schedule "A" at least once. Eventually a random sample constituting approximately one third of the total employee group was contacted with the following results. Of the employees expressing a preference, 25 indicated that they supported the variance application and 4 indicated that they did not support it.

The variance application was made initially on August 5, 1997. The variance was granted as of the date of application, subject to the Delegate's investigation. The agreement between the Delegate and the employer was that if the application was not approved, the employer would pay all overtime in accordance with the *Act*.

The shift approved by the Director's delegate consisted of 14 consecutive work days at 12 hours per day, followed by 14 consecutive days of rest. Overtime was to be averaged over the 4 week cycle. There would be daily overtime of double time after 12 hours per day, and weekly overtime of time and one half after 40 hours per week and double time after 48 hours per week, averaged over a 4 week schedule

The variance was sought by the employer by letter dated July 30, 1997 for the following reasons:

... to ensure the preservation of the employers operations, because we cannot operate in that it is extremely difficult if not impossible to perate on a regular work week of 40 hours during construction, given the isolation and expense regarding air transportation.

There was no evidence in the material before me of the date that Mr. Campbell commenced for the employer. He states that:

the work variance was not in place during Campbell's employment.
Therefore provincial employment standards apply.

Mr. Campbell appears to have resigned his employment on January 19, 1998 on the date that he spoke to the Director's delegate, who was conducting the survey.

ANALYSIS

In this case, the burden lies with Mr. Campbell to demonstrate that there has been an error in the Determination such that I should vary or cancel the Determination.

Mr. Campbell argues in his submission that his individual rights under the *Act* to over time pay should not be overwritten by the Director. He says that his rights under the Charter of Rights and Freedoms has been infringed under s. 15.1, but he does not elaborate on this argument. The Charter argument is not developed in Mr. Campbell's brief. There appears to have been no notice given to the Attorney Generals of British Columbia and Canada as required by the *Constitutional Questions Act, R.S.B.C. 1996, c. 68. s. 8* and therefore I am not going to consider that argument. He argues that he was coerced into signing the form. He points out that this was an employer initiated variance for the employer's convenience.

The employer argues that it was operating in good faith in the understanding that the variance would be granted as of the date of the application subject to investigation. It further argues that

Mr. Campbell was properly covered by the variance and therefore he is not entitled to additional wages.

In my view there is no evidence of coercion in this evidence. The employer appears to have asked the employees to sign the variance as a term of employment. An employee was free to accept or reject the terms of employment offered.

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 investigation conducted by the Director's delegate in January and February of 1998 revealed that the majority of employees to whom the variance would apply had approved of the variance. From the wording of the *Act* it is clear that it is not necessary for all the employees to be in favour of the variance for the Director to grant the variance. Even if all or almost all of the employees were to support the variance that would not mean that the Director is compelled to rubber stamp a proposal : Arcos Consulting Ltd. BC EST # D410/98. There is no requirement in the *Act* that the application be a joint application of the employer and employees as long as the majority of the affected employees are aware of the effect and approve of the application. Once a Delegate has approved the variance it applies to all the employees in a particular category of work specified in the variance.

The Director's delegate found that the variance was consistent with the purposes of the *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).

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. There does not appear to be any supportable evidence that Mr. Campbell was surprised by the variance application of the employer. He must have been aware of this application from the first date of employment. I therefore find that it was not unreasonable for the variance to be issued to be effective as of the date of application. This appears to be consistent with the reasonable expectations of the parties. There is nothing unreasonable about the decision that the Director made in this matter.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination in this matter, dated July 29, 1998 be confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal