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 -

Walthers Pontiac Buick GMC Ltd.
("Walthers" or the "employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

PANEL: John McConchie, Chair
Casey McCabe
Kenneth Wm. Thornicroft

FILE No: 1999/247 & 1999/248

DATE OF DECISION: December 15, 1999

DECISION

OVERVIEW

We have before us an appeal brought by Walthers Pontiac Buick GMC Ltd. ("Walthers" or the "employer") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) with respect to two separate Determinations both of which were issued by a delegate of the Director of Employment Standards (the "Director") on March 31st, 1999.

The employer's appeal as it relates to EST File No. 1999/247 concerns the delegate's refusal to grant a variance exempting Walthers from the requirement to pay its employee, Jody Marland, overtime wages in accordance with section 40 of the *Act*. The appeal as it relates to EST File No. 1999/248 concerns the delegate's refusal to renew a variance of the overtime pay requirements for two of Walthers employees, namely, George Barta and Jason Wiggin. We understand that this latter variance was granted on April 28th, 1997 and expired on May 1st, 1999.

The delegate refused both the "Marland" variance application and the "Barta/Wiggin" renewal application for the identical reasons, reproduced in their entirety, below:

> "Based on my investigation of the application, I have determined this variance cannot be granted.
>
> Walthers Pontiac Buick GMC Ltd. has recently been certified by the Labour Relations Board pursuant to sec. 18 of the Labour Code [sic] of British Columbia. Accordingly, the bargaining authority is the certified trade union.
>
> The employee[s] subject of this application is [are] part of the certified bargaining unit. The trade union is not signatory to this application.
>
> Employees may not independently negotiate conditions of employment. Rather, this application would have to be processed with the trade union being the applicant on behalf of the employees."

Thus, narrowly construed, the delegate refused the employer's application for a variance (and the separate application for a renewal of variance) solely because the union was not a signatory to the section 72 applications. Taking a somewhat broader view, the delegate's reasons could be construed as an attempt to preserve the union's exclusive right, recognized in section 27 of the *Labour Relations Code*, to bargain collectively with the employer with respect to the bargaining unit employees' terms and conditions of employment.

FACTS

While the legal issues raised by this appeal are somewhat complex, the basic facts are not. Pursuant to section 72 of the *Act* Walthers applied for, and on April 28th, 1997 obtained, a variance relating to the payment of overtime wages (see section 40 of the *Act*) for two of its employees, George Barta and Jason Wiggin. By way of the variance, the Director approved a 2-

week work cycle whereby the employees worked a 48-hour/6-day week followed by a 32-hour/4-day week; daily overtime was payable after 9 hours (time and one-half) and 11 hours (double-time), respectively, and weekly overtime was payable if the 2-week average exceeded 40 hours (time and one-half) and 48 hours (double-time), respectively. On March 26th, 1999, and prior to the expiration of this variance on May 1st, 1999, the employer applied for a renewal of the variance but, of course, that renewal application was refused.

On March 8th, 1999 the employer also applied for a new variance, similarly exempting it from section 40 of the *Act*, with respect to another employee, Jody Marland. This latter application was refused for the same reason given for the refusal of the renewal application. The key fact affecting the delegate's decision to refuse both variance applications was the certification by the Labour Relations Board on March 2nd, 1999 of the International Association of Machinists and Aerospace Workers, Local Lodge 2710 (the "union") for a bargaining unit consisting of nonexempt employees at the employer's Vernon operation except sales and office staff.

The employer now appeals both the refusal to renew the "Barta/Wiggin" variance and the refusal to grant the "Marland" variance.

ISSUES TO BE DECIDED

Walthers' legal counsel filed a single appeal with respect to each of the two Determinations. The employer's counsel, in his letter to the Tribunal dated April 23rd, 1999 (appended to Walthers' notice of appeal) characterized the issue on appeal as follows (at p. 3):

> "In a workplace where no collective agreement exists, and the employer and the affected employees jointly apply for a section 72(h) Variance, may the Director refuse a Variance solely on the basis that a union has been certified under the Labour Relations Code for a bargaining unit which includes those applicant employees?"

