Citation: Penticton Sikh Temple and Indian Cultural Society (Re)
2020 BCEST 68

An Application for Reconsideration

- by -

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

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: Robert E. Groves

FILE No.: 2020/074

DATE OF DECISION: June 16, 2020

DECISION

SUBMISSIONS

Colin J. Edstrom — counsel for Penticton Sikh Temple and Indian Cultural Society

OVERVIEW

1. This is an application for reconsideration pursuant to section 116 of the *Employment Standards Act* (the "*ESA*") brought by the Penticton Sikh Temple and Indian Cultural Society (the "Society"). The application challenges a decision of the Tribunal (the "Appeal Decision") dated April 8, 2020 and referenced as 2020 BCEST 33.

2. This matter arose from a complaint delivered to the Employment Standards Branch by one Jasbir Singh (the "Complainant"), a former employee of the Society, who alleged that the Society had failed to pay him regular and overtime wages, statutory holiday pay, vacation pay, and compensation for length of service.

3. A delegate (the "Delegate") of the Director of Employment Standards (the "Director") conducted a lengthy hearing of the complaint and issued a determination on November 29, 2019 (the "Determination"). The Determination found that the Society had acted in contravention of the *ESA*. It found that the Complainant was entitled to receive $42,162.15 in wages and accrued interest, and that the Society should pay a further $3,000.00 in administrative penalties.

4. The Society appealed the Determination pursuant to section 112 of the *ESA*. The Tribunal's Appeal Decision confirmed the Determination.

5. I have before me the Society's appeal form and application for reconsideration, its submissions delivered in support, the Determination and its accompanying Reasons, the Appeal Decision, and the record the Director was required to deliver to the Tribunal pursuant to subsection 112(5) of the *ESA.* I find that I can decide the application without the need to burden the Complainant and the Director with a request for submissions.

FACTS

6. Absent any statements I may make to the contrary, I accept, and incorporate by reference, the facts set out in the Determination and the Appeal Decision. What follows is but a summary of the facts I believe are most salient.

7. While the Delegate heard evidence on behalf of the parties to the complaint over a period of several days, the facts that are pertinent to the issue raised in the Society's appeal, and this application for reconsideration, are well defined, and limited in number.

8. The Complainant was employed as a priest at the Society's Temple from June 2015 until his employment ceased in December 2018.

9. A condition of the Complainant's employment was that he not leave the Temple unattended, and that if he wished to leave the Temple premises during open hours, he needed to secure the agreement of one of the Society's managing Committee members to replace him. During his tenure, there were but a few occasions on which the Complainant left the Temple grounds to attend to personal matters.

10. Throughout the duration of his employment, the Complainant's family and home were in India, and so he had no other residence in Canada apart from the Temple. The Society provided the Complainant with the use of a small room on the second floor of the Temple, which acted as his sleeping quarters. The Complainant also had access to a shared washroom, and he cooked his meals in a communal kitchen. The Delegate found that the Complainant's sleeping room was the only space at the Temple that was reserved for his sole use, as all the other spaces were freely accessible to the members of the congregation and the Temple's managing Committee.

11. The Society contended that since the Complainant lived at the Temple, he could not be construed to be at work, and earning wages, while he was merely on call there, rather than performing more specific assigned duties. It relied for this position on subsection 1(2) of the *ESA*, which reads as follows:

> An employee is deemed to be at work while on call at a location designated by the employer unless the designated location is the employee's residence.

12. The substance of the Society's interpretation of the Complainant's living circumstances was that he treated the entire Temple premises as his residence, and not merely the sleeping quarters to which he retreated when not on call elsewhere at the Temple.

13. The Delegate rejected this interpretation of the facts. The Delegate's findings are captured in the following excerpts from her Reasons, at R27:

> A person has a reasonable expectation of privacy in their residence and the right to exclude others who do not reside there. The only place in the temple where the Complainant had any expectation of privacy or where he could exclude others (during open hours) was his sleeping quarters. Further, the Complainant was not free to come and go from the temple during its open hours as the Society argued. If the temple was the Complainant's residence, it would be reasonable to expect that he could come and go at will when he was not working so he could attend to his own affairs however that was not the case during the temple's open hours. Instead, the Society restricted the Complainant's freedom of movement during that time by requiring as one of his "job duties" (subject to disciplinary action) that he not leave the temple unattended "at any time" unless there was someone to replace him.
>
> For these reasons, I find that the entire temple was not the Complainant's residence during its open hours and that whether the Complainant was performing his prescribed duties or required to remain on the temple grounds by the Society during the temple's open hours, he was working "on call" at a place designated by the Employer and he was therefore deemed to be at work.

14. Having made these findings of fact, the Delegate determined that the Complainant was entitled to be compensated in wages for working thirteen hours per day, seven days a week, during the statutory recovery period, with an adjustment made for those occasions when the Complainant was permitted to be absent from work. Since the Delegate determined that the Complainant was on call, and therefore

working, for thirteen hours or more every day, she did not find it necessary to decide which individual duties the Complainant had performed, and for how long, each day.

15. The Delegate's analysis resulted in an order that the Society pay the sum for wages and interest to which I have referred above.

16. The Society appealed the Determination, alleging that the Delegate erred in law when she found that the Complainant was "working" for all the hours he was on call each day at the Temple. More specifically, the Society repeated the argument it had presented, unsuccessfully, to the Delegate that the entirety of the Temple premises constituted the Complainant's residence, and not merely his sleeping quarters.

17. For the Society, this meant that, having regard to the subsection 1(2) provision in the *ESA* to which I have referred, it was necessary, in order to establish the amount of wages that might be owed to the Complainant, that the Delegate separate out those hours in each working day when the Complainant was not actually performing any job duties, but was merely remaining on the Temple premises "on call".

18. The Society contended that the Delegate's interpretation of what is meant by a "residence" in subsection 1(2) was too narrow. It relied on decisions from the Tribunal and elsewhere for the proposition that a residence might incorporate spaces where a person might not expect complete privacy including, for example, places where people live and work communally. Since the Complainant utilized cooking and washroom facilities at the Temple which one might reasonably construe to be amenities normally associated with a residence, despite the fact that they were not made available for his exclusive use, the Society argued that the whole of the Temple premises must be determined to have been the Complainant's residence, and not merely his private sleeping quarters.

19. The Tribunal Member issuing the Appeal Decision concluded that the Society's submission was flawed. In particular, the Member was of the view that the Temple premises could not be described as a "communal workplace" where the living facilities were shared by several employees. Instead, the Temple was a place of worship, and the evidence revealed that the only person working there was the Complainant.

20. The Member stated there was no evidence the Complainant was entitled to consider the entire Temple premises his residence. Indeed, the reason for his presence at the Temple was not because it was his residence. Rather, he was there because it was his place of work, and so the aspects of his presence there which might appear to connote that the Temple was his residence were, for the most part, merely adjuncts to the work he was performing there. For the Member, this construction of the factual reality was fortified by the requirement that the Complainant never leave the Temple premises unless he secured the services of someone to replace him.

21. The Member acknowledged that the Complainant's presence at the Temple was more than temporary – a factor suggestive of an interpretation that it might constitute his residence. However, the Member also observed that the facts as found by the Delegate did not support a conclusion that the Complainant used the entire Temple in a manner that one might expect from a person who considered it to be his residence.

22. For these reasons, the Member determined that the Society had not demonstrated that the Delegate had committed an error of law and confirmed the Determination.

ISSUES

23. There are two issues which arise on an application for reconsideration of a decision of the Tribunal:

1. Does the request meet the threshold established by the Tribunal for reconsidering a decision?
2. If so, should the decision be confirmed, cancelled, varied or referred back to the original panel, or another panel of the Tribunal?

DISCUSSION

24. The power of the Tribunal to reconsider one of its decisions arises pursuant to section 116, the relevant portion of which reads as follows:

> 116 (1) On application under subsection (2) or on its own motion, the tribunal may
>
> (a) reconsider any order or decision of the tribunal, and
>
> (b) confirm, cancel or vary the order or decision or refer the matter back to the original panel or another panel.

25. As the Tribunal has stated repeatedly, the reconsideration power is discretionary, and must be exercised with restraint. Reconsideration is not an automatic right bestowed on a party who disagrees with an order or decision of the Tribunal in an appeal.

26. The attitude of the Tribunal towards applications under section 116 is derived in part from section 2 of the *ESA,* which identifies as purposes of the legislation the promotion of fair treatment of employees and employers, and the provision of fair and efficient procedures for resolving disputes over the application and interpretation of the statute. It is also derived from a desire to preserve the integrity of the appeal process mandated in section 112.

27. With these principles in mind, the Tribunal has repeatedly asserted that an application for reconsideration will be unsuccessful absent exceptional circumstances, the existence of which must be clearly established by the party seeking to have the Tribunal's appeal decision overturned.

28. The Tribunal has adopted a two-stage analysis when considering applications for reconsideration. In the first stage, the Tribunal considers an applicant's submissions, the record that was before the Tribunal in the appeal proceedings, and the decision the applicant wishes to have reconsidered. The Tribunal then asks whether the matters raised in the application warrant a reconsideration of the decision at all. A “yes” answer means that the applicant has raised questions of fact, law, principle or procedure flowing from the appeal decision which are so important that they warrant reconsideration.

29. In general, the Tribunal will be disinclined to reconsider if the primary focus of the application is to have the reconsideration panel re-weigh arguments that failed in the appeal. It has been said that reconsideration is not an opportunity to get a "second opinion" when a party simply does not agree with an appeal decision of the Tribunal (see *Re Middleton*, BC EST # RD126/06).

30. If the applicant satisfies the requirements in the first stage, the Tribunal will go on to the second stage of the inquiry, which focuses on the merits of the Tribunal's decision in the appeal. When considering that decision at this second stage, the standard applied is one of correctness.

31. When reflecting on the question whether the Society has met its burden on the first stage of the reconsideration analysis, I have been guided by the following comments of the Tribunal in *The Director of Employment Standards*, BC EST # RD046/01:

> In considering the importance of the issues "to the parties and/or their implications for future cases", it perhaps goes without saying that the Tribunal is not applying a litmus test based on the purely subjective perspectives of the parties; every dispute is "important" to the parties involved. Yet just as the Court of Appeal will take into account "a [question of] statutory interpretation that was particularly important to a litigant" in deciding whether to grant leave to appeal from the decision of an administrative tribunal (*Queen's Plate Development Ltd. v. Vancouver Assessor, Area 9* (1987) 16 B.C.L.R. (2d) 104 (C.A.); *Richard's on Richards Cabaret v. General Manager, Liquor Control and Licensing* [1986] B.C.J. No. 261 (C.A.)), so too questions of law of particular importance to individual circumstances [*sic* of the] parties before the Tribunal will be a factor under s. 116.

32. Here, the Society submits that the outcome of these proceedings is important not only because the sum said to be owed to the Complainant is substantial, in circumstances where the financial health of the Society is dependent on offerings from its members and other attendees at the Temple, but also to institutions of like nature that provide accommodation to spiritual advisers as a term of their appointment, and require them to be on call at the worksite premises where their accommodation space is located.

33. The Society submits further that the Tribunal failed to consider authoritative comments in *Thomson v. M.N.R.* [1946] S.C.R. 209 pertinent to the question of what constitutes a "residence" for our purposes. As a result, the Society claims that the Tribunal applied a definition that was too restrictive when it determined that the Complainant did not use the entire Temple as one would typically use their residence.

34. Finally, the Society asserts that the Tribunal erred in placing weight on the fact that the Complainant was required to remain at the Temple during working hours. The Society contends that this misses the point, as subsection 1(2) of the *ESA* makes it clear that an employer can stipulate that an employee remain on call at his residence without being liable for the payment of wages during that time.

