

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 -

Concord Security Corporation
(“Concord”)

- of a Determination issued by -

The Director Of Employment Standards
(the “Director”)

ADJUDICATOR:	Geoffrey Crampton
FILE NO.:	96/681
DATE OF HEARING:	December 8, 1997
DATE OF DECISION:	December 31, 1997

DECISION

APPEARANCES

Denise McCabe on behalf of Concord Security Corporation
A.B.D. Abdirazak Ali on his own behalf
Chris Finding on behalf of the Director of Employment Standards Branch

OVERVIEW

This is an appeal by Concord Security Corporation (“Concord”), under Section 112 of the *Employment Standards Act* (the “Act”), against Determination # CDET 004389 which was issued by a delegate of the Director on October 23, 1996.

The Determination requires Concord to pay overtime wages to Abdirazak A.B.D. Ali who was employed as a “Patrol Driver” from April 23, 1995 to January 3, 1996. The Director’s delegate included in the Determination a finding that Mr. Ali terminated his employment with Concord voluntarily and, therefore, was not entitled to compensation for length of service under Section 63 of the *Act*. Mr. Ali did not appeal the Determination.

A hearing was held on December 8, 1997 at the Tribunal’s offices in Vancouver at which time the parties agreed that there was a single, narrow issue for the Tribunal to decide. Several earlier hearing dates had been re-scheduled or adjourned. The hearing scheduled for April 14, 1997 was adjourned at Mr. Ali’s request because he was required to write an examination on that date at the University of Alberta in Edmonton. I adjourned the hearing which was held on May 20, 1997 for the following three reasons:

- Mr. Chris Perry (one of Concord’s Witnesses) was not available to give evidence because of a recent injury which required him to receive emergency medical treatment at the time of the hearing.
- Mr. Abdirazak Ali’s witnesses were not present at the hearing: and
- to provide Mr. Abdirazak Ali with an opportunity to seek legal advice and possibly, to engage legal counsel to represent him at a hearing.

The hearing scheduled for October 3, 1997 was adjourned at Mr. Ali's request and on the advice of his physician who confirmed that he was unable to travel from Edmonton to Vancouver due to injuries suffered by him in an automobile accident.

At the hearing on December 8, 1997, Mr. Ali acknowledged that he had "quit" his employment as a "Patrol Driver" with Concord. It was therefore not necessary to hear any evidence on that issue.

ISSUE TO BE DECIDED

The sole issue to be decided in this appeal is whether the variance to Section 35 of the *Act* (Maximum Hours of Work) which was granted to Concord for "Patrol Drivers" applies to Mr. Ali's employment with Concord. That is, is Mr. Ali entitled to payment of overtime wages associated with his working a 12-hour shift schedule while a variance was in effect?

FACTS

The essential facts of this appeal, which are not in dispute, were set out by the Director's delegate in the Reason schedule as follows:

The complainant was employed as a patrol driver. This work group was covered by a variance of the overtime provisions of the *Employment Standards Act*. The variance expired and the employer applied for a new variance. The officer (i.e. the Director's delegate) requested that the employer provide a list of all the persons employed as patrol drivers. The employer sent a list of persons and the officer called a number of person on the list in order to verify that persons in the work group supported the variance applications. The officer then called the employer and confirmed that the variance would be grated/extended from the date that the original variance had expired.

There is also no dispute that Mr. Ali's period of employment was from April 23, 1995 to January 3, 1996 and that the application by Concord for a new variance was made and granted in early June, 1995. However, Mr. Ali's name was not included in the list of "Patrol Drivers" which Concord sent to the Director's delegate.

"Patrol Drivers" who were employed by Concord worked a 12 hour shift schedule and were not paid overtime wages because of the variance granted by the Director under Section 73 of the *Act*.

Mr. Ali wrote on June 2, 1995 to Mr. Kevin Wills, Concord's Personnel Manager:

"I really concern my overtime and I don't get paid because I work 12 hrs shift which I am getting paid just Regular Rate. i.e. 8/Hr. So I have been working with the other security company and I was getting paid overtime so I will like you to look this matter and I rather prefer to work only 8 hrs. Once I don't get paid my overtime.

Thanks for your cooperation."

ANALYSIS

An employer and employees may apply to the Director of Employment Standards for a variance of Section 35 of the *Act* (Maximum Hours of Work). This right is created under Section 72(f) of the *Act*. The Director's power to grant a variance is set out in Section 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 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.

