EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

Central Park Veterinary Hospital
("Central Park" or the "Employer")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: Mark Thompson

FILE NO.: 98/145

DATE OF HEARINGS: May 19, June 23, August 14, 1998, written submissions concluding October 7,1998

DATE OF DECISION: November 25, 1998

DECISION

APPEARANCES

Elizabeth Watson:	On behalf of Central Park Veterinary Hospital
Catherine Hunt:	On behalf of the Director of Employment Standards
Kari McDougall:	On behalf of herself

OVERVIEW

This is an appeal by Central Park Veterinary Hospital ("Central Park" or the "Employer") pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") against a Determination issued by a Mr. Ken White ("White"), a delegate of the Director of Employment Standards (the "Director") on February 17, 1998.

The Determination found that Central Park owed a former employee, Ms. Kari McDougall ("McDougall") the sum of $8,726.58 in unpaid overtime wages. The Employer argued that it had applied for a variance on October 3, 1996. Having heard nothing from the Employment Standards Branch, and believing that it already had a variance, Central Park continued to schedule work on 12-hour shifts. In addition, the Employer argued that the Director's delegate, Mr. Ken White, had made his decision without a complete record and that he showed bias in refusing to consider all of the evidence available which related to the variance allegedly issued to Central Park.

ISSUE TO BE DECIDED

The first issue to be decided is whether there was a variance in place from 1996 at Central Park Hospital. Depending on the decision regarding the variance, the secondary issue is the nature of the investigation that preceded the variance.

FACTS

During most of the time relevant to this hearing, the Employer has operated two veterinary hospitals, one in Burnaby, known as "Central Park Veterinary Hospital," and another in Surrey, known as "South Surrey Veterinary Hospital." The latter facility opened in 1982. Persons employed at both locations are employees of Central Park. The matters in dispute occurred at the Burnaby location.

McDougall was employed as a receptionist at Central Park from December 15, 1988 through May 14, 1997, when she resigned. During her employment, she worked various schedules, all of which entailed her presence at Central Park for 12 hours per shift. From

December, 1988 until some time in 1989, she was paid for 10.5 hours per day at straight time, with unpaid coffee breaks and lunch hours totaling 1.5 hours per day. After 1989, she was paid for 12 hours per shift, with the condition that she be available to work as necessary during the coffee breaks and lunch hours.

Dr. James Olafson ("Olafson") is the owner of Central Park. He testified that he decided to operate the hospital on a 24-hour basis between 1976 and 1978. He consulted with the Employment Standards Branch (the "Branch") and was told that he could assign his staff to 12-hour shifts. He stated that after an officer of the Branch set up a model work schedule, Central Park received a variance. His wife, Mrs. Beverly Olafson, was the office manager at that time and dealt directly with the Branch.

Mrs. Olafson was office manager for Central Park from 1971 to 1990. She introduced into evidence a letter to the Branch dated January 31, 1980 requesting a "permit" to schedule staff for a 10.5 hour workday, with a maximum of four consecutive work days and the legally-required intervals between shift changes. She further stated that members of the staff had agreed to the proposed schedule, a copy of which was attached to the letter. Dr. Olafsson testified that he had met with the staff and a representative of the Branch to discuss the variance, and the staff had agreed to the proposed schedule. In the course of this proceeding, Mrs. Olafsson and her successor, Mrs. Peggy Ueland ("Ueland"), searched the Employer's files for a copy of a variance issued in response to the January 31, 1980 letter. They could not locate any variance or indeed any other reply to the Employer's letter. In addition, the Director's delegate searched the current files and the archives of the Branch and found no record of any variance for Central Park.

By all accounts, Central Park began operating under the work schedule proposed in the January 31, 1980 letter. Between 1980 and 1996, at least four former employees filed complaints with the Branch, alleging violations of the statute that proceeded the current *Act*. Not all of these complaints involved overtime.

