

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act

-by-

The Khalsa Diwan Society
("The Society")

and

Gian Singh Kotli
("Kotli")

-of a Determination issued by-

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: File No. 96/122

DATE OF HEARING: May 17, 1996

DATE OF DECISION: May 30, 1996

DECISION

APPEARANCES

Harinder Singh Sohi for The Khalsa Diwan Society

Gian Singh Kotli on his own behalf

David Ages for the Director of Employment Standards

OVERVIEW

This is an appeal brought by both The Khalsa Diwan Society (“the Society”) and Gian Singh Kotli (“Kotli”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from Determination No. CDET 000867 issued by the Director of Employment Standards (the “Director”) on January 23, 1996. The Director determined that the Society had wrongfully dismissed Kotli and that the Society owed Kotli the sum of \$3,532.29 representing unpaid vacation pay, severance pay and interest. This Determination was subsequently varied by the Director on February 14, 1996 pursuant to section 86 of the *Act*. The varied Determination is in the amount of \$2,279.08.

Mr. Ages, on behalf of the Director, took the position that the original January 23, 1996 Determination was the correct one and that the “calculation errors” purportedly made in that Determination were, in fact, not errors. Mr. Ages’ position on this latter issue was set out in fuller detail in an undated memorandum addressed to the Tribunal’s Registrar and filed with the Tribunal, but apparently not forwarded to the parties named in both the original Determination and the February 14, 1996 “variance letter”.

At the outset of the appeal hearing in this matter, I heard submissions from Mr. Ages and from both appellants and ruled that the Determination properly before me was the varied Determination in the lesser sum of \$2,279.08. In my view, Mr. Ages’ undated memorandum filed with the Tribunal is not sufficient to constitute a further variance of the Determination as varied pursuant to the Director’s delegate’s letter of February 14, 1996 (this letter was under the signature of Ms. Sharon A. Charbonneau, Industrial Relations Officer). If the Director wishes to vary a Determination under section 86 of the *Act*, I am of the view that, as a minimum, the Director should issue a letter, such as the February 14, 1996 letter issued in this case, to the parties setting out the Reasons for the variance and calculating the revised amount owing. Mr. Ages’ undated memorandum to the

Tribunal reflects his opinion that the original Determination did not contain any “calulation errors”, however, in my view, it does not constitute a further variance of the February 14, 1996 Determination. However, in light of the fact that both parties named in the Determination have filed appeals with the Tribunal, this issue is of rather limited significance in this particular case.

As I noted above, both parties have filed appeals, however, Kotli’s appeal was filed outside the statutory time limit set out in section 112 of the *Act*. When Mr. Kotli received the Director’s Revised Determination set out in Ms. Charbonneau’s February 14, 1996 letter, he immediately wrote to the Employment Standards Branch expressing his disagreement with the revised figure. Kotli testified that he never received a reply to his letter dated February 21, 1996 addressed to the Employment Standards Branch. Kotli testified that he thought that when he wrote his letter to the Employment Standards Branch, especially when he did not receive any reply, that he had taken all the necessary steps required to challenge the revised Determination.

Kotli has consistently maintained, from the point of his discharge to date, that he was wrongfully discharged and that the Society owes him certain monies. Kotli’s position has been communicated in writing to both the Society and to the Employment Standards Branch on more than one occasion, the most recent being his letter of February 21, 1996 in response to the issuance of a revised Determination. Accordingly, pursuant to section 109(1)(b) of the *Act* I granted Kotli an extension to file an Appeal to May 18, 1996 and proceeded with the hearing on the assumption that Kotli would file an appeal in compliance with my time extension order. In fact, Kotli has now filed an appeal; he did so on May 17, 1996 at 11:41 A.M. immediately after the appeal hearing concluded.

FACTS

Kotli was hired by the Society as a “temporary” priest in September 1990. Kotli was subsequently offered and accepted a full-time permanent position commencing January 1, 1991; he was paid a monthly salary of \$800 plus free room and board. Kotli’s monthly stipend increased during his years of service with the Society. Kotli’s employment terminated on June 18, 1995 at which time he was receiving \$1,150 per month plus free room and board.

The Society maintains that it had just cause to terminate Kotli. Mr. Harinder Singh Sohi, the Senior Assistant Treasurer and a member of the Board of Directors of the Society, appeared as the sole witness on behalf of the Society and acknowledged that the Society owed Kotli the sum of \$788. Kotli, for his part, maintains that he was dismissed without just cause or notice and that, accordingly, he is entitled to termination pay pursuant to section 63 of the *Act*. Further, Kotli alleges that his employment contract with the Society called for a monthly stipend of \$1200 which has never been fully paid, and that he is also entitled to accrued vacation pay.

ISSUES TO BE DECIDED

There are two issues before me:

1. Did the Society have just cause to terminate Kotli?; and
2. What were the terms and conditions of Kotli's employment contract, particularly with respect to the monthly stipend?

I might parenthetically add that the parties are in agreement that the value of Kotli's room and board should be fixed at \$325 per month throughout the entire duration of Kotli's employment. This latter figure was utilized by the Director in calculating the amount set out in the Determination.