In addition, in his April 23rd submission, counsel for the employer took the position that "the Director has no standing to make submissions regarding the correctness of the Determinations, the proper construction of the *Employment Standards Act* (and *Regulation*) or her jurisdictional authority to interpret the legislation" (page 4) and that the Tribunal ought to review the Director's Determinations applying the "correctness" standard.

ANALYSIS

The Director's Standing

After reviewing the parties' respective submissions regarding the Director's standing with respect to this appeal, the Panel Chair issued an interim decision by way of a letter to the parties dated September 17th, 1999 the relevant portion of which reads as follows:

> "After consideration of the submissions of the Appellant dated April 23rd, 1999, we have determined that the Director does have the standing to make submissions in this matter."

In addition, by way of the same letter, the Panel Chair confirmed that the union also had standing to make submissions to the Tribunal regarding the merits of the employer's appeal. Accordingly, the Panel has had the benefit of submissions not only from the employer's counsel, but also from both the Director's legal counsel and from the union's authorized representative.

The Standard of Review

The Supreme Court of Canada has established two principal "tests" that govern judicial review of decisions made by administrative tribunals, namely, the "patently unreasonable" test and the "correctness" test [*cf. e.g., Dayco v. CAW-Canada* (1993), 102 D.L.R. (4th) 609]. In broad terms, the former (and more deferential) test applies whenever an administrative tribunal makes a decision with respect to an issue that is clearly within its statutory authority. On the other hand, the "correctness" test applies when the tribunal is required to make a decision outside its "home territory" (*i.e.,* its own statute or, in the case of a labour arbitrator, the collective agreement) or where the tribunal's decision concerns the tribunal's jurisdiction under its enabling statute.

It must be remembered, however, that these two tests were formulated in the context of judicial review of decision made by administrative tribunals. The Employment Standards Tribunal does not perform the same function as that undertaken by a court on judicial review and the decisions appealed to the Tribunal are not protected by a privative clause of any kind. The Tribunal, by virtue of section 108(2) of the *Act*, is empowered to "decide all questions of fact or law arising in the course of an appeal or review" and its decisions are protected by a strong privative clause (see section 110). Further, the Tribunal has certain powers ascribed to *Inquiry Act* commissions (see section 108) as well as powers to enter and inspect premises, demand documents and summon witnesses (see section 109).

Thus, in our view, the scope of the Tribunal's authority is considerably broader than that of a court hearing an application for judicial review. In matters of strict statutory interpretation, the Tribunal (subject to judicial review) is the final arbiter; on the other hand, where the appeal before the Tribunal relates to the exercise of the Director's discretionary authority, the Tribunal has held that the Director is entitled to a substantial measure of deference (see *e.g., Ludhiana Contractors Ltd.*, B.C.E.S.T. Decision No. 361/98).

With the foregoing comments in mind, we now turn to the Director's decision regarding the two variance applications that are the subject of the two Determinations now before us.

The Director's decision to refuse the variance applications

Pursuant to section 72(h) of the *Act*, an employer and its employees may jointly apply for a variance regarding the payment of overtime wages:

Application for a variance

72. 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: ...

(h) section 40 (overtime wages for employees not on a flexible work schedule)...

Upon receipt of such an application, the Director *may* issue a variance and, in addition, may attach certain terms and conditions to any variance that may be granted:

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...

(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...

As we previously noted, the two Determinations can be construed narrowly or more broadly.

In our view, the delegate erred if he refused the variance applications simply because (taking the narrow interpretation) the union was not a signatory to the variance applications. We can find nothing in the language of section 72 that mandates such a conclusion. While there is nothing in the *Act* that would prevent a trade union from acting as agent for employees for purposes of a section 72 application, such an application is not fatally flawed if the certified trade union is not designated as a co-applicant consistent with its status as the authorized agent for the affected employees.

In essence, and again taking a narrow view of the delegate's reasoning, the delegate has incorporated into section 72 the following italicized proviso: "An employer and any of the employer's employees, *and where the employees are represented by a certified bargaining agent, that bargaining agent,* may, in accordance with the regulations, join in a written application to the director for a variance...". In our view, such a provision can only be introduced by the Legislature; neither the Director nor this Tribunal has the authority to, in effect, amend the *Act* under the guise of statutory interpretation.