Between December, 1988 and August 1989, the Branch dealt with Central Park in connection with a complaint filed by Ms. Sandra Lynn De Bruin. In December 1988, Ms. Lois Hardy ("Hardy"), an Employment Standards Officer, wrote to Central Park, requesting payment for overtime, statutory holiday pay and vacation pay on Ms. DeBruin's behalf. Mrs. Olafson replied, explaining her view of the facts of the case. She also stated that the Employer had been granted approval for a 12-hour work schedule in 1971. After meeting with Hardy, Mrs. Olafson sent her a copy of the January 31, 1980 letter. Mrs. Olafson further explained that Central Park had assumed that its request for a variance had been granted for a 12-hour schedule since 1980, although she had been unable to locate any variance. Finally, Mrs. Olafson asked that the January, 1980 request be revived for a variance. Hardy responded to Olafson in May 1989, explaining the legal requirements for statutory holidays. She added that she could find no record of a variance issued to Central Park for a 10.5 hour day, although a complaint seeking overtime pay had been filed in 1986, resulting in payment to the complainant. Hardy further stated that the shifts Ms. DeBruin had worked would not have been acceptable for a variance. However,

she would consider re-opening the request for a variance after Ms. DeBruin's case was closed. Mrs. Olafson explained to Hardy in a letter dated May 27, 1989 that the 10.5 hour schedule had been converted to a 12 hour rotation by agreement with the employees who would be paid for their coffee and lunch breaks.

According to Mrs. Olafson, Hardy came to the hospital and advised Mrs. Olafsson on setting up an acceptable work schedule with a four-week cycle. After May, 1989 Mrs. Olafsson had no further contact with Hardy. The Employer did not present any evidence of having received a variance or that a variance was actually issued.

Mrs. Olafson testified that she explained the work schedule to Central Park's employees, although she did not recall discussing the matter with MacDougall, who started work while she was office manager. Mrs. Olafson acknowledged that no written notice of a variance had ever been posted on Central Park's premises, although by November 1990 a booklet on the previous employment standards statute was posted on a bulletin board.

One of the bases of the Employer's appeal was White's alleged failure to rely on all evidence of its applications for a variance and other contacts with the Branch. In the course of the hearing, White noticed a number on one of the Central Park documents that referred to a system the Branch no longer used. By mutual agreement, the hearing was adjourned to permit a thorough search of the Branch's records for all evidence relevant to the case.

The search produced a total of 85 documents, all involving Central Park. The documents arose out of several complaints filed by former employees against Central Park between 1970 and 1996. Ms. Watson objected to the disclosure of these documents to McDougall and also claimed that the volume of material was prejudicial to her client. Since the appeal was based in part on an allegation that the Director's delegate had failed to consider the full record of Central Park, I ruled that McDougall should have access to documents connected to a variance covering hours of work or complaints against the Employer concerning hours of work. In fact, a number of the documents produced had no bearing on this case and were not introduced into evidence.

The documents produced contained additional correspondence arising from Ms. DeBruin's complaint. She worked a 12-hour shift in April, May and early June 1988, and thereafter worked an 8-hour shift. According to calculations accepted by Mrs. Olafson and Hardy, De Bruin received overtime rates for work in excess of 12 hours or in excess of 8 hours, depending on the work schedule. Hardy's notes referred to a meeting with Dr. and Mrs. Olafson on March 9, 1989 at which Olafson insisted that Central Park had a variance, but that Hardy was unable to locate the variance. According to her work records, Hardy requested that the Branch headquarters search its files for a variance on March 20. No record of a variance was found. At some point, Mrs. Olafson recalled that Hardy provided her with a work schedule for the use of Central Park, which remained in the Employer's files. Apart from the lack of a date or other evidence of its origin, the schedule did not contain any data on the length of the standard workday.

Ms. DeBruin told Hardy that she did not want to participate in a hearing and would accept payment for statutory holidays and overtime over 12 hours in a day. Hardy and Central Park then agreed on the amount to which Ms. DeBruin was entitled, and her case was closed on July 14, 1989.