Section 30 of the *Employment Standards Regulations* (B.C. Reg. 396/95) sets out the process by which an application for a variance must be made:

- (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.

The Determination sets out the following grounds on which the Director's delegate concluded that Concord was required to pay overtime wages to Mr. Ali.. Concord represented the list of patrol drivers as being an exhaustive list. Mr. Ali, "who maintains that he had let his employer know that he did not want to work 12-hour shifts, was not included on the list of patrol drivers." Since Mr. Ali's name was not on the list at the time of the application, the Director's delegate takes the position that he was not covered by the variance and was, therefore, entitled to payment at premium rates for hour worked in excess of 8 hours per day as required by Section 35 of the *Act*.

The Director's delegate argued, in the alternative:

"...if the variance is for the work group and not for the individual drivers on the application, I am taking the position that there was bad faith on the employer's part by not including the complainant on the application and therefore the variances does not apply to the complainant."

I note, however, that the Director's delegate did not submit any grounds either in his Determination or in his submission to the Tribunal for taking the position that Concord had prepared the list of "patrol drivers" in bad faith.

The Director's delegate argued that when a variance application is made for a small group of employees, the effect of not including one employee's name in the list (*Regulation* Section 30(2)(f)) is that the variance does not apply to that person. However, he acknowledges candidly that if Mr. Ali's name had been included in the list which Concord had sent him and Mr. Ali had opposed the granting of a variance, the variance would have been granted and Mr. Ali would not have been entitled to payment of overtime wages and his complaint would have been dismissed.

Mr. Ali submitted that: he was never made aware of the variance by Concord; he expressed his concerns about the non-payment of wages in his letter of June 2, 1995; and, he believes the Determination to be fair and reasonable in all circumstances of this appeal.

Counsel for Concord submits that Mr. Ali's name was omitted inadvertently from the list of "patrol drivers" which was sent to the Director's delegate in support of its application to renew the variance. Concord also makes the following submissions in support of its appeal:

- Neither the *Act* nor the *Regulation* require that all employees support the imposition of a variance.
- Section 30 of the *Regulation* requires that the employer forward, along with the application, a letter to the Director which includes, among other things:
 - the signature of the employer;
 - the signatures of a **majority** of the employees who will be affected by the variance; and
 - the name and home phone number of each employee who signs the letter.
- There is no specific provision in the *Act* which requires an employer to produce a list of every employee potentially affected by the variance.
- Neither the *Act* nor the *Regulation* require that the Director satisfy herself that **all** affected employees approve of the application.
- Under section 73(1)(a) of the *Act*, the Director may grant a variance if she is satisfied that a **majority** of the employees who will be affected by the variance are aware of its effect and approve of the application.
- Once a variance is granted, it applies to all employees in the work group. If the Director's delegate had wanted to limit the scope of the variance, he could have done so under the authority of section 73(3)(a) or section 73(3)(c). He did neither.

- The Director's delegate satisfied himself that a majority of employees supported the variance. Mr. Ali's disapproval of the variance application would not have altered the decision to grant it as he was the only individual who opposed the application. The Director's delegate did not attach any limitations or conditions to the variance. Concord was, therefore, entitled to rely on the assumption that the variance applied to all employees in the work group.

When I review and consider all the evidence and submissions I am unable to find any ground on which to conclude that Concord acted in bad faith when it made its application to renew the variance of Section 35 of the *Act*. There is no dispute that a variance was already in effect at the time Mr. Ali was employed in April, 1995 nor that a new variance was granted in June, 1995.

Section 73(1)(a) of the *Act* allows the Director to grant a variance if she is satisfied that a majority of the affected employees approve of the application. The Director's delegate acknowledged that if Mr. Ali's name had been included in the list of names which Concord submitted to him, the variance would have been granted despite his opposition to it. That is, the majority required by Section 30(2) of the *Regulation* existed despite Mr. Ali's opposition to renewing the variance in June, 1995. Nothing in the *Act* or *Regulation* establishes a different prodder for "small groups of employees" compared to "large groups."

Finally, I note that the variances was granted for "Patrol Drivers" employed by Concord. Since Mr. Ali was employed as a "Patrol Driver" the variance applies to his employment with Concord. He is, therefore, not entitled to payment of overtime wages.

ORDER

I order, under section 115 of the *Act*, that the Determination be cancelled.

Geoffrey Crampton
Chair
Employment Standards Tribunal

GC:sr