

An appeal

- by -

Satnam Education Society carrying on business as Khalsa School
(“Khalsa School”)

- of a Determination issued by -

The Director of Employment Standards
(the “Director”)

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

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2012A/96

DATE OF DECISION: January 18, 2013

DECISION

SUBMISSIONS

Jaspreet S. Malik	counsel for Satnam Education Society carrying on business as Khalsa School
Narinder S. Grewal	on his own behalf
Gagan Dhaliwal	on behalf of the Director of Employment Standards

OVERVIEW

1. Satnam Education Society carrying on business as Khalsa School (“Khalsa School”) has filed an appeal under Section 112 of the *Employment Standards Act* (the “*Act*”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on July 25, 2012.
2. The Determination found that Khalsa School had contravened Part 5, section 46, Part 7, section 58 and Part 8, section 63 of the *Act* in respect of the employment of Narinder S. Grewal (“Mr. Grewal”) and ordered Khalsa School to pay Mr. Grewal an amount of \$12,809.98, an amount that included wages and interest under section 88 of the *Act*.
3. The Director also imposed administrative penalties under Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$1,500.00.
4. The total amount of the Determination is \$14,309.98.
5. In its appeal, Khalsa School alleges the Director erred in fact and law in finding Mr. Grewal was not a manager for the purposes of the *Act* and in finding that Mr. Grewal did not commit a single act of provable misconduct.
6. Khalsa School seeks to have the Determination varied or referred back to the Director.
7. The Tribunal has discretion to choose the type of hearing for deciding an appeal. Appeals to the Tribunal are not *de novo* hearings and the statutory grounds of appeal are narrow in scope. The Tribunal is not required to hold an oral appeal hearing and may choose to hold any combination of oral, electronic or written submission hearing: see section 103 of the *Act* and section 36 of the *Administrative Tribunals Act*. The Tribunal finds the matters raised in this appeal can be decided from Determination, the material on the section 112(5) “record”, together with the written submissions of the parties and any additional evidence allowed by the Tribunal to be added to the “Record”.

ISSUE

8. The issues in this appeal are whether Khalsa School has shown the Director erred in law by finding either that Mr. Grewal was a manager under the *Act* or that he was not dismissed for cause and was accordingly entitled to length of service compensation.

THE FACTS

9. Khalsa School operates a private school. Mr. Grewal was employed as the head teacher of the religious department from September 2002 until April 2011. In October 2011, Mr. Grewal filed a complaint with the Director alleging Khalsa School had contravened the *Act* by failing to pay overtime wages, statutory holiday pay, annual vacation pay and compensation for length of service. Mr. Grewal also alleged Khalsa School had made unauthorized deductions from his wages. The Director conducted a hearing on the complaint on March 29, 2012.
10. The issues raised in the complaint process and addressed in the complaint hearing reflect all elements of the complaint: whether Mr. Grewal was entitled to overtime, statutory holiday pay, annual vacation pay and compensation for length of service and whether Khalsa School had made unauthorized deductions from Mr. Grewal's wages.
11. The Director found Mr. Grewal fell within the definition of "teacher" in the *Regulation* and, as a teacher, was excluded from the overtime provisions found in Part 4 of the *Act*. The Director also found Mr. Grewal had not established he was entitled to additional regular wages for extra work. Neither aspect of this part of the Determination has been appealed.
12. The Director found Mr. Grewal was owed annual vacation pay in the amount of \$2,425.06. That finding has not been appealed.
13. The Director found Mr. Grewal was entitled to statutory holiday pay in the amount of \$354.86. In arriving at this finding, the Director rejected the argument by Khalsa School that Mr. Grewal was a manager under the *Act* and not entitled to statutory holiday pay. The conclusion of the Director on Mr. Grewal's status under the *Act* was based on the finding that although "Mr. Grewal supervised, directed and evaluated staff in the religious department, Mr. Bhatia admitted that he could only make recommendations in regards to hiring, firing and disciplinary actions. Mr. Bhatia stated that ultimately, decisions were made by the Religion Committee and he and Mr. Grewal could only make recommendations." The Director found, at page R13, that, "Sometimes those recommendations were followed. Sometimes they were not." In result, the Director viewed Mr. Grewal to be employed more in a "supervisory" capacity than in a managerial capacity and was not excluded from the statutory holiday pay provisions of the *Act*.
14. The Director found Khalsa School did not make unauthorized deductions from Mr. Grewal's wages and denied that aspect of the complaint. As indicated above, that finding has not been appealed.
15. The Director decided Mr. Grewal was entitled to compensation for length of service, finding Khalsa School had not discharged the burden of showing Mr. Grewal had disentitled himself to that statutory benefit by either quitting or committing an act, or acts, of misconduct sufficient to justify summary dismissal.
16. At the complaint hearing, Khalsa School alleged just cause for Mr. Grewal's dismissal because he had incited a boycott of classes by teachers, had erased school documents from his computer and was absent from school without leave. Khalsa School presented evidence in support of its allegations in the form of "investigation notes, witness testimony and sworn affidavits". The Director noted in the Determination that the characterization of the alleged "boycott" incident, which had occurred on April 14, 2011, had changed over the course of the complaint process: from the initial investigation by Mr. Bhatia, where he noted teachers had said "Mr. Grewal instructed them to meet with Mr. Bhatia before classes on April 14"; later being characterized as a "protest as Mr. Grewal had quit his job"; and, finally, at the hearing being described as a "boycott instigated by Mr. Grewal". The Director appeared to be unimpressed by the fact the six