On August 22, 1989, Hardy wrote to Mrs. Olafson, notifying her that she had not received an application for a variance with a schedule attached. Hardy reminded Mrs. Olafson that Central Park was not covered by a variance and stated

> any hours worked over 8 in a day and/or 40 hours in a week by your employees, would require payment at the overtime rates as stipulated under Section 30 of the Employment Standards Act.
>
> I have been keeping your file open pending your variance request, and will continue to do so until September 7, 1989. If I have not received your request by that date, I will close your file.

Mrs. Olafson testified that she sent Mrs. Hardy a copy of the blank work schedule Mrs. Hardy had prepared. However, the Branch's records contained no such correspondence from Central Park.

Mrs. Peggy Ueland ("Ueland") took over Mrs. Olafson's duties as office manager for the Employer in 1990. McDougall was already an employee of Central Park when Ueland became office manager. On occasion, McDougall made out the work schedules for herself and other employees. Neither she nor any other employee complained about the schedule prior to the complaint that gave rise to this case. Ueland was told that the Employer was operating with a variance some time in 1990, but the subject did not arise until May 15, 1996, when a former employee, Ms. Joyce Olson ("Olson"), filed a complaint with the Branch seeking length of service compensation. Ms. Joanne Kembel ("Kembel") was the Director's delegate responsible for dealing with the complaint. During the course of her investigation, Kembel raised the matter of overtime pay. Ueland informed her in July 1996 that the Employer had a variance for 12-hour shifts.

Following her investigation of the Olson complaint, Kembel wrote to Ueland on September 30, 1996, stating that the variance discussed in the July 17 conversation expired "in April, 1996." Kembel issued a determination that included overtime pay. Central Park paid Olson the full amount of wages owed her as stated in the determination of September 30, 1996. Ueland recalled speaking to Kembel about a variance, and Kembel told her that Central Park should re-apply for a variance.

Olafson wrote to the Director on October 3, 1996 requesting a variance for the Central Park Veterinary Hospital, stating that the Employer had the variance for "the past eighteen years." In October 1996, another delegate of the Director requested a copy of the work schedule for Central Park. Ueland sent a detailed schedule for each employee of Central Park for September through November. In addition, all of the staff members signed

statements agreeing to "comply with the modified work week," with a maximum workday of twelve hours. According to Ueland, all of the staff wanted the extended workday.

Ueland testified that she never received a variance following her discussions with Kembel in 1996. On November 13, 1996, Kembel wrote to Olafson commenting on the schedules she had received in October. Kembel explained that some employees were scheduled for five days per week. The Director would not approve a variance in a situation where an employee would be expected to work five days per week for more than eight hours per day. Kembel requested an explanation of the number of hours expected each day. Kembel also suggested that Central Park might take advantage of flexible work schedules provided in the *Regulation* to the *Act*, and enclosed a copy of the schedules. Ueland replied to Kembel on November 25, with a fax listing the work schedules for the receptionists, veterinary assistants, veterinary technicians and the reception/veterinary assistant. Ueland also faxed a work schedule for all employees for the months of September through November 1996. Kembel's notes recorded conversations in November 1996. According to the notes, Kembel explained the requirements an employer had to meet in order to receive a variance, and Ueland was going to speak to Olafson about work schedules. Kembel waited for a formal request from the Employer for a variance and never received one. White explained that the file moved between two offices of the Branch, apparently because an employee of the Branch made an error about which hospital operated by the Employer was involved in the request. Central Park continued to schedule work according to its past practice.

Ms. Tammy Longstaff ("Longstaff") was employed at Central Park from October 1989 to August 1996. Central Park was her first full time employer after leaving school. During her employment there, twelve-hour shifts were normal, although she felt pressured to work after her shift was completed. Under cross examination, Longstaff acknowledged that she was paid at overtime rates for work beyond 12 hours on a shift, but not for time over 40 hours in a week. She recalled receiving pay cheques for work over 100 hours in a pay period. She started to work at the location when she was 18 years old and assumed that these practices were normal for any workplace. Similarly, she signed a "paper" regarding hour work schedule in 1989, believing that this was a condition of employment. She did not recall ever seeing any booklet or other material posted about the *Act*, although she cleaned the bulletin board. Nor did anyone ever explain her rights under employment standards legislation.

Ms. Anna Payne ("Payne") testified that she worked for the Employer for two periods. Her first work schedule was part time—three hours per day. In 1989, she changed to a 12-hour schedule. She did not recall seeing a notice about the *Act* or any previous statute. A co-worker gave her a letter to sign in October 1996, agreeing to a 12-hour shift. She did sign the document, but could not recall signing any similar statement in 1989. In 1996, Ueland told her that if there were an inquiry about the work schedule, there would be changes in the workplace, and some people might lose their jobs. In 1995-1996, Payne wanted extra hours, as she was interested in saving money. She believed that she had been scheduled for more than 40 hours in a week, averaged over a six-week period.

Ms. McDougall testified that when she started work at Central Park, she was told that she would work 12-hour shifts 3 days a week for one month, and 4 days a week for the second month. No one had ever explained the variance to her and that she had never been told about the six-week period for averaging hours of work prior to the hearing in this case. She did sign a letter agreeing to a 12-hour shift in the belief that it merely confirmed the existing practice. McDougall stated that she willingly worked three twelve-hour shifts per week, but did not want to work four or five such shifts. She firmly denied ever receiving any compensatory time off, and did not receive overtime pay for working more than three twelve-hour shifts in a week. She only received overtime pay for working more than 12 hours on a shift.

McDougall denied that she had ever made up work schedules for the hospital. On at least one occasion, Ueland scheduled her with two days on and two days off, which she found inconvenient. McDougall then proposed a different schedule to give herself more consecutive days off, for which she was reprimanded. Her only other contact with work schedules was to transcribe forms for the employees at Central Park. Longstaff confirmed McDougall's testimony in her statement to the Tribunal, both as to McDougall's role in making up work schedules and her lack of authority to alter work schedules prepared by senior staff.

White introduced evidence on the Branch's past practice in granting variances. Since 1978, it was normal practice to grant variances that met Branch guidelines. White could not recall a variance being refused. In August of 1989, the Regional Manager of the Branch instructed officers charged with enforcing employment standards legislation to include a specified expiry date in requests for a variance, with a suggested range of three to twelve months. Branch guidelines required that shift schedules be posted in "a conspicuous place " in an employer's establishment. Interpretation guidelines issued by the Branch on May 26, 1992 provided for time limits to be included in variances "if appropriate" and a requirement to post variances. A sample variance issued in April 1995 specified the permissible work schedules, including rules for the payment of overtime. It also required that the notice be posted on the employer's premises "where the employees affected may readily see it."

The current *Act* took effect on November 1, 1995, after which the Branch cancelled existing variances, according to White. It notified employers holding variances that they should apply for new variances. It was common ground between the Employer and White that Central Park did not receive any notification.

McDougall filed her complaint claiming overtime pay on August 24, 1997. White then requested the Employer's pay records for McDougall. Although there was no direct evidence on their conversation, it was apparent that Ueland told White that the Employer was operating under a variance. After examining the payroll records, White concluded that McDougall was owed approximately $8,400. He wrote to Ueland on December 9,

1997 asking her to check the calculations. He explained that he had been unable to find a variance covering hours of work for Central Park.

White testified concerning his efforts to find a variance prior to issuing the Determination. He first looked in the Branch computer files for a variance. The files are organized by employer number, and there was no record of a variance under the names of Central Park Veterinary Hospital, Central Surrey Veterinary Hospital or Olafson. He had a staff member examine Kembel's records for a variance application in 1996 and found none. He found a file for the Employer dated 1993 and contacted the two industrial relations officers who had been responsible for it, and they could not find a variance for him. After the first day of hearings in this case, he found an old employer number. As discussed above, he instructed that another search for a variance be undertaken using the former number. No one was able to locate a variance, although approximately 85 other documents were found, which were available as evidence in this proceeding. He also instructed the Branch staff in Victoria to search for a variance. The person in charge of the files reviewed records since 1940 and found no variance.