35. In my view, the issues raised by the Society, taken collectively, meet the requisite standard for a reconsideration at stage one. In particular, the Society's submissions relating to the application of the wording of subsection 1(2) to the circumstances of the Complainant's employment at a place of worship like the Temple are sufficient for that purpose.

36. That said, I have decided that the application must be dismissed at stage two. My reasons are as follows.

37. The Society argues that the Tribunal failed to address its submission based on the comments of the Supreme Court of Canada in *Thomson*, *supra*, regarding the meaning to be ascribed to the word "residence" in a taxation statute at issue in the case. More specifically, the Society relies on statements made by Kerwin J., who said this:

> There is no definition in the Act of "resident" or "ordinarily resident" but they should receive the meaning ascribed to them by common usage…. The Shorter Oxford English Dictionary gives the meaning of "reside" as being "To dwell permanently or for a considerable time, to have one's settled or usual abode, to live, in or at a particular place".

38. The Society also relied on what was said by Estey J.:

> A reference to the dictionary and judicial comments upon the meaning of these terms indicates that one is "ordinarily resident" in the place where in the settled routine of his life he regularly, normally or customarily lives. One "sojourns" at a place where he unusually, casually or intermittently visits or stays. In the former the element of permanence; in the latter that of the temporary predominates. The difference cannot be stated in precise and definite terms, but each case must be determined after all of the relevant factors are taken into consideration, but the foregoing indicates in a general way the essential difference. It is not the length of the visit or stay that determines the question….

39. The Society states that the Tribunal did not address the Society's references to the *Thomson* decision, and argues that if it had done so it would have concluded the entirety of the Temple premises was the Complainant's residence.

40. The Society asserts that if one applies a "common usage" of the word "residence" to the circumstances of the Complainant, one must conclude that the Temple was his residence for the purposes of the *ESA*. In support, the Society points to the Delegate's finding, acknowledged by the Tribunal, that the Complainant lived nowhere else in Canada but at the Temple premises, and submits that if a person had asked the Complainant where he lived, slept, cooked, and bathed, the response would have been "the Temple".

41. In further support, the Society refers to the decision of the Tribunal in *Re: Lowan (Corner House)*, BC EST # D254/98, which recognized there might be cases of more limited privacy for an employee at his residence; for example, where the employee is living communally with others, or at his place of work. In that case, the Tribunal went on to say:

> For a workplace to also be considered a residence the place of work must assume some of the qualities of a residence. There must be some degree of privacy; a space, all be it limited, to call one's own. There must be some degree of settlement to carry on as much of those everyday things as possible, subject only to the minimum necessary intrusions of the requirements of the employment. There must be some element of permanence as opposed to the intermittent or temporary.

42. The kernel of the Society's argument, then, is one that it has maintained throughout the various stages of these proceedings, and again on this application. Since the Complainant had private living quarters at the Temple to which he could retreat with an element of settled permanence, as well as access to the cooking and washroom facilities located elsewhere in the Temple, the whole of the Temple premises was thereby converted into his residence for the purposes of the *ESA*, with the result that any "on call" hours spent at the Temple should not have attracted the right to claim wages from the Society.

43. I cannot accede to this argument, and not merely because it reproduces the substance of arguments that failed to persuade both the Delegate and the Member on appeal.

44. It is clear from the authorities noted that a definition of one's "residence" must incorporate several broadly described concepts, and so it is, of necessity, highly fact driven. Referring again to the Thomson decision, the comments of yet another member of the court, Rand J., capture some of the difficulties inherent in any discussion attempting to define with precision the meaning of the word "residence":

> The gradation of degrees of time, object, intention, continuity and other relevant circumstances, shows, I think, that in common parlance "residing" is not a term of invariable elements, all of which must be satisfied in each instance. It is quite impossible to give it a precise and inclusive definition. It is highly flexible, and its many shades of meaning vary not only in the contexts of different matters, but also in different aspects of the same matter. In one case it is satisfied by certain elements, in another by others, some common, some new.

45. Later in his opinion, Rand J. sought to characterize the concept of "residence" more precisely, as:

> …chiefly a matter of the degree to which a person in mind and fact settles into or maintains or centralizes his ordinary mode of living with its accessories in social relations, interests and conveniences at or in the place in question.

46. On the question of the degree to which the various spaces at the Temple were to be construed as such settled elements of his mode of living that they should be considered to be the Complainant's residence, the Delegate drew a clear distinction on the facts between the Complainant's sleeping room, and the other locations on the Temple premises where he might be present each day.

47. The Delegate found that, apart from his sleeping room, the Complainant had no expectation of privacy in any part of the Temple during its open hours. His room was the only area on the Temple premises that was reserved for his sole use, and therefore, it was the only space that might be construed to be his "residence" for the purposes of subsection 1(2) of the *ESA*. While the Complainant was also permitted to use the cooking and washroom facilities in the Temple, those areas, unlike his sleeping quarters, were not available for his sole use, and he had no reasonable expectation of privacy there.

48. Although cooking and bathing facilities are usually associated with one's residence, in this instance the existence of those spaces as amenities available to other important users of the Temple as a place of worship overwhelmed such an interpretation. The Society argued that the Complainant was present at the Temple because he lived there. The Delegate's approach to the characterization of the spaces at the Temple reflected a different emphasis, namely, that the Complainant was present at the Temple because he worked there. The aspects of the Complainant's tenure at the Temple that were suggestive of his residing there were, therefore, largely incidental to the true nature of his activities at that location. Those activities were almost entirely work-related. They were not, to any marked degree, reflective of the Complainant's using the premises in a manner that one might normally expect someone would enjoy their personal residence.

49. The distinction between the Delegate's attitude toward the Complainant's sleeping room, and the other spaces at the Temple, was affirmed in the Appeal Decision. The Tribunal said this:

> …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.
>
> 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.

50. For the same reasons, it is my view that the Society's assertion the Complainant's circumstances indicated his surrendering some of the benefits of a private residence "to live communally or at a place of work" is also misplaced. On this point, the Tribunal was correct to emphasize the fact that the Temple was not a communal workplace where the facilities and work duties were shared by a number of employees. Instead, the Temple was a place of worship, and the only employee working there was the Complainant.

51. It is trite to state that the Tribunal will be reluctant to disturb a delegate's findings of fact. For the Tribunal to decide to do that it must be shown that the delegate's finding was irrational, perverse, or inexplicable. This is so because the appellate jurisdiction of the Tribunal under section 112 does not permit it to correct errors of fact. Instead, the Tribunal may only correct errors of law. An error of fact does not amount to an error of law unless the Tribunal concludes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have made the impugned finding of fact (see *Gemex Developments Corp. v. B.C. (Assessor)* (1998) 62 BCLR 3d 354; *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)* [2000] BCJ No.331).

52. In my opinion, the distinction drawn by the Delegate, and affirmed in the Appeal Decision, between the Complainant's sleeping quarters and the rest of the Temple premises was not irrational, perverse or inexplicable. It was a factual distinction it was reasonable for the Delegate to make in the circumstances, and so it cannot be characterized as an error of law.

53. It is also clear from the Appeal Decision that the Member did consider the Society's arguments based on the authorities it cited. The Member affirmed, in the language referred to by the Society that it drew from *Thomson*, *supra*, that the Delegate had taken a "common sense" approach – one that was consistent with the "common usage" of the notion of a "residence" – in the circumstances of the Temple.

54. The Member also observed, correctly, that the Delegate's approach to the proper identification of the Complainant's residence was "strict", and therefore consistent with the purposes and objects of the *ESA* as a remedial statute. Previous decisions of the Tribunal have also affirmed the importance of scrutinizing with care the nature of an employee's living accommodations as a "residence" in circumstances such as those confronting the Complainant, where the employee's access to the minimum benefits provided by the *ESA* is at stake. As was stated by the Tribunal in *Knutson First Aid Services (1994) Ltd.*, BC EST # RD095/01:

> There is good reason under the *Act* not to take an overly expansive view of the term "employee's residence" in s. 1. The *Act* itself creates the presumption that "on call" employees are deemed to be at work while on call. In expressly addressing the "on call" scenario, the Legislature must be taken to have understood the reality that workers are often "on call" for many hours beyond

> the regular workday. The Legislature, not the Director or the Tribunal, has made the policy decision that the only exception to counting all "on call" hours as work is when the "designated location" to be on call is the "employee's residence".
>
> …It is noteworthy that the Legislature defined the exception in s.1(2) by using the phrase *employee's residence* rather than a formulation such as "location designated by the employer" or "accommodation designated by the employer". Manifestly, the Legislature felt the term "employee's residence" should be defined objectively, and that "on call" time should be non-compensable only when an employee can truly and clearly be said to be otherwise "compensated" by being at their residence.

55. The Tribunal in *Knutson* also made the point that a loose interpretation of what constitutes an employee's "residence" might have the deleterious effect of denying employees wages for periods of time when they were waiting at such a location because they were "on call". For the Tribunal, such an interpretive approach would require very clear language on the part of the Legislature.

56. The Society argues that *Knutson* is distinguishable because the employee there was a first aid worker living in temporary accommodation in a remote camp setting who had a permanent residence elsewhere, while the Complainant's only permanent home was the Temple.

57. In my view, this argument is misconceived. The Delegate found as a fact that the Complainant's family and "home" were in India. The Complainant was not a permanent resident in Canada. Viewing his circumstances in this way, one might conclude that his presence at the Temple was at an even more remote location than the work camp the first aid worker experienced in Knutson.

58. A final submission made by the Society is that the Delegate, and so, too, the Tribunal in the Appeal Decision, erred in determining that the Temple was not the Complainant's residence because the Society required that the Complainant remain on the Temple premises during working hours. The Society asserts that subsection 1(2) of the *ESA* expressly permits an employer to require an employee to stay at his residence while "on call", and so the mere fact an employer has imposed this stipulation cannot assist in determining whether the location identified is the employee's residence.

59. I agree with the Society's position that an employee is not at work if the place an employer designates for him to be on call is the employee's residence. That is what subsection 1(2) expressly provides. However, I do not accept that an employer's requiring an employee to remain on call at a specific location is irrelevant when one is called upon to decide whether the location is, in fact, the employee's residence for the purposes of the *ESA*. That is an entirely different question. In order for the residential exception in subsection 1(2) to apply at all, it must first be determined whether the on call location is the employee's residence, and factors like the employer's insisting that the employee stay there is one among many that may be utilized to inform an answer to that question.

60. Here, the Delegate concluded, as part of her analysis of the question whether the Complainant resided at the Temple, and if so, what the nature and scope of his residential space might be, that it was a relevant part of the factual matrix to note that the Complainant was not at liberty to come and go as he pleased, but was, instead, required to remain at the Temple during working hours. I cannot see that it was unreasonable for the Delegate, and the Member in the Appeal Decision, to make this observation.

61. The reason why this finding of fact was important to a determination of the residence issue is that the space where the Complainant was required to remain was the place where he performed his work duties. It was the space within the Temple where religious functions occurred, and where the Complainant could be expected to attend to the needs of the members of the congregation, the management Committee, and other visitors. It was because the Complainant was required to be on call and ready to perform work in that space, rather than inside his private sleeping quarters, that the Delegate decided, correctly in my view, that it was important to distinguish between these various locations within the Temple in order to determine which, if any of them, should be construed to be the Complainant's "residence".

62. Utilizing this approach, the Delegate determined that only the Complainant's sleeping room should be characterized as his "residence" for the purposes of the *ESA*. The Member in the Appeal Decision concluded that the Determination contained no error on this point. The Society has not persuaded me that the result expressed in the Appeal Decision is incorrect.

ORDER

63. The Society's application for reconsideration is dismissed. Pursuant to section 116 of the *ESA*, the Appeal Decision, 2020 BCEST 33, is confirmed.

Robert E. Groves
Member
Employment Standards Tribunal