affidavits submitted by Khalsa School at the complaint hearing were identical, consisting of two sentences in each, which said Mr. Grewal asked each affiant to “boycott” their first class on April 14. One of the affiants was called to give oral testimony. The Director found this witness’ testimony to be “unconvincing”, as “he stated he could not remember the details of his conversation with Mr. Grewal as it had happened so long ago” (the Director also noted the affidavits were all sworn March 15, 2012 – more than eleven months after the events being described).

17. The Director referred in the Determination to other evidence relating to the incident but, in the final analysis, was not persuaded by the totality of the evidence that Khalsa School had proven Mr. Grewal had incited a “boycott” on April 14.
18. The Director also considered the other allegations made in support of Mr. Grewal’s dismissal and found, in the matter of the erased school records, no misconduct had been proven and, in respect of the absence without approved leave, that Khalsa School had not shown Mr. Grewal had received any warnings for attendance related matters in the past or had been informed his employment would be terminated if he were absent in the future.
19. In sum, while the Director found some conduct that might warrant a disciplinary response from Khalsa School, there was no misconduct that, individually or collectively, was sufficient to justify Mr. Grewal’s immediate summary dismissal.

ARGUMENT

20. Counsel for Khalsa School submits the Director erred in law and misunderstood the facts in finding Mr. Grewal was not a manager and in finding that Mr. Grewal “did not commit a single act of misconduct”.
21. Counsel says the finding on the manager issue is logically flawed and ignores evidence provided by Khalsa School on that issue.
22. On the matter of just cause for termination, counsel for Khalsa School says the acceptance by the Director of the “most likely” characterization of the April 14 incident satisfies the test for summary dismissal set out in the Determination and the result in the Determination is irreconcilable with that stated test applied to the accepted facts. In that respect, counsel for Khalsa School says the Director accepted Mr. Bhatia’s description of the incident in the investigation findings he recorded on May 4, 2011, that Mr. Grewal “told them he will not come back tomorrow and the teachers should not open their rooms and have a meeting with Mr. Bhatia”, as “likely to be the most accurate” and should have, of itself, been sufficient to justify the termination.
23. Mr. Grewal and the Director have responded to the appeal.
24. At its core, the submission of Mr. Grewal endorses the findings made and conclusions reached in the Determination on the two issues raised in this appeal. The submission also introduces material and makes submissions relating to a matter between an entity identified as Satnam Trust and Canada Revenue. This matter has no apparent relevance to the issues raised in this appeal and I do not intend to consider it or address it any further in these reasons. As I have stated twice already in these reasons, there has been no appeal of the Director’s decision on the claim by Mr. Grewal that Khalsa School made unauthorized deductions from his wages.
25. The Director’s response says, in sum, that no error of law was made, nor was any evidence submitted at the complaint hearing “ignored”. In respect of the latter point, the Director makes two points: first, it was not

the evidence, as suggested in paragraph 18 of the appeal submission, that Mr. Grewal's recommendations to the Religious Committee were "presumptively followed"; and second, that the facts presented at the complaint hearing on the issue of the status of Mr. Grewal under the *Act* are set out at pages R4 and R5 of the Determination. The Director says the "Statement of Facts" submitted with the appeal includes information that was not presented to the Director during the complaint hearing.

26. The Director says the Determination clearly sets out the reasons for the conclusion on Mr. Grewal's claim for length of service compensation at pages R15 to R19. The Director says that, properly read, there is no inconsistency in that reasoning and evidence alleged to have been "ignored" was merely not considered relevant to the issue of "just cause".
27. In his final reply, counsel for Khalsa School objects to the standing of the Director to make submissions on the appeal. He submits the Director has no legal authority to make submissions on the substantive aspects of the appeal; that the role of the Director is limited to explaining the record and making submissions relating to jurisdiction. Counsel also re-asserts the position of Khalsa School on the status of Mr. Grewal under the *Act* and on the just cause issue. With the exception of adding the suggestion that Mr. Grewal was employed in an executive capacity, which I find not only to be inappropriately raised at this stage of the process but also entirely without merit, nothing new is added to the initial appeal submissions.

ANALYSIS

28. The grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, 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 made.*

29. A review of decisions of the Tribunal reveals certain principles applicable to appeals have consistently been applied. The following principles bear on the analysis and result of this appeal.
30. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. 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.
31. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03. The Tribunal noted in the *Britco Structures Ltd.* case that the test for establishing an error of law on this basis is stringent, requiring the appellant to show that the findings of fact are perverse and inexplicable, in the sense that they are made without any evidence, that they are inconsistent with and contradictory to the evidence or they are without any rational foundation.
32. Generally, the Tribunal has adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
 2. a misapplication of an applicable principle of general law;
 3. acting without any evidence;
 4. acting on a view of the facts which could not reasonably be entertained; and
 5. adopting a method of assessment which is wrong in principle.
33. Before addressing whether Khalsa School has met the burden of demonstrating the Director committed an error of law in respect of either of the issues, I will address the objection of counsel for Khalsa School to the submissions made by the Director in reply to the appeal and the concern raised in the Director's submission that facts and evidence not provided during the complaint process have been included in the appeal.
34. In *British Columbia Securities Commission*, BC EST # RD121/07 (Judicial Review dismissed: see *British Columbia Securities Commission v. Burke*, 2008 BCSC 1244), the Tribunal considered the proper role of the Director in proceedings before the Tribunal, concluding there were "sound practical and policy reasons reflected in the *Act* for not unduly limiting the role of the Director in an appeal" (para. 22). The Tribunal confirmed the view originally developed in *BWT Business World*, BC EST # D050/96 ("*BWT Business World*"), that: "The role of the Director on an appeal hearing must be considered in the context of the overall investigative and adjudicative framework established by the *Act*" (p. 4). The rationale for the Tribunal's approach to the role of the Director – the typical nature of the proceedings and litigants before both the Director and the Tribunal, the need to ensure that the Tribunal receives the perspective of the Director (who is primarily responsible for the administration of the *Act* and initially responsible for its interpretation) on the issue being addressed on appeal or reconsideration and the objective of timely, efficient, and final resolution of complaints made under the *Act* – are fully expressed in paras. 17 through 21. The role given to the Director by the Tribunal is summarized in the following statement, at para. 27:
- The above rationale informs the Tribunal's policy to allow the Director to make complete submissions on all aspects of an appeal, including natural justice.
35. See also: *Canwood International Inc. v. Bork*, 2012 BCSC 578.
36. Applying the above to the role of the Director in this appeal, I dismiss the objection made by counsel for Khalsa School. The responsibility of the Director to ensure the Tribunal receives her perspective on the issues raised by the appeal – including her perspective on the additional evidence and factual assertions presented with the appeal – and the objectives of efficiency and finality directs the scope of the Director's role and justifies accepting all aspects of the submission made by the Director in this appeal.
37. I will now address the Director's comments on the contested additional evidence and factual assertions.
38. Where an appeal is, in fact or in substance, based on new evidence that was not before the Director when the Determination was being made, the Tribunal has discretion to accept or refuse such new or additional evidence. While Khalsa School has not specifically grounded this appeal in section 112(1)(c), it is apparent from a review of the Determination and the section 112(5) "record" that the assertions of "fact" about which the Director has raised concern were not made or established during the complaint process and, as such, should be considered against the principles that bear on whether or not this evidence is to be accepted.
39. The Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the proposed evidence against several considerations, including whether such evidence was reasonably available and could

have been provided during the complaint process, whether the evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it be reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03. New or additional evidence which does not satisfy any of these conditions will rarely be accepted. It should be noted that the conditions set out in the *Davies* decision are conjunctive and the party requesting the Tribunal to admit the new evidence must satisfy all of them before the Tribunal will admit that evidence.

40. In this case, I will not accept the contested assertions of fact made by counsel for Khalsa School for several reasons. First, and primarily, these assertions of fact are not “new”; they existed and were reasonably available to be provided to the Director during the complaint process. Second, they directly challenge findings of fact made by the Director on the managerial issue and speak to the scope of Mr. Grewal’s authority without demonstrating any error of law in the findings of fact made by the Director on this issue. As well, it is obvious these assertions were never put to Mr. Grewal during the complaint hearing. Third, I am not persuaded that these “facts”, even if accepted, could result in a different conclusion than was reached by the Director.
41. The analysis for answering the question of who is a manager for the purposes is well established. It commences with an examination of the definition of manager in section 1 of the *Regulation*:

“manager” means

- (a) a person whose principal employment responsibilities consist of supervising or directing, or both supervising and directing, human or other resources, or
- (b) a person employed in an executive capacity.

42. The factual assessment of whether a person’s employment falls within the definition of manager is governed by the analysis directed in *Director of Employment Standards*, BC EST # D479/97 (reconsideration of BC EST # D170/97, 429485 B.C. *Limited operating as Amelia Street Bistro*) at pages 5-6:

The task of determining if a person is a manager must address the definition of manager in the *Regulation*. If there are no duties consisting of supervising and directing other employees, and there is no issue that the person is employed in an executive capacity, then the person is not a manager, regardless of the importance of their employment duties to the operation of the business. That point was made by the Tribunal in *Anducci’s Pasta Bar Ltd.*:

Many of the duties to which the employer pointed as evidence of Lum’s managerial status did not address the definition of manager in the *Regulation*. Handling of cash, custody of a key, responsibility for checking purchases and the like are all responsible duties, but they are not connected with the supervision or direction of employees.

Any conclusion about whether the primary employment duties of a person consist of supervising and directing employees depends upon a total characterization of that person’s duties, and will include consideration of the amount of time spent supervising and directing other employees, the nature of the person’s other (non-supervising) employment duties, the degree to which the person exercises the kind of power and authority typical of a manager, to what elements of supervision and direction that power and authority applies, the reason for the employment and the nature and size of the business. It is irrelevant to the conclusion that the person is described by the employer or identified by other employees as a “manager”. That would be putting form over substance. The person’s status will be determined by law, not by the title chosen by the employer or understood by some third party.

We also accept that in determining whether a person is a manager the remedial nature of the *Act* and the purposes of the *Act* are proper considerations. The Director raises a concern that an interpretation of manager which does not accept the limited scope of exclusion from the minimum standards of the *Act* could have serious consequences for persons in positions such as foreman and first line supervisor who spend a significant amount of time supervising and directing other employees but frequently do not exhibit a power and authority typical of a manager. As we stated above, the degree to which some power and authority typical of a manager is present and is exercised by an employee are necessary considerations to reaching a conclusion about the total characterization of the primary employment duties of that employee.

Typically, a manager has a power of independent action, autonomy and discretion; he or she has the authority to make final decisions, not simply recommendations, relating to supervising and directing employees or to the conduct of the business. Making final judgments about such matters as hiring, firing, disciplining, authorizing overtime, time off or leaves of absence, calling employees in to work or laying them off, altering work processes, establishing or altering work schedules and training employees is typical of the responsibility and discretion accorded a manager. We do not say that the employee must have a responsibility and discretion about all of these matters. It is a question of degree, keeping in mind the object is to reach a conclusion about whether the employee has and is exercising a power and authority typical of a manager. It is not sufficient simply to say a person has that authority. It must be shown to have been exercised by that person.