White acknowledged that he had seen or could have seen the 1996 correspondence between Kembel and the Employer prior to issuing his Determination. He also found some letters from employees accepting the 12-hour work schedule on file. Ueland had told him more than once that the Employer had a variance, but she was unable to produce a copy. He also had reviewed Ueland's fax to another Director's delegate of October 11, 1996 with employee work schedules. White then concluded that there was no variance because neither he nor Ueland could find one. However, he did not advise Ueland to obtain a variance because she insisted that the Employer already had a variance. In addition, the old records were not accessible by means of the computer-based system currently in use at the Branch.

In the course of searching the files under the old employer number, White encountered a report written by a Branch representative, Mr. G. A. George, summarizing a conversation with Olafson in January 1980. An employee who objected had filed a complaint to the twelve-hour work schedule. Olafson informed the representative that he had "received permission from the Board of Industrial Relations in approximately 1973." Mr. George reported that he had searched for variance and found none. After examining the Employer's work schedule, he found that it was favourable to the employees, but advised Olafson that he was vulnerable to another complaint about overtime. White also reviewed the file arising from Ms. DeBruin's complaint in 1989, but did not know that Ms. Hardy appeared to accept that the Employer had a variance.

White acknowledged that the Employer had provided him with documents when he requested them. He stated that he did not advise Ueland to apply for a variance because she insisted that one existed already. There was no evidence that the steps required for the issuance of a variance were followed between 1992 and 1995. However, prior to the proclamation of the new *Act*, the Director had insisted that variances must be posted and effectively did not exist if they were not posted. White could not recall ever seeing a

variance without a time limit, as required by various policy directives of the Branch before 1995.

ANALYSIS

Counsel for the Employer based her appeal first on the grounds that the investigation leading to the Determination had been inadequate and that the Director's delegate had showed bias by

> refusing to consider the evidence and the weight of evidence provided by the employer and by failing to provide all of the pertinent facts to the Tribunal.

In particular, she alleged that the Determination was made without reference to "the historical record." White admitted to Ueland that his files were incomplete and sought her assistance in locating the variance in question. Furthermore, Counsel argued that the Director's delegate had failed to inform the Tribunal that a variance was in place and that an application for a variance had been made on "the specific recommendation of Joanne Kembel." The delegate also failed to note in his Determination that McDougall had signed an agreement to a variance in 1988 or 1989. Counsel argued that the Employer's work schedule had been established with Hardy's assistance. Counsel took issue with the statement in the Determination that the "variance application did not have any schedule attached to it." She asserted that a schedule was in fact part of the application.

Counsel also raised an issue of law in her appeal, namely that Section 73(4) of the *Act* requires that a variance be granted or denied by a written determination. Since no written determination followed the October 3, 1996 application by Central Park, the Employer was entitled to assume that the "matter was still under consideration or had been resolved."

Counsel also raised a number of factual issues in support of her appeal. She stated that McDougall had been responsible "for the preparation and the imposition of the work schedules for all employees." Moreover, McDougall had signed statements indicating her willingness to work a 12-hour shift and had already received compensatory time off.

Counsel for the Director replied that the Director's delegate had conducted a thorough investigation of the complaint. He found no variance and issued a Determination accordingly. The delegate exercised his discretion in conducting his investigation and weighing the facts before him. The Employer's allegation of apprehension of bias was based on a misunderstanding of the process by which determinations are issued and subject to appeal. A determination is a decision that interprets the *Act*. Any party affected by a determination has the right to file an appeal to this Tribunal.

McDougall challenged a number of statements in the Employer's appeal concerning her work for Central Park and the circumstances under which she signed a statement agreeing to work 12-hour shifts. These issues were also raised in the Tribunal's hearing.

Counsel for the Employer and the Director and McDougall expanded on these arguments in post-hearing briefs.

For the sake of brevity, I turn first to the allegations of bias against White. In fairness to Ms. Watson, she did not raise bias in her post-hearing brief, although she commented extensively on the investigation that preceded the Determination. However, as the Court of Appeal stated in *Adams v. Workers' Compensation Board*, B.C.C.A., (1989) 42 B.C.L.R. 228, at 231-232:

> An accusation of that nature is an adverse imputation on the integrity of the person against whom it is made. The sting and the doubt about integrity lingers even when the allegation is rejected. It is the kind of allegation easily made but impossible to refute except by a general denial. It ought not to be made unless supported by sufficient evidence to demonstrate that, to a reasonable person, there is a sound basis for apprehending that the person against whom it is made will not bring an impartial mind to bear upon the cause.

