



An appeal

- by -

Cariboo Gur Sikh Temple Society (1979)
(“the Society”)

- 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.: 2014A/90

DATE OF DECISION: October 9, 2014

DECISION

SUBMISSIONS

Andres Barker

counsel for Cariboo Gur Sikh Temple Society (1979)

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Cariboo Gur Sikh Temple Society (1979) (“the Society”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on June 10, 2014.
2. The Determination found the Society had contravened Part 3, sections 16, 17 and 27, Part 4, sections 36 and 40, Part 5, section 46, Part 7, section 58 and Part 8, section 63 of the *Act* in respect of the employment of Daljit Singh Sodhi (“Mr. Sodhi”) and ordered the Society to pay wages to Mr. Sodhi in the amount of \$7,451.11, including interest under section 88 of the *Act*, and to pay administrative penalties in the amount of \$4,000.00. The total amount of the Determination is \$11,451.11.
3. The Society has filed an appeal of the Determination, alleging the Director erred in law and failed to observe principles of natural justice in making the Determination.
4. In correspondence dated July 28, 2014, the Tribunal notified the parties that, among other things, no submissions were being sought from the other parties pending review of the appeal by the Tribunal and that following such review all, or part, of the appeal might be dismissed.
5. The section 112(5) “record” has been provided to the Tribunal by the Director and a copy has been delivered to the Society, who has been given the opportunity to object to the completeness of the section 112(5) “record”. An objection has been raised to the completeness of the section 112(5) “record” by the Society. That objection will be addressed later in this decision.
6. I have decided this appeal is an appropriate case for consideration under section 114 of the *Act*. At this stage, I am assessing this appeal based solely on the Determination, the appeal and written submission made on behalf of the Society and my review of the section 112(5) “record” that was before the Director when the Determination was being made. Under section 114(1) of the *Act*, the Tribunal has discretion to dismiss all or part of an appeal, without a hearing of any kind, for any of the reasons listed in that subsection, which states:

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 the 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;*

(b) *one or more of the requirements of section 112(2) have not been met.*

7. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, Mr. Sodhi will, and the Director may, be invited to file further submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1) of the *Act*, it will be dismissed. In this case, I am looking at the prospect of the appeal succeeding.

ISSUE

8. The issue being considered at this stage of the proceedings is whether there is any reasonable prospect the appeal can succeed.

THE FACTS

9. The Society operates a Sikh Temple in Quesnel, BC. Mr. Sodhi was employed by the Society as a Granthi, or Priest, from January 30, 2009, to January 15, 2014. He was paid \$1,000.00 a month during his employment.
10. Mr. Sodhi claimed the Society owed him regular wages, statutory and annual vacation pay and compensation for length of service.
11. Mr. Sodhi asserted he had signed an employment contract in June 2009 that set his rate of pay at \$2,850.00 a month, less \$1,000.00 a month for accommodations, in return for 40 hours of work a week. He claimed he was never paid according to the terms of this contract, but had consistently received \$1,000.00 a month.
12. Mr. Sodhi provided the Director with a breakdown of his hours of work, which indicated work was being performed seven days a week, totalling 40 hours. He claimed he had never taken any time off as vacation; he said he had been absent from January 30, 2012, to February 19, 2012, for surgery and that he was absent from the Temple during other periods; he said his family performed his duties on those occasions.
13. Mr. Sodhi claimed he had never received a wage statement from the Society and, consequently, had no idea how many hours the Society believed he was working. He provided a Record of Employment (“ROE”) issued to him by the Society on January 17, 2013, which, in the comment field, stated “He works 6 hours on Sundays and 4 hours on all other days”. The ROE was issued by the Society’s bookkeeper.
14. Mr. Sodhi provided a letter, dated September 19, 2010, that he said indicated he and his family were entitled to reside at the Temple. He provided copies of two letters, both dated December 2, 2012, the first clarifying the Priest’s duties and the second directing Mr. Sodhi and his family to vacate the Temple residence before January 1, 2013. Mr. Sodhi said he and his family did not vacate until later in January 2013.
15. Varinder Gill, a director and President of the Society from 2002 until 2011, provided evidence in support of Mr. Sodhi’s regular wage claim, indicating Mr. Sodhi was to receive \$2,850.00 a month (less \$1,000.00 a month for accommodation) but never did.
16. Most of the Society’s submissions were provided by Kiran Puri, a director of the Society.
17. He submitted the contract proffered by Mr. Sodhi and supported by Varinder Gill was a fiction. He presented the Director with a letter, dated June 13, 2009, signed by Mr. Sodhi, committing to work for the Society as Granthi for a period of five years. He said this was the only written agreement between the Society and Mr. Sodhi. He stated Mr. Sodhi was to receive \$1,000.00 a month as salary, free accommodation and

meal expenses. A letter was provided from the former Granthi stating these were the terms of his employment.

18. Kiran Puri submitted the April 5, 2009, contract stating Mr. Sodhi's salary was \$3,850.00 was clearly a fraud. He alleged it was concocted by Mr. Sodhi and Varinder Gill for other and unrelated purposes.
19. The Society provided a form, dated 05/12/2008, in which it is stated Mr. Sodhi's salary would be \$1,000.00 a month for four to six hours of work daily.
20. Mr. Sodhi never approached the Society regarding any underpayment of wages.
21. Kiran Puri said Mr. Sodhi had requested a three month vacation, but the Society denied that request. He said it had never been a term of Mr. Sodhi's employment that his family be allowed to reside in the Temple. He said the Sodhis were evicted in December 2012 in order to comply with Fire Code regulations. He said the Society expected Mr. Sodhi to continue working as Priest after his family's eviction and it was his decision not to return to work after January 15, 2013. He said the Society provided one of the December 2, 2012, letters to clarify Mr. Sodhi's responsibilities as Priest.
22. The Society provided a spreadsheet of hours of work for Mr. Sodhi, compiled by Harblas Sandhu, a director of the Society. The Society said the spreadsheet was compiled from a calendar which was used to record Mr. Sodhi's days of work. It was acknowledged the calendar did not record hours of work. The Society submitted Mr. Sodhi's work load was very light and should not have taken more than 1.5 hours on each of six days and five hours on Sunday. This position was supported by the perceptions of a number of the directors of the Society, including Kiran Puri, filed in affidavit form and provided to the Director. The spreadsheet also recorded 53 days taken from work by Mr. Sodhi between January 1 and July 22, 2012. The Society submitted it was agreed these days would be taken as vacation time and credit towards future statutory holiday pay.
23. The Society provided a revised ROE for Mr. Sodhi in September 2013 stating he worked 5 hours on Sunday and 1.5 hours all other days. The ROE was signed by the Society's bookkeeper.
24. It suffices to say the information and evidence from the respective parties conflicted in many areas.
25. In the face of this conflicting evidence, the Director made findings of fact relating to the claim.
26. First, the Director was required to decide whether there was a written contract of employment. The Director found there was no written contract. In doing so, the Director did not accept that the June 12, 2009, document was created to govern the employment relationship between the Society and Mr. Sodhi. The Director did not find Varinder Gill's evidence concerning the document to be credible.
27. The Director was persuaded by the evidence provided by the Society that Mr. Sodhi had been offered a salary of \$1,000.00 a month, less statutory deductions, and had worked his entire tenure as Granthi – two and one-half years – for that amount. On that evidence, the Director concluded that was the salary associated with the position for which Mr. Sodhi was employed.
28. Second, and notwithstanding the answer to the above finding, the Director was required to decide whether there were any outstanding wages owed to Mr. Sodhi.

29. The Director noted, applying section 80 of the *Act*, the recovery period encompassed wages earned or payable from July 16, 2012 to January 15, 2013. The Director accepted the spreadsheet submitted by the Society accurately reflected the days Mr. Sodhi actually worked.
30. However, the Director found the Society's record of the hours worked by Mr. Sodhi to be "problematic". The Director found the spreadsheet did not record hours of work. Otherwise, the Society had presented "inconsistent" positions with regard to Mr. Sodhi's hours of work.: the 2008 letter to Immigration Canada noted he would work 28 to 42 hours a week; the first ROE, issued January 17, 2013, indicated he worked 30 hours a week; and the revised ROE, issued September 18, 2013, recorded he normally worked 14 hours a week, which is also what the spreadsheet indicated. It is noted in the Determination that the Society kept no accurate record of hours worked and the estimates provided were based on sporadic observations and their "understanding" of how long the tasks of the position should have taken.
31. The Director was persuaded by the fact that Mr. Sodhi was the only individual with firsthand knowledge of his hours of work, had provided a detailed account of his daily tasks and the time required to perform them; the Society's inconsistent position also factored into the Director's decision.
32. The Director found, on the evidence, that the Society had failed to pay minimum wage, had not paid wages at least semi-monthly, had not provided wage statements to Mr. Sodhi, had not provided Mr. Sodhi with at least 32 hours free from work each week, had not paid overtime for hours worked in excess of 8 in a day, did not pay Mr. Sodhi statutory holiday pay for six holidays that occurred during the recovery period and did not pay annual vacation pay. In making this last finding, the Director concluded the Society could not use the 21 days of paid sick leave provided to Mr. Sodhi between January 30 and February 19, 2012, to reduce his annual vacation entitlement and that section 59 of the *Act* disallows an employer from offsetting previously granted vacation in excess of the minimum standard against future vacation entitlement, absent a written request from the employee.
33. The Director found the Society had, through the letters of December 2, 2012, significantly and unilaterally altered Mr. Sodhi's terms of employment and, applying section 66 of the *Act*, decided his employment had been terminated, giving rise to entitlement to length of service compensation.