ANALYSIS

Did the Society have just cause to terminate Kotli?

Kotli was advised of his termination by way of a letter dated June 18, 1995 under the signature of Hardial Singh Johal, President. The letter does not specifically state that the Society is terminating Kotli for cause although perhaps such an allegation can be inferred from the text:

“Please take this notice that Khalsa Diwan Society no longer needs your services. I thank you for your services in the past and I regret to make this decision. But under the circumstances I have no other choice.”

Previously, by way of letters dated January 26 and April 19, 1995, Kotli had been warned about his job performance and told that his continued employment was at risk.

It is common ground that Kotli has not received termination pay or notice in lieu thereof as directed by section 63 of the *Act*. However, termination pay or notice in lieu thereof is not required if the employer has “just cause” to terminate the employee [section 63(3)(c)]. If Kotli was not terminated for cause, he is entitled to termination pay in the amount of four weeks' wages [section 63(2)(b)].

In a letter dated December 12, 1995, the Society responded to Kotli's complaint filed with the Employment Standards Branch stating that “Mr. Kotli was fired for not doing his job, refusing to take instruction, the society owe no severance pay to him”.

However, the Society led absolutely no evidence before me to substantiate its claim that it had just cause to terminate Kotli. Indeed, based on its position that it owed Kotli the sum of \$788 (which includes an amount on account of termination pay), as submitted by Mr. Sohi at the outset of the appeal hearing, it would appear that the Society abandoned its former position with respect to the issue of just cause. In any event, an allegation of just cause requires the employer to prove, on a balance of probabilities, that the employee has so fundamentally breached his or her employment contract that the employer is entitled to unilaterally terminate the employment relationship. There is simply no evidence before me upon which I could conclude that such a breach occurred. Accordingly, I am satisfied that Kotli is entitled to four weeks' termination pay pursuant to section 63 of the *Act*.

What were the terms and conditions of Kotli's employment contract?

The bulk of the monies owed under the Determination represents unpaid vacation pay. Vacation pay is calculated as a percentage of an employee's total wages for the year in which the vacation leave entitlement is earned (section 58). As Kotli's total period of employment with the Society was less than five years, he would have been entitled to vacation pay calculated at 4% of wages. The key question, however, is what were Kotli's wages during his period of employment?

The unpaid vacation pay set out in the schedule to the Determination is based on the actual wages that were earned (plus the imputed value of \$325 per month for room and board) by Kotli during his tenure with the Society. These monthly stipend amounts range from \$900 to \$1,150 during the period of Kotli's employment with the Society. The Society's position is that these various monthly amounts reflect what was agreed between the Society and Kotli. Kotli, on the other hand, maintains that when he was offered full-time permanent employment he was told that his monthly stipend would be \$1,200, although he never received the full amount of that stipend during his tenure with the Society.

Ordinarily such a conflict in the evidence would raise a credibility problem--whom to believe and why? However, in this case, the Society's own document corroborates Kotli's position. By way of a letter dated November 1, 1991 (Exhibit 2), under the signature of the then president of the Society, a Mr. Kundan Singh Sajjan, the Society represented to the Canadian Consulate General in Seattle, Washington (written in support of Kotli's application for permanent residence status Canada) that:

“[the Society] at its meeting held on July 1st 1991 has resolved unanimously to offer Mr. Gian Singh Kotli the permanent position as priest with the Sikh Temple...Mr. Kotli will be provided with free room and board and will be paid the sum of \$1,200 per month. The usual medical benefits will be available to him. This position is of a permanent and continuing nature...”

Thus, at least as and from July 1st, 1991, Kotli was to be paid, according to the Society, a monthly stipend of \$1,200 plus room and board and medical benefits. Accordingly, Kotli has a contractual claim against the Society for unpaid wages to the extent that the Society paid him some lesser amount, particularly in light of the definition of “wages” contained in section 1 of the *Act*:

“wages” includes

(a) salaries, commissions or money, paid or payable by an employer to an employee for work,...

If, as appears to be the case, the Society had no intention of paying Kotli a monthly stipend of \$1,200 then, in my view, the Society is in breach of section 8 of the *Act* which provides as follows:

8. An employer must not induce, influence or persuade a person to become an employee, or to work or to be available for work, by misrepresenting

- (a) the availability of a position,
- (b) the type of work,
- (c) the wages, or
- (d) the conditions of employment.

Regardless of whether Kotli’s claim is based in contract, for unpaid wages, or under section 8 for misrepresentation (a type of “statutory tort” claim), the same result follows, namely, that Kotli is entitled to be compensated for the shortfall between what he contracted for (or what was represented he would be paid), namely, \$1,200 per month, and what he was in fact paid.

What is Kotli entitled to receive under the Act?

According to section 80 of the *Act*, an employee may claim wages (which, by definition, includes unpaid wages, vacation and termination pay) beginning twenty-four months from the earlier of the date of the complaint or the termination of employment. Kotli’s complaint was filed on July 6, 1995 with respect to a termination that occurred on June 18, 1995. Thus, Kotli’s claim can be calculated as and from June 19, 1993.

The Society’s payroll records are incomplete and, in some cases, nonexistent. The best evidence as to Kotli’s annual compensation is contained in the T-4 (and T-4A) statements issued by the Society. The Society issued Kotli T-4/4A statements for 1993 and 1993, but for some unknown reason, not for 1995. Kotli’s earnings in 1993 and 1994, according to his T-4/4A statements, were as follows:

1993: \$11,040.00

1994: \$10,800.00

None of the T-4/4A statements indicate, as they should do, the value of the room and board provided to Kotli by the Society; nevertheless, the value of room and board should be added to the above figures. I accept the findings of the Industrial Relations officer (which is consistent with the evidence of both Kotli and Sohi) that Kotli was paid a monthly stipend of \$1,150.00 plus room and board during the period January 1 to June 18, 1995.

For 1993 and 1995, Kotli was entitled to receive an annual sum of \$14,400 plus room and board. In 1994, Kotli, by his own admission, took an unpaid leave during the entire month of November and thus his salary entitlement for that year was 13,200. Accordingly, Kotli's unpaid wage claim, for the period from June 19, 1993 to June 18, 1995 is as follows:

i) June 19 - December 31, 1993:	$203/365 \times (14400 - 11040)$	= \$1,868.71
ii) January 1 - December 31, 1994:	$13,200 - 10,800$	= \$2,400.00
iii) January 1 - June 18, 1995:	$5 \times (1200 - 1150) + (18/30 \times 50)$	= \$ 280.00

TOTAL UNPAID WAGE CLAIM: = \$4,548.71

In addition to the unpaid wage claim based on the monthly stipend, there is a further claim based on unpaid vacation pay. Section 58(1)(a) of the *Act* directs that vacation pay must be paid at a rate of "4% of the employee's total wages during the year of employment entitling the employee to the vacation pay". Kotli's vacation pay entitlement is as follows:

1993: 4% of 12 x (1200 + 325 room and board)	= \$732.00 (payable for 1992)
1994: 4% of 12 x (1200 + 325 room and board)	= \$732.00 (payable for 1993)
1995: 4% of 11 x (1200 + 325 room and board)	= \$671.00 (payable for 1994)
1995: 4% of (5 x 1525) + (18/30 x 1525)	= \$341.60 (payable for 1995)

Subtotal = \$2,476.60

Less value of vacation actually received as per the Determination = (\$1,213.85)

BALANCE DUE FOR VACATION PAY: = \$1,262.75

It should be noted that although the 1993 vacation pay entitlement was earned as at December 31, 1992, this vacation pay entitlement was payable as late as December 1993 [sections 57(2) and 58(2)], and is, therefore, well within the two-year limitation period set out in section 80 of the *Act*.

In addition to the foregoing amounts, as I have already noted earlier in these reasons, Kotli was dismissed without just cause and accordingly is entitled to termination pay under section 63 of the *Act* as follows:

TERMINATION PAY: $1.04 \times 4/52 \times 18,300$ per annum = \$1,464.00

The above calculation of Kotli's entitlement to termination pay is based on four weeks' wages. I have added a 4% allowance for vacation pay because, in my view, "wages" as defined in the *Act* includes statutory vacation pay which is "money...required to be paid by an employer to an employee under [the] *Act*". Further, vacation pay, under section 58, is calculated based on "total wages" and termination pay under section 63 is specifically defined to be a component of "wages" as that latter term is defined in section 1.

The total amount owing to Kotli, therefore, is \$7,275.46.

I should note that there is some dispute between the parties as to the actual amount of vacation time taken by Kotli. I have not been persuaded by either party that the Determination is in error on this particular point. In addition, the Society maintains that it should be given credit for a further \$1,000 payment made to Kotli by way of cheque number 6043 dated July 31, 1994 (Exhibit 1). I must assume that if this payment does represent wages, it is already accounted for in Kotli's two T-4A statements issued by the Society for the calendar year 1994. If this money was in fact advanced to Kotli as a loan (as was alleged by Sohi, although he admitted in cross-examination that he had no personal knowledge of any such transaction), I can only say that there is absolutely no evidence before me to support such an allegation--I might note that the line marked "For" in the bottom left hand corner of Exhibit 1 is blank.

The Society further maintains that it should be credited for certain items (a fax machine and a camera) that allegedly belong to the Society and are being wrongfully withheld by Kotli. I would only say that if Kotli is wrongfully withholding such items (and the evidence before me falls far short of satisfying me on this point) then the Society should pursue its remedies in another forum, perhaps under the Criminal Code or in Small Claims Court.

ORDER

Pursuant to section 115 of the *Act*, I order that Determination No. CDET 000867 be varied and that a new Determination be issued as against the Khalsa Diwan Society in the amount of \$7,275.46 together with interest to be calculated by the Director in accordance with section 88 of the *Act*. If there is a dispute regarding the interest calculation, the parties may make further written submissions to the Employment Standards Tribunal on that specific matter.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal