

An application for suspension

- by -

Satnam Education Society carrying on business as Khalsa School
("Khalsa")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

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

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2012A/97

DATE OF DECISION: October 5, 2012

DECISION

SUBMISSIONS

Jaspreet Malik	counsel for Satnam Education Society carrying on business as Khalsa School
Gagan Dhaliwal	on behalf of the Director of Employment Standards

OVERVIEW

1. On October 11, 2011, Narinder Grewal filed a complaint with the Director of Employment Standards (the “Director”) alleging that the Satnam Education Society carrying on business as Khalsa School (“Khalsa School”) had contravened the *Employment Standards Act* (the “*Act*”) in failing to pay him overtime, statutory holiday and vacation pay as well as compensation for length of service. Mr. Grewal also alleged that Khalsa School had made unauthorized deductions from his wages. On July 25, 2012, the Director issued a Determination ordering Khalsa School to pay Mr. Grewal a total of \$12,809.98, representing annual vacation pay, statutory holiday pay, compensation for length of service and accrued interest. The Director also imposed three administrative penalties in the total amount of \$1,500.00 for contraventions of sections 46, 58 and 63 of the *Act* for a total amount payable of \$14,309.98.
2. Khalsa School appealed the Determination on September 4, 2012, alleging that the Director had erred in law. Khalsa also sought a suspension of the Determination pursuant to Section 113 of the *Act* pending the outcome of its appeal.
3. This decision addresses only the suspension request.

FACTS AND ARGUMENT

4. The facts relevant to the issues on appeal are as follows. Mr. Grewal, who was employed as a teacher by Khalsa School, alleged that he worked overtime hours for which he was not compensated and that he was not paid the statutory holiday pay to which he was entitled. Khalsa School took the position that Mr. Grewal was exempt from the overtime provisions of the *Act* because he was a teacher. Khalsa School also contended that Mr. Grewal was not entitled to statutory holiday pay on the grounds that he was a manager, as defined under the *Act*.
5. Mr. Grewal also alleged that his employment was terminated without cause. Khalsa School contended that Mr. Grewal quit and did not intend to return to work.
6. The Director determined that Mr. Grewal was entitled to statutory holiday pay, concluding that he was not a manager. The Director also concluded Khalsa School had failed to discharge the burden of demonstrating that Mr. Grewal had quit his employment and determined that he was entitled to compensation for length of service.
7. Khalsa School argues that the Director erred in law in concluding a) that Mr. Grewal was not a manager and b) that Mr. Grewal’s actions did not constitute a single act of misconduct entitling Khalsa School to terminate his employment without paying compensation for length of service.

8. Khalsa School deposited the total amount required to be paid under the Determination with the appeal.
9. Counsel for Khalsa School says that payment of the Determination to the employee before the appeal is decided will be “detrimental” to Khalsa School because a successful appeal will require it to try to recover the “unearned” amount from Mr. Grewal.
10. The Director did not oppose the suspension request.

ANALYSIS

11. Section 113 of the *Act* provides as follows:
 - (1) A person who appeals a determination may request the Tribunal to suspend the effect of the determination.
 - (2) The tribunal may suspend the determination for the period and subject to the conditions it thinks appropriate, but only if the person who requests the suspension deposits with the director either
 - a) the total amount, if any, required to be paid under the determination or,
 - b) a smaller amount that the tribunal considers adequate in the circumstances of the appeal.
12. The Tribunal will not suspend the effect of a Determination in circumstances where the grounds of appeal are frivolous or have no apparent merit; however it may suspend where the appeal may have some merit. (*Tricom Services Inc.*, BC EST # D420/97; *TNL Paving Ltd.*, BC EST # D397/99)
13. While it is not the function of the Tribunal Member to conduct an extensive analysis of the merits of an appeal on a suspension application, I am persuaded that the appeal has some merit. Without expressing an opinion on those merits, the appeal raises issues of law involving a review of the facts and the delegate’s analysis of those facts in light of several sections of the *Act* as well as the law surrounding the issues of quitting and employee misconduct justifying termination, all of which will require consideration by the Tribunal.
14. As Mr. Grewal did not respond to Khalsa School’s submissions, I infer that the only prejudice he may suffer if Khalsa School is unsuccessful on appeal would be a short delay in receiving funds that have been determined owing. I am persuaded that there will be some prejudice to Khalsa School if the funds are paid out before the appeal is decided.
15. Having received no submissions opposing the application and after a consideration of all of the other factors, I find no reason not to grant the application to suspend the effect of the Determination.

ORDER

16. Pursuant to section 113 of the *Act*, I allow the application to suspend the effect of the Determination pending the outcome of the appeal.

Carol L. Roberts
Member
Employment Standards Tribunal