In enacting the *Employment Standards Act,* the Legislature was, of course, well aware that certain workplaces are organized and thus made an effort to accommodate the process of collective

bargaining by giving employers and unions some flexibility to modify certain minimum employment standards (see sections 4, 43, 49, 61 and 69 of the *Act*). Accordingly, the minimum standards set out in the *Act* governing hours of work, overtime and special clothing allowances may be modified through collective bargaining provided, however, that the provisions set out in the collective agreement "when considered together, meet or exceed" the minimum requirements of the *Act.* In our opinion, however, it does not follow that simply because a certified trade union may agree to modify overtime standards through collective bargaining, that same union must be a signatory to an application for a variance, especially when there is no collective agreement in place.

Notwithstanding the foregoing--which perhaps might be characterized as taking a *procedural* view of the matter (*i.e.*, a certified trade union must be a signatory to any variance application affecting a bargaining unit employee)--we are of the view that the Determinations could equally reflect a conscious *policy*-driven approach to the exercise of a *discretionary* power.

As previously noted, the Tribunal has acknowledged that the Director's exercise of her discretion stands on a different footing from a question of strict statutory interpretation. As a pure matter of statutory interpretation, we are of the view that a certified bargaining agent need not be a signatory to a section 72 application that affects one or more bargaining unit employees.

On the other hand, once a trade union is certified, "it has the exclusive authority to bargain collectively" on behalf of the bargaining unit employees [see section 27(1)(a) of the *Labour Relations Code*]. Upon delivery of a notice to commence collective bargaining, the employer and union must commence collective bargaining (*Labour Relations Code*, section 47) and it is an unfair labour practice for either party "to fail or refuse to bargain collectively in good faith...[or to refuse] to make every reasonable effort to conclude a collective agreement" (*Labour Relations Code*, section 11).

Of course, one of the issues that the certified union and the employer might negotiate is the question of overtime pay and, indeed, the parties might, through their negotiations, reach an accord modifying the effect of section 40 of the *Act.* Thus, where a union has been certified but has not yet concluded a collective agreement with the employer, an application for a variance regarding the overtime pay provisions of the *Act* could be seen as an attempt to bypass the collective bargaining process. In other words, rather than dealing with the union directly across the bargaining table, the employer chooses to deal with the union indirectly (or, as in this case, not at all--recall that the certification predated either variance application) through the Employment Standards Branch. The question then is whether or not the Director ought to allow her office to be enmeshed in the parties' collective negotiations.

Taking a broader view of the delegate's reasons, we are of the view that the delegate may have simply answered the foregoing question in the negative. Can it be said that in refusing the application the Director's delegate was not acting in good faith? We cannot so conclude, at least not on the basis of the record presently before us.

We do note that one of the purposes of the *Act* is to encourage open communication between employers and employees [section 2(c)] and that another is "to provide fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*" [section 2(d)].

When we turn to the *Labour Relations Code* we note that the purposes of that legislation are "to encourage the practice and procedure of collective bargaining" and "to encourage cooperative participation between employers and trade unions in resolving workplace issues" [*Labour Relations Code*, sections 2(a) and (b)]. Finally, given the strictures of section 45(b) of the *Labour Relations Code*, it may well be that in seeking a variance of the overtime pay standard (or the renewal of a variance that was otherwise about to expire), the employer was endeavouring to alter a term or condition of employment within the statutory 4-month "freeze" period without securing the requisite approval of the Labour Relations Board. If these considerations were in the forefront of the delegate's decision-making process, we would be hardpressed to conclude that the delegate was acting in bad faith in refusing the variance applications.

In the end, we are simply unable to confidently state whether the delegate refused the variance applications on a "narrow" procedural basis or on a broader "policy" basis. Accordingly, we think it best to refer the entire matter back to the Director so that the Director's position may be more fully explicated.

ORDER

Pursuant to section 115(1)(b) of the *Act*, we order that the employer's variance applications be referred back to the Director.

John L. McConchie
Adjudicator and Panel Chair
Employment Standards Tribunal

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal

E. Casey McCabe
Adjudicator
Employment Standards Tribunal