As will become apparent in this Analysis, I have concluded that the Branch was occasionally remiss in its dealings with Central Park. However, in three days of hearings and the examination 50 exhibits, the Employer did not present one piece of evidence to support the allegation of bias. Mere disagreement with the weight given to evidence presented or the extent to which an investigation was conducted does not lead to a conclusion of bias. A reasonable apprehension of bias would rest on conclusions that the delegate failed to accept evidence proffered by one party or deliberately misstated it in a determination. Counsel acknowledged that White went over the Employer's records with Ueland and asked her to search for more records to support her statement that the Employer was operating under a variance. White referred to the October 3, 1996 application for a variance. Branch files admittedly incomplete, and additional files were uncovered by chance, through White's intervention in the hearing. There was no basis for concluding that he did not review the evidence *available to him at the time* in reaching the conclusion reflected in the Determination.

After a review of an extensive body of evidence, one conclusion is inescapable: the Branch and its predecessor agencies did not ever issue an hours of work variance to Central Park. The Employer in this appeal bore the onus of demonstrating that a variance or an equivalent permission to exceed the legally-prescribed work day had been issued by the Branch or one of its predecessor agencies. See *World Project Management*, BC EST #D324/96, upheld on appeal by BC EST #D222/96). That onus was not met. Olafson and the two office managers may have believed they had a variance, but the Employer has never been able to produce a written variance. The rather tangled circumstances surrounding the alleged variance do not reflect well on either the Branch or the Employer,

but the evidence presented does not include any document that could be termed a variance under the *Act* or any equivalent document under previous legislation.

The first evidence either Central Park or the Branch could produce of any application for a variance was the January 31, 1980 letter. No explanation was offered by the Branch, or the Employer, for the Branch's failure to respond to the letter. Legislation then in effect, the *Hours of Work Act*, required an investigation of any application for a variance by a representative of the Board of Industrial Relations to verify that employees agreed to the proposed work schedule. The representative was required to file a written report, and the employer was to post a work schedule. Based on the evidence presented, I conclude that none of these steps was followed in response to Central Park's letter and that no variance was ever issued.

Counsel for the Employer argued that Central Park was entitled to implement the work schedule in the absence of any response to its request. She further argued that the past practice of the Branch was to grant variances without written confirmation. I cannot accept these arguments. Counsel did not present any principle of law or legal precedent for an employer, or indeed any other applicant to a government agency, to support the proposition that a failure by a government agency to reply to an application entitles the applicant to act unilaterally on its application. Furthermore, there was no evidence that the Branch ever granted variances without written confirmation. Thus, the principle in *Canada (Attorney General) v. Canada (Human Rights Tribunal)* 19 Admin. L.R. (2d) 69, is not applicable. The Employer was not disadvantaged because of a change in policy. The policy was constant. Moreover, the Employer was warned by Mr. George in 1980, Hardy in 1989 and Kembel in 1996 that its work schedules did not conform to the criteria of the employment standards act in effect at the time.

Given the lack of a consistent file on Central Park's application for a variance, it is possible that a variance was issued but somehow was lost. Counsel for the Employer argued that the Branch and in particular the Director's delegate was derelict in not finding a variance in the Branch's file. The Employer was obligated to maintain a copy of the variance, if one was issued, and to acquaint new employees with its existence. Neither condition was fulfilled. Three former employees testified that they were not informed of their right to work an alternate work schedule if a majority of the employees agreed. Ueland and Mrs. Olafson were vague about having briefed new employees of their rights under the applicable employment standards legislation.

