

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 -

Thompson Bros. (Constr.) Ltd.

- of a Determination issued by -

The Director of Employment Standards
("Director")

ADJUDICATOR: April Katz

FILE No.: 2000/581

DATE OF DECISION: December 8, 2000

DECISION

APPEARANCES:

Susan Arnold, Heenan Blaikie on behalf of Thompson Bros. (Constr.) Ltd..
Debbie Sigurdson on behalf of the Director

OVERVIEW

The Employer, Thompson Bros. (Constr.) Ltd., (“Thompson”) applied for a variance of sections 35, 36 and 40 of the *Employment Standards Act* (“Act”) pursuant to Part 9 of the Act. The Director denied the Application for a variance in a Determination dated July 31, 2000. This is the Thompson’s appeal of that decision.

ISSUE

Did the Director error in denying Thompson’s Application for a Variance under Part 9 of the Act?

ARGUMENT

Thompson submits that the application for a variance for this work force in northern British Columbia benefits the employees and is in accord with the intent of the Act. Thompson argues that a regular 40-hour workweek arrangement is not feasible or desirable due to the remote work location and the seasonal nature of the work. Thompson argues that the opportunity to return home over a 4 to 8 day break is more attractive to employees than a weekly day off. Thompson submits that the employees have more flexibility to arrange time off at the most convenient time for them.

Without the variance Thompson does not consider the project economically feasible. The ability to attract a qualified work force requires the ability to rearrange the work hours to maximize the number of working hours for the employees at a rate of pay that leaves a reasonable return for the employer.

The Director concluded that there was nothing in the Act, which prevented Thompson from recruiting the qualified labour force so long as Thompson was prepared to pay the shift premium of double time.

THE FACTS

Thompson has a contract with Public Works Canada to perform road construction on km 895 to km 905 of the Alaska Highway in British Columbia. The contract requires Thompson to comply

with the minimum standards set out in the *Act*. Thompson applied for a variance under the *Act* on May 15, 2000 and then submitted a new application on June 13, 2000. On June 23, 2000 Thompson submitted a list of 55 signatures from its employees in support of the Application. At the time there were 60 employees. Four were absent from the work site when the signatures were gathered. Only one person was not in favour of the variance.

The Application asked for a variance of the requirements in sections 35, maximum hours of work, section 36, hours free from work, and section 40, overtime wages for employees not on a flexible work schedule of the *Act*. Specifically Thompson asked that there be

1. two 10.5 hour shifts per 24 hour period, one day shift and one night shift
2. overtime be paid at the rate of 1.5 for all hours worked over 10 hours per day or 40 hours per week
3. 8 hours free from work between shifts
4. a minimum of 4 days off in each four week period at a mutually agreeable time
5. double time paid for any hours worked over 11 per day or any shift commencing within less than 8 hours of the previous shift or if the employee did not have 4 days off in the previous 4 weeks.

The 60 employees were located at Thompson's remote camp in northern British Columbia. The Delegate interviewed 36 employees by satellite telephone. Eighteen indicated they supported the Application. Nine indicated they did not want any days off and withdrew their support of the Application. Three employees wanted double time for hours worked after 48 hours per week. Nine indicated they would like a different type of schedule with longer time off so they could go home. The latter employees said 4 days was not long enough to travel home from the camp. The Delegate was unsure if the employees who signed in support of the application had understood the implications of variance.

ANALYSIS

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 was 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 has the discretion to grant the variance or not. She 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" (*Takarabe et al.*, BC EST #D160/98).

The Director exercises her discretion to grant a variance under section 73 of the *Act*. 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.*

The Director must first be satisfied that a majority of the employees who will be affected by a variance are both aware of its effect and approve of the application. Secondly the Director must be satisfied that the proposed variance is consistent with the *Act*. The Delegate was not certain all the employees understood the affect of the proposed variance.

Thompson's submission is that at the time of the application a majority of employees did support the application and signed the form after considerable time was spent explaining its implications.

In the survey of 36 employees, the Delegate found that a majority of the employees wanted the variation or more hours of work and less time off. She was uncertain if there was a majority of employees who wanted the employer relieved of the obligation to pay premium (double time) wages. There is no doubt that the majority of employees consider the seasonal work opportunity is worth the sacrifice of being absent from their families. Whether they want to go away for stretches of time or stay at work is a personal preference that Thompson indicated it was prepared to accommodate. The Delegate's written material does not say if the employees were aware that they would not receive the same level of overtime with the variance. The focus of the analysis is tied to the discussion about the hours of work and days off.

