

Citation: Penticton Sikh Temple and Indian Cultural Society (Re)
2020 BCEST 33



An appeal

- by -

Penticton Sikh Temple and Indian Cultural Society
("the Society")

- of a Determination issued by -

The Director of Employment Standards

pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: David B. Stevenson

FILE No.: 2020/003

DATE OF DECISION: April 8, 2020

DECISION

SUBMISSIONS

Colin J. Edstrom

counsel for Penticton Sikh Temple and Indian Cultural Society

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (“*ESA*”), Penticton Sikh Temple and Indian Cultural Society (“the Society”) has filed an appeal of a determination issued by Carrie H. Manarin, a delegate of the Director of Employment Standards (the “Director”) on November 29, 2019 (the “Determination”).
2. The Determination found the Society had contravened Part 3, sections 16, 17, 18, 27 and 28, and Part 4, section 40 of the *ESA* in respect of the employment of Jasbir Singh (“Mr. Singh”) and ordered the Society to pay wages to Mr. Singh in the amount of \$42,162.15, an amount that included interest under section 88 of the *ESA*, and to pay administrative penalties in the amount of \$3,000.00. The total amount of the Determination is \$45,162.15.
3. In this appeal the Society says the Director erred in law in finding the entirety of the Society’s Temple was not Mr. Singh’s residence. The Society seeks to have the Determination referred back to the Director and Mr. Singh’s wages recalculated based on a corrected legal finding that Mr. Singh was “on call” in his residence for his period of employment with the Society.
4. In correspondence dated January 9, 2020, the Tribunal acknowledged having received an appeal. Among other things, the correspondence requested the section 112(5) record (the “record”) from the Director, notified the parties that no submissions were being sought from any other party pending a review of the appeal by the Tribunal and notified the parties that, following such review, all or part of the appeal might be dismissed.
5. The record has been provided to the Tribunal by the Director. A copy has been delivered to the Society and Mr. Singh, who have both been given an opportunity to object to its completeness. No party has indicated there are any omissions from the record. I am satisfied the record is complete.
6. I have decided this appeal is appropriate for consideration under section 114 of the *ESA*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submission filed with the appeal and my review of the material that was before the Director when the Determination was being made. Under section 114(1), the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:
 - 114 (1) *At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of any appeal if the tribunal determines that any of the following apply:*
 - (a) *the appeal is not within the jurisdiction of the tribunal;*
 - (b) *the appeal was not filed within the applicable time limit;*

- (c) *the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;*
- (d) *the appeal was made in bad faith or filed for an improper purpose or motive;*
- (e) *the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;*
- (f) *there is no reasonable prospect the appeal will succeed;*
- (g) *the substance of the appeal has been appropriately dealt with in another proceeding;*
- (h) *one or more of the requirements of section 112(2) have not been met.*

7. If satisfied the appeal or a part of it should not be dismissed under section 114(1), Mr. Singh and the Director will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal will succeed.

ISSUE

8. The issue here is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

THE FACTS

9. While the Determination addressed several issues, the issue raised in this appeal is limited to whether the Director erred in finding all of the Society's Temple, and temple grounds, was not Mr. Singh's residence and that he was working "on call" at a place designated by his employer when he was performing his prescribed duties in the Temple or was required to remain on the temple grounds.
10. The facts relating to that issue are not extensive.
11. Mr. Singh was employed by the Society as a priest commencing June 15, 2015. He was terminated December 17, 2018.
12. Mr. Singh was hired pursuant to a document that set out terms and conditions of employment. He was given a list of 13 (later increased to 19) duties which, in the words of the Determination, "specified not only what he was required to do but when and how he was to do it. . . . One of those duties required [Mr. Singh] to never leave the temple unattended and to contact a Committee member if he wished to leave during open hours". (at page R21)
13. Mr. Singh was provided a 12-foot by 12-foot room on the second floor of the Temple for his sole use. He prepared his meals in the Temple's communal kitchen and shared a washroom.
14. For the reasons which are elaborated in the Determination, at pages R26 – R 28, the Director rejected the argument made by the Society that the entirety of the Temple was Mr. Singh's residence.

15. To briefly summarize the reasons for the Director’s decision, the Director found that, except for his room, Mr. Singh had no expectation of privacy in any part of the Temple during its open hours – which were also the hours he was required to attend the parishioners in the Temple. He had no authority to exclude any of the parishioners from the Temple and no freedom to come and go from the Temple at will if he was not working.
16. The Director found Mr. Singh was at work, or “on call”, at a location– the Temple and temple grounds – designated by the employer that was not his residence and he was entitled to wages while at that location.
17. The Director found Mr. Singh’s scheduled duties commenced no later than 4:00 am and continued until typically 7:00 or 8:00 pm, with a one-hour personal break and a two-hour rest break within that period.

THE APPEAL

18. The Society submits the Director erred in law on the question of residence, arguing the entire Temple satisfies the notion of “residence” for the purposes of the definition of “work” in section 1(2) of the *ESA*.
19. The Society, referring to Tribunal decisions addressing the notion of “residence”, says the notion, “imposes a common-sense approach that incorporates a degree of permanence but is flexible and responsive to communal style workplaces. Residence is the place where a person regularly, usually or customarily lives.”
20. The argument of the Society places considerable emphasis on Mr. Singh having use of the communal kitchen in the Temple to prepare his meals and of a shared washroom.

ANALYSIS

21. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *ESA*, which says:
- 112 (1) *Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*
- (a) *the director erred in law;*
- (b) *the director failed to observe the principles of natural justice in making the determination;*
- (c) *evidence has become available that was not available at the time the determination was being made.*
22. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the determination under one of the statutory grounds.
23. I shall set aside one apparent misconception in the Society’s argument at the outset: the Temple and temple grounds are not what could be described as a “communal workplace” where the available facilities are shared by several employees. It is a place of worship, its facilities devoted to the religious needs of the parishioners and visitors. The only person working in the Temple and temple grounds was Mr. Singh.

24. In that vein, there is simply no evidence in the material that Mr. Singh was entitled to consider the entire Temple and temple grounds as his residence; all of the evidence is clear that his presence in the Temple and on the temple grounds were for the benefit of the Society, the parishioners and visitors, with Mr. Singh being able to occupy that space and use the Temple facilities as a necessary adjunct to the duties that were required of him, notably in this context, the requirement that he never leave the Temple unattended.
25. As well, while the living arrangements for Mr. Singh clearly were more than temporary and had some degree of permanence, there is also no evidence Mr. Singh used the entire Temple as one would typically use their residence: as a place to hang one's hat, keep one's clothes, store treasures and family memories; as a place of retreat from the turmoil of the workplace; a place to entertain one's friends; and an address of one's own, a phone number, and a place to receive mail.
26. I find the Director has taken a “common sense” approach to the notion of “residence” in the circumstances of this case. The approach of the Director is also consistent with the common usage of the notion, which as described in the paragraph on pages 8 – 9 of *Anne Elizabeth Lowan and Timothy James Lowan operating as Corner House*, BC EST # D254/98, is sufficiently “strict” enough that it meets the purposes and objects of the *ESA* and is consistent with its remedial nature.
27. The Society has not demonstrated an error of law.
28. I find the appeal has no reasonable prospect of succeeding. The purposes and objects of the *ESA* are not served by requiring the other parties to respond to it. The appeal is dismissed under section 114(1) of the *ESA*.

ORDER

29. Pursuant to section 115 of the *ESA*, I order the Determination dated November 29, 2019, be confirmed in the amount of \$45,162.15.

David B. Stevenson
Member
Employment Standards Tribunal