ARGUMENT

34. Counsel for the Society alleges the Director failed to observe principles of natural justice in making the Determination through:
- a. failing to conduct an oral hearing into the matter by which the Society would be able to cross-examine Mr. Sodhi on his evidence;
 - b. failing to consider whether Mr. Sodhi had been entering fraudulent documents into the proceeding, and what effect that might have on the balance of his evidence; and
 - c. failing to consider, in relation to the entire complaint, the clear and cogent evidence that Mr. Sodhi and his witness have manufactured documents and provided false testimony.
35. Counsel for the Society also asserts, as an alternative, that the Director erred in law by acting on a view of the facts that could not be reasonably entertained when the Director chose to disregard evidence of fraud as it concerned a portion of Mr. Sodhi's complaint, and subsequently considered the balance of the complaint as though clear and cogent evidence of fraud did not exist.

36. While the argument of counsel for the Society is extensive and frames the grounds and reasons for appeal in slightly different terminology, the central point of his submissions is that the Director erred by accepting Mr. Sodhi's evidence on two matters: his hours of work and his eviction from the Temple residence. Counsel submits his evidence on both these matters ought to have been coloured by what he says was the presentation of fraudulent evidence on the matter of his salary. Counsel submits the Director, in refusing to accept the June 12, 2009, document as reflecting any agreement governing the employment relationship, raised a question of Mr. Sodhi's credibility generally. He says this circumstance ought to have required the Director to hold an oral hearing in respect of all matters of fact raised in the claim, although it is clear from the appeal submission the only findings of fact being attacked are those relating to Mr. Sodhi's weekly hours of work and the eviction from the Temple residence.
37. Although counsel for the Society does not allege Mr. Sodhi made fraudulent statements to the Director concerning his hours of work or his eviction, he submits that since Mr. Sodhi was "willing to enter fraudulent documents" to prove his rate of pay, "it is reasonable that his evidence concerning the balance of his claim including his hours of work was also suspect". He notes the Society disputed Mr. Sodhi's evidence in both areas.
38. Counsel submits it was a breach of principles of natural justice for the Director to have failed to consider whether Mr. Sodhi was entering false evidence and what effect, if any, that had on his other evidence. He argues the evidence of fraud was clear and cogent and the Director erred in giving weight to any of Mr. Sodhi's evidence without considering how such evidence "interplayed with the legitimacy of his claim concerning his rate of pay" and the evidence he submitted to support it.
39. In the same way, counsel says disregarding "evidence of fraud" as it applied to one aspect of Mr. Sodhi's complaint, when considering other aspects of it, was "acting on a view of the facts that could not be reasonably entertained" and amounted to an error of law.

ANALYSIS

40. When considering whether the appeal has any reasonable prospect of succeeding, the Tribunal looks at the relative merits of an appeal, examining the statutory grounds of appeal chosen and considering those against well established principles which operate in the context of appeals generally and, more particularly, to the specific matters raised in the appeal.
41. 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 being made.*
42. The Tribunal has established that an appeal under the *Act* is intended to be 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 of review identified in section 112. This burden requires the appellant to provide, demonstrate or establish a cogent evidentiary basis for the appeal.