Thompson was not prepared to regularly pay double time for the 7th day in a row worked. The employer preferred to have the employees sit for a day in camp than allow them to accrue double the hourly wages if a variance was not available.

The second test of section 73 is the intent of the *Act*. The purposes of the *Act* are set out in section 2 of the *Act*, which provides as follows.

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.*

Section 4 prohibits the employer and employee from contracting out of the provision of the *Act*.

Requirements of this Act cannot be waived

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

When the Director looks at the intent of the *Act* under section 73 she must look at the whole *Act* and not just section 2. It is clear that the *Act* is intended to provide all employees with minimum standards of compensation and fair treatment. Communication between employees and employers is encouraged.

In *Re Telav Inc.* BC EST #D167/98 counsel for the employer argued that the Director must look at the whole *Act* not just section 2 to determine the intent of the *Act*. He drew attention to sections 2 ((b) and 2 (e) and argued that the variance sought to promote the fair treatment of the employer and the employees with the effect of producing an efficient labour force under terms and conditions which suited the circumstances.

Counsel pointed out that sections 37 and 38 contemplate flexible work schedules and that the intent of the *Act* must be viewed in this context. Section 37 requires that 65% of the employees support the change in the schedule. After considering the circumstances, the Tribunal cancelled the Director's determination.

In Thompson's appeal submission they indicate that they had extensive discussions about the variance with the employees. The effect of the variance and the fact that the employer would keep a 6 day a week schedule if the variance was not approved was fully explained. The employees who had their families at the camp and wished one day a week off were permitted that schedule under the variance.

The employees, for whom this was their only employment for the year, wished to maximize the numbers of days they could earn. They did not necessarily want one day off a week. Thompson was offering the employees only two options, 6 days a week or the variance with 4 days off per month with no double time for work over 48 hours per week.

Under the variance the employees working more than 10 hours per day would receive 1.5 times their hourly rate and double time after 11 hours per day. Employees would receive 1.5 times the hourly rate after working 40 hours per week.

The Director's Determination states that there is nothing in the *Act* prohibiting Thompson's proposed hours of work. The requirement Thompson wants waived is the obligation to pay premium salaries for extended hours per day and per week. The Determination suggests that the

reason for the variance is not to attract a qualified labour force but to avoid paying for overtime worked.

The Determination concludes that the Application does not identify a benefit to the employees which is sufficient to justify the requested alteration of the entitlement to a minimum employment standard. “This Application is a request for an exclusion from the statutory requirement to pay double time, not a variance to the hours of work and overtime provisions of the *Act*.”

In *Re Arcas Consulting Archaeologist Ltd.* BC EST #D410/98 the Adjudicator was considering an appeal from a denial of a variance for a group of employees working in a remote northern location on an archeological dig. Nineteen of the twenty-one employees supported the application to vary the hours of work and overtime and the delegate had met with employees and the employer to try and find a satisfactory arrangement. The Determination denied the variance. In the Tribunal decision the Adjudicator set out the test for the Director and the Tribunal on appeals.

The Tribunal found that even if all the employees are in agreement the Director retains discretion to approve or not approve the variance. The Tribunal will not interfere with the exercise of the Director’s discretion unless it finds that the exercise was an abuse of power, the Director made a mistake in determining her jurisdiction, there were procedural irregularities or the decision was unreasonable *Re Goudreau* BC EST #D066/98

The Tribunal found in that situation the employees had traded overtime compensation for time off. There was no structure, which permitted one to see if and when an employee would be getting time off. Under the 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 Tribunal concluded that the variance did not provided the minimum standards set out in the *Act*.

The Tribunal decided that the Director had considered the family responsibilities and the business necessities of the operation as well as the interests of the employees. Finally the Tribunal concluded as follows.

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.

There is no evidence here that the Director has abused her power, exceeded her jurisdiction, not followed procedural safeguards, or been unreasonable in her analysis of the situation. The Delegate has considered the family and the other circumstances of the employees. The employer’s need for a qualified work force was considered.

The discretion is given to the Director. It is not the Tribunal’s discretion to be exercised in the absence of error by the Director.

CONCLUSION

Based on the evidence before me I do not find an error in the Determination and therefore, I deny the appeal.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination in this matter, dated July 31, 2000 be confirmed.

April D. Katz

April D. Katz
Adjudicator
Employment Standards Tribunal

ADK/bls