The Employer also relied on Hardy's actions in 1988-1989 to support its argument that a variance was in place. In 1989 Hardy informed Central Park that she could find no record of a variance, despite a thorough search of the Branch's records, and warned the Employer that the work schedule then in place would not be acceptable as the basis for a variance. Hardy did advise the Employer on an acceptable work schedule. The example of Hardy's work schedule presented in evidence by the Employer did not contain the type of data necessary for the issuance of a variance. Furthermore, Hardy wrote to the Employer in August 1989 suggesting that Central Park apply for a variance. Neither the

Branch nor the Employer could produce any correspondence from Central Park in response to Hardy's proposal.

Based on this evidence, I conclude that the Branch had not issued a variance to Central Park by the end of 1989. Ms. De Bruin chose to accept a settlement of her complaint that did not involve payment for daily overtime in excess of 8 hours. Her action did not bind the Branch in any way.

Much the same process occurred in 1996. A former employee filed a complaint. The Employer, by then represented by Ueland, informed the Branch that a variance was in place. When no variance could be located, the Employer formally requested one. The Branch representative, Kembel in this case, informed Central Park that the work schedule in place did not meet the requirements of the *Regulation* to the *Act* and supplied a menu of work schedules that would satisfy the requirements of the *Act*. Neither the Employer nor the Branch could produce any evidence that a second application was filed, and I must conclude that the Employer did not act on Kembel's suggestion.

As noted above, the *Act* took effect on November 1, 1995. Section 128(1) of the *Act* provided for transition from the former Act as follows:

> Despite the repeal of the former Act, an order, certificate, registration, licence, variance, authorization or referral issued or made under that Act remains in force until it expires or is suspended or cancelled under that Act.

White testified that the Branch cancelled all existing variances after the *Act* took effect. I can only conclude that Kembel's reference to the expiry of the Employer's variance in April 1996 was based on her assumption that, if Central Park had a variance, it would have been cancelled after the new *Act* took effect.

Counsel for the Employer also argued that the employees had requested the longer work schedule, that McDougall had agreed to the 12-hour work schedule and she and other employees had benefited from it in the form of compensatory time off. Counsel further attacked the Determination for its lack of any reference to McDougall's consent to the variance. The Employer also argued that McDougall was responsible for preparing work schedules for the Central Park.

McDougall testified, without contradiction, that she had never received compensatory time off. She submitted time sheets on an hourly basis and was paid accordingly. Compensatory time off presumably would include employees receiving time off with pay in exchange for extra hours worked previously. Payroll records produced in evidence supported McDougall's testimony. No evidence of a system of compensatory time off was introduced in this case. Olafson testified that he initiated the 12-hour work schedule (then a 10.5-hour schedule) when he began offering service to his clients on a 24-hour basis in the Central Park Hospital. McDougall also testified that her duties were to fill in the names of employees on a standard work schedule, an administrative task.

McDougall, Payne and Longstaff testified that they were not aware of their rights under existing employment standards legislation when they signed an agreement to work twelve hours. Their signing such an agreement, whatever their knowledge of their rights, is not really relevant to this case. Action by the Branch is necessary to establish a variance. A process of investigation exists precisely to determine that employees affected do know their rights and freely consent to the proposed work schedule. Similarly, McDougall's participation in the administration of the work schedule did not constitute a waiver of any of her rights under the *Act*.

The conduct of the Branch in its dealings with this Employer is open to criticism, in particular the apparent lack of any reply to the January 31, 1980 letter and the failure to take action to grant or deny a variance in 1996. However, representatives of the Branch warned the Employer on numerous occasions that its work schedules were not in conformity with the requirements of the law. Counsel for the Employer correctly pointed out that the Determination stated that denials of a request for a variance should be in the form of a determination. No determination was issued in response to the Employer's letter of October 3, 1996. However, it was and is the obligation of an employer to obtain a variance. The Employer in this case insisted that if it had applied for a variance, it was entitled to act on its application, not on the issuance of a determination by the Director. At least since 1980, and apparently for decades previously, that practice has not been acceptable.

ORDER

For these reasons, pursuant to Section 115 of the *Act*, the Determination of February 17, 1998 is confirmed. McDougall should receive the amount of wages set out in the Determination, plus additional interest accrued pursuant to Section 88 of the *Act*.

Mark Thompson
Adjudicator
Employment Standards Tribunal