43. While amendments to the definition have changed some aspects of the analysis, the central considerations remain intact: see *Howe Holdings Ltd.*, BC EST # D131/04. I also note the following comment from *Howe Holdings Ltd.* at page 7, reinforcing the view that the definition of manager must take into consideration the remedial nature and the purposes of the *Act*:

As remedial legislation, the *Act* is to be given such large and liberal interpretation as will best ensure the attainment of its purposes and objects. (see, for example, *On Line Film Services Ltd v Director of Employment Standards*, BC EST # D319/97, and *Helping Hands v. Director of Employment Standards*, (1995) 131 D.L.R. (4th) 336 (B.C.C.A.)).

44. Counsel for Khalsa School has approached the challenge to the Director's conclusion relating to the question of whether Mr. Grewal's principal employment responsibilities related to supervising and/or directing human resources primarily from a factual perspective, asserting there were facts, which if properly assessed, ought to have led to the conclusion that he fell within the definition of manager.
45. The difficulty with this approach, however, is that it requires, first, that the Tribunal accept all the facts as alleged (which I have not) and, second, that the Tribunal engage in the kind of factual analysis that as a matter of policy we take caution to avoid and to make findings the Tribunal has no authority to make in the absence of a demonstrable error of law on the facts: see *Jane Welch operating as Windy Willows Farm*, BC EST # D161/05.
46. I do not agree with counsel's assertion that the Director provided "little or no reason" for finding Mr. Grewal was not a manager under the *Act*. Read in context, the Director is clearly saying the evidence did not show Mr. Grewal, in the words of *Director of Employment Standards (re Amelia Street Bistro)*, *supra*, had the "power of independent action, autonomy and discretion; . . . the authority to make final decisions, not simply recommendations, relating to supervising and directing employees". My reading of the Determination indicates the finding of the Director was based on factual conclusions considered against the test for determining whether an employee is a manager under the *Act*. The test used by the Director is the correct test.

47. In sum, while Khalsa School may disagree with the conclusion reached by the Director, it is one the Director was entitled to make on the available facts and is one in respect of which the Tribunal has no authority as it was clearly based on evidence that was before the Director and is not shown to be reviewable on appeal.
48. Khalsa School does not succeed on their appeal of the issue of whether Mr. Grewal was a manager.
49. On the just cause issue, I reach the same conclusion.
50. I do not agree that the “test” for establishing just cause for summary dismissal is, as suggested by counsel for Khalsa School, dependent on simply establishing “a single act of provable misconduct”. That “test” finds no support in any decision of the Tribunal or in any analysis of summary dismissal under the *Act* that is sought to be grounded on a single incident. Rather, the test is as stated in the Determination, at page R16:
- Activities such as theft, fraud or conflict of interest can result in the summary discharge of an employee after only one provable incident. To justify dismissal on the basis of a single act, the employee must have acted wilfully or deliberately.
51. It is a question of evidence and that evidence must show that the employee’s misconduct, in this case Mr. Grewal’s misconduct, was sufficient to repudiate the employment contract. In this case, the Director found that while Khalsa School alleged Mr. Grewal had “incited a boycott” of classes, the evidence did not support that allegation. The findings and the conclusion of the Director was that, despite evidence of some misconduct, the conduct of Mr. Grewal in sum was insufficient to show he had repudiated his employment contract.
52. Once again, the difficulty with the appeal is that it would require the Tribunal to interfere with findings and conclusions of fact made by the Director without there being any error of law in respect of those facts being demonstrated in the appeal. As indicated above, the authority of the Tribunal in respect of appeals challenging findings of fact or seeking to have the Tribunal re-visit and alter findings of fact is limited.
53. As with the “manager” issue, I find Khalsa School has not succeeded on the “just cause” issue.
54. In result, I find the appeal as a whole lacks merit and it is dismissed.

ORDER

55. Pursuant to section 112 of the *Act*, I order the Determination dated July 25, 2012, be confirmed in the amount of \$14,309.98, together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

David B. Stevenson
Member
Employment Standards Tribunal