43. 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.
44. This appeal is grounded in a claim that the Director failed to observe principles of natural justice, or in the alternative the Director erred in law, by not conducting an oral hearing. At the outset, I confirm the following principles from the Tribunal's decision *Director of Employment Standards and Leticia Macaranas Sarmiento*, BC EST # RD082/13: first, there is no absolute right to an oral hearing; second, the Director has the discretionary authority to decide how complaints should be processed and such authority may not be interfered with unless the process selected by the Director offends some legal principle; and, third, the circumstances where the Tribunal would be justified in interfering with this discretion would be exceptional.
45. I also adopt the comments from the Tribunal's decision *Dr. Rudy Wassenaar*, BC EST # RD65/02, that a finding of fraud requires showing a party involved in a process before the Director or the Tribunal made a representation knowing it was false, or was reckless with regard to the truth of the representation, with the intention the representation be acted upon.
46. The Director made no finding of fraud in respect of any of the evidence provided by Mr. Sodhi, notwithstanding the allegation was made against him by the Society. I do not equate the Director having "concerns" with the June 12, 2009, "contract" and with the credibility of Varinder Gill's evidence concerning that document with proof of fraud by Mr. Sodhi.
47. Notwithstanding, even if I accepted the argument that Mr. Sodhi's representations relating to the document were, at least, an attempt to perpetrate a fraud on the process, I am not aware of any principle – and none has been provided to me – that would require every other representation made by Mr. Sodhi, including representations supported by objective evidence, *cf.* the 02.12.2012 document, Notice to Vacate the residence, to be summarily rejected or to be subjected to cross-examination in an oral hearing. There is clearly no evidence and no basis for finding the evidence of hours of work and the eviction was fraudulent. The best that can be said of the challenged evidence, as counsel put it in the appeal submission, is it is reasonably suspect. That is insufficient to demonstrate fraud and equally insufficient as a basis for interfering with the discretionary authority of the Director to choose the complaint process.
48. The Director accepted the evidence of Mr. Sodhi being challenged in this appeal and provided reasons for doing so in the Determination. Those reasons are grounded in the evidence provided in the challenged areas and in the Director's perception of the validity of that evidence. The Society has not shown the Director's view of the challenged evidence was wrong. I would add that, in the case of evidence of hours of work, the Director was also guided by the inconsistent position of the Society which certainly gave the appearance of an attempt to create evidence designed to minimize Mr. Sodhi's hours of work without any objectively valid basis for doing so.
49. Simply put, this appeal is nothing more than an attempt to have the Tribunal approve an effort by the Society to challenge findings of fact without any legal basis for doing so. As indicated above, the Tribunal has no authority to consider appeals that do no more than challenge findings of fact.
50. The above comments apply to all of the chosen grounds and reasons for the appeal.

51. For these reasons, there is no possibility this appeal can succeed. The purposes and objects of the *Act* would not be served by requiring the other parties to respond to it.
52. I dismiss the appeal and confirm the Determination.
53. As a final matter, I will comment on the objection by counsel for the Society to the completeness of the section 112(5) “record”. For clarification, counsel objects to the absence of notes of interviews between the Director and the Society concerning allegations of fraud; notes of interviews between the Director and Mr. Sodhi in response to allegations that he had provided fraudulent documentation; and notes between the Director and Varinder Gill concerning his evidence, including his response to allegations that he admitted to creating fraudulent documentation relating to Mr. Sodhi’s conditions of employment.
54. The Director has responded to the objection, noting, in relation to the first two matters, that the Society and Mr. Sodhi were advised that their respective arguments and evidence was expected to be put in written form, written submissions were received from both parties and it was those submissions which were relied on. In relation to the third matter, Varinder Gill’s evidence was not accepted and, while he verbally denied falsifying, or admitting to falsifying, documents, that information was passed on to the Society and, in the final analysis, little turned on his evidence.
55. Counsel also asserts there were documents in the section 112(5) “record” that were not provided to the Society. The Director says many of the statements contained in those documents were largely irrelevant and what was not irrelevant supported the position of the Society and were acknowledged by Mr. Sodhi. The Society was aware of the content of the documents and no allegations are contained in the documents of which the Society was not aware.
56. While counsel has responded, asserting relevance to some of the undisclosed documents, there is nothing in his submissions identifying what documents might have been relevant to any issue raised in the appeal and how the failure to receive those documents affected the ability of the Society to know and respond to the claims made by Mr. Sodhi.
57. The above answers the submission relating to certain documents in the section 112(5) “record” not being provided. In respect of the demand for the Director’s notes, I adopt the position expressed by the Tribunal in *United Specialty Products Ltd.*, BC EST # D057/12, in which the Tribunal stated, in reference to notes taken at a complaint hearing, that such notes are not customarily ordered to be produced. The rationale for such position is expressed in that decision at para. 18 of the decision, with the Tribunal noting that ordering production of the Director’s notes would be “a rare and unique occasion”. Although this decision specifically addresses notes taken during a complaint hearing, I do not find notes taken during an investigation that has their purpose of providing the factual basis for adjudicating the complaint to be significantly different in nature to compel a lesser view of when they might be ordered to be produced, provided the relevant information contained in those notes, and an opportunity to respond, is provided.
58. I do not find anything in the circumstances of this matter would qualify as “a rare and unique occasion”. All of the information that might be found in the notes of the Director was committed to writing by each party. Notes relating to discussions with Varinder Gill are not relevant to this appeal.
59. The objection is not accepted. The notes need not have been provided.

ORDER

- ^{60.} Pursuant to section 115 of the *Act*, I order the Determination dated June 10, 2014, be confirmed in the amount of \$11,451.11, together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal