EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the *Employment Standards Act* R.S.B.C. 1996, C. 113

- by -

Golden Sikh Cultural Society
("the Society")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	David Stevenson
FILE NO.:	98/300
DATE OF HEARING:	August 5, 1998
DATE OF DECISION:	August 18, 1998

DECISION

APPEARANCES

for the Appellant:	Satman S. Aujla, Esq. Shiv Singh Jaswal
for the Individual:	Ellen Zimmerman Daljit Singh Kohaly

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by the Golden Sikh Cultural Society ("the Society") of a Determination which was issued on April 22, 1998 by a delegate of the Director of Employment Standards (the "Director"). The Director concluded the Society had contravened Sections 34(2)(a), 45(a), 58(1)(a) and 63(2)(b) of the *Act* in respect of the employment of Daljit Singh Kohaly ("Kohaly") and ordered the Society to pay an amount of $30.082.79.

The Society says the Director erred in concluding Kohaly was an employee of the Society and, even if he was an employee of the Society, he had accepted the terms and conditions of employment with the Society and such terms and conditions represented full and complete remuneration, including vacation pay, statutory holiday pay and all other wages. The Society also says, if Kohaly was an employee, the Director erred in concluding he was dismissed from his employment without cause or notice. Finally, the Society says, in any event, the hourly wage rate used by the Director was wrong.

ISSUES TO BE DECIDED

There are several issues in this appeal: first, whether the Society can raise any argument that Kohaly is not their employee as that issue was not raised during the investigation; second, in any event of the first issue, whether the Society has shown Kohaly was not an employee of the Society; third, if he was an employee of the Society, whether the claim of Kohaly to the minimum benefits provided by the *Act* can be affected by an agreement to accept less than the requirements of the *Act*; fourth, if he was an employee of the Society, whether the amounts paid to Kohaly were inclusive of vacation pay, statutory holiday pay and any other wages; fifth, if Kohaly was an employee of the Society, whether he gave the Society cause to dismiss him and whether he quit his employment; and sixth, if he was an employee of the Society, whether the Director erred in calculating his wage rate.

FACTS

Even though there are a large number of issues, there is not much dispute on the facts, except in respect of the issue of the dismissal of Kohaly.

The Society is provincially registered under the Society Act. It operates under a Constitution and By-Laws that allows the membership to authorize the Society to employ a Priest (Garanthi). Kohaly was employed as a Priest (Garanthi) in the Temple of the Society from December of 1993. He resided in the premises of the Society. In return for the services he provided to the members of the Society and to the members of the Sikh community coming to the Temple he was paid an amount of $500.00 a month and was given room and board, valued at $300.00 a month. Kohaly received a cheque each month from the Society, from which the Society had deducted the employee's portion of UIC and CPP contributions. He was given T-4 summaries by the Society showing earnings of $6000.00 a year. During the investigation, Mr. Satman S. Aujla, Counsel for the Society, filed correspondence to the Director, dated February 2, 1998, in response to the complaint. In the correspondence, Mr. Aujla says:

> This is to advise you that the above mentioned employee [Kohaly] was asked and given ample opportunity to rectify his breaches, but despite our best efforts, he failed to cooperate with the society.
>
> On the last occasion, Mr. Kohli [sic] was supposed to complete his vacation by July 31st, 1997, and attend the Temple in order to renegotiate the terms of his employment on August 1st, 1997. Without any reason or explanation, he failed to show up until August 16th, 1997.
>
> In any event, after he came to renegotiate the terms of his employment, he declined to accept the condition of employment and voluntarily on his own quit his job.

The "breaches" referred to above, in addition to the specific matter raised, relate to allegations that Kohaly violated fundamental tenets of a Priest by watching vulgar movies and cooking and eating meat in the Temple and subsequently refusing to cooperate with the Society to rectify what was perceived to be irreligious activity.

Kohaly says he was unavoidably delayed in India in July, 1997 and notified the Society of his delay. He also says that when he returned, the Society presented him conditions of employment that included a reduction in his pay and a requirement that he be rebaptized as a "true Sikh and follow all conditions of a Baptized Sikh". He refused to sign the employment agreement and he also refused to be rebaptized (although he testified he did undergo this ceremony the following November). The Society says his refusal to sign the revised conditions of employment constituted a quitting of his employment and further supports their argument that Kohaly was not entitled to length of service compensation.

The Society has appealed the conclusion of the Director concerning Kohaly's hours of work and hourly rate. The Society, in response to a Demand for Employer Records, submitted employee records for a period from June 1, 1995 to May 31, 1997 for Kohaly. The employer's records show that Kohaly worked between 50 and 64 hours, averaging 55.15 hours, a month over this period. In Kohaly's complaint, it says:

> His hours of work varied. He was paid $500 monthly salary plus room and board. He was expected to be available to his congregation on an on call basis 24 hours daily, seven days a week. He regularly conducted 2 hr. services - 1 in am, 2 in pm, 6 days a week - on Sunday he conducted an 8 hr. service.

The discrepancy in the two positions was canvassed in the hearing. I find, in the circumstances of this case, that the records of the employer do not accurately reflect the time worked by Kohaly during the claim period. The evidence supports a conclusion, and there was a general consensus among the witnesses that was not seriously challenged, that Kohaly worked an average of 1 to 1½ hours each morning and 1 to 2 hours each evening, 6 days a week, and 4 to 5 hours on Sunday for the Society. This conclusion gives rise to alternate considerations in respect of the complaint, which I will address later.

ANALYSIS

I will deal first with the position of the Society in this appeal that Kohaly was not an employee of the Society for the purposes of the *Act*. This issue was raised for the first time on appeal. There was no disagreement during the investigation that Kohaly was an employee under the *Act*. While the Tribunal is normally reluctant to consider an argument on appeal that has not been raised during the investigation, where the issue raised is one which is jurisdictional and goes to the question of whether the *Act* has application at all to the relationship, the Tribunal has relaxed its usual response. I will consider the issue of the employment status of Kohaly.

The onus is on the Society to show Kohaly was not an employee for the purposes of the *Act*. The Determination makes note that "[t]he employer confirms the Employer/Employee relationship". The argument of the Society has two aspects: first, that the *Act* does not apply to a person working in the capacity of a Priest; and, second, if it does, the *Act* should recognize the position of Priest is unique and that the requirements of that job do not fit neatly into the minimum employment requirements found in the *Act*.

The Society has not demonstrated there was any error in the conclusion of the Director that Kohaly was an employee of the Society. In fact, the evidence elicited during the hearing only served to confirm that conclusion. Regardless of the test which might be used, Kohaly is an employee under the *Act*. He was hired by the Society to perform the

functions required of a Priest, he was instructed by the Executive Committee of the Society about what his responsibilities would be, the Society set the terms and conditions of employment, the Society paid wages and made UIC and CPP contributions on those wages and on some occasions, he would be specifically instructed to perform a marriage ceremony or attend a funeral. In all, the evidence showed the Society had a significant degree of control over the work that was performed by Kohaly. The definition of employee under the *Act* is given a liberal interpretation by the Tribunal and the touchstone of the employer/employee relationship is control: see *On-Line Film Services Inc.*, BC EST #D319/97, and cases cited therein.

In response to the second part of the argument, I am unable to agree with Counsel for the Society that the application of the *Act* should be relaxed for this employment relationship. The Regulations to the *Act* contain a number of exclusions from application of the whole or particular parts of the *Act*. They do not contain any exclusion from its application relating to the employment of a Priest. I have no jurisdiction to add more exclusions to those already listed. That is a legislative function.

In conclusion, Kohaly is an employee for the purposes of the *Act* and his employment is not excluded from application of the minimum terms and conditions of employment set out in the *Act*.

Counsel for the Society argues, if I conclude (as I have) Kohaly is an employee of the Society, that effect should be given to the "agreement" between the Society and Kohaly regarding his terms and conditions of employment. Section 4 of the *Act* speaks directly to that argument..

It says:

> *4. The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.*

Simply put, Section 4 of the *Act* renders such agreements, to the extent they do not meet the minimum requirements of the *Act*, of no effect. In other words, the *Act* does not allow employers and employees to make any agreement relating to the employment of the employee that contravenes the *Act*. The Director was statutorily obligated to give effect to that provision in the investigation and Determination and could not allow the agreement between the Society and Kohaly, to the extent it contravened the *Act*, to have force and effect.

Counsel for the Society next argues that the Director erred by not accepting that vacation pay and statutory holiday pay was included in the amount paid to Kohaly each month. There is no disagreement that when Kohaly was hired he was told his monthly wage

included 4% holiday pay. That was confirmed in the evidence of the Society and is shown on the "Employee's Earnings" records provided to the Director by the Society. The same records also show Kohaly was credited with some statutory holiday pay, although it is not clear how it was calculated as Kohaly received the same $500.00 a month for those months which did not contain a statutory holiday as he did for those months that did contain a statutory holiday.

The Tribunal has considered the issue of whether vacation pay and statutory holiday pay can be included in an hourly or unit wage scheme. In *Frank Markin*, BC EST #D228/98, the Tribunal concluded:

> The *Act* does not allow the inclusion of vacation pay as part of an hourly or unit wage scheme. That conclusion has been reached by the Tribunal in several decisions: *Foresil Enterprises Ltd.*, BC EST #D201/96, *W. M. Schultz Trucking Ltd.*, BC EST #D127/97, *Kirkham Silviculture Ltd.*, BC EST #D263/97 and *Pro Fasteners Inc.*, BC EST #D556/97. The Tribunal has identified a number of factors which contribute to that conclusion, most significantly, a concern that allowing vacation pay to be included as part of an hourly or unit wage scheme has the potential to cause an employee's regular wages to be reduced as their vacation entitlement increases. In this case, the Director has accepted (and the evidence supports) that Markin had been employed by Advance for more than five years. As such, he would have become entitled to 6% vacation pay effective October or November, 1996 (the fifth anniversary date of his employment). There is, however, no indication that this increased statutory entitlement was implemented. His hourly wage rate stayed the same. In effect, his base hourly rate was reduced by the 2% increase in vacation pay entitlement mandated by the *Act*. That concern was also relied on by the Court in *Atlas Travel Service Ltd. -and- Director of Employment Standards*, unreported, Vancouver Registry No. A931266, October 7, 1994 (Braidwood) in dismissing an argument that a scheme in which holiday and vacation pay were included in the commission wage structure of the complaining employees did not contravene the *Act*:
>
> > By the contract the travel agents signed with Atlas Travel, after two years of employment, an employee would be entitled to three weeks of vacation. Assuming a base commission of 50 per cent, the *Employment Standards Act* provides for two per cent vacation pay per week. Therefore, with two weeks of vacation, the employee is receiving 46 per cent commission. With three weeks of vacation, that commission drops down to 44 per cent. That is an absurd result, for an employee's "total wages" ought

> not to decline with seniority in order to fund a statutory obligation which rests with the employer.
> (pages 5-6)

> Also, the Tribunal has stated that the *Act* requires vacation pay be calculated on the previous year's total wages, which includes vacation pay paid in the previous year; see *Laporte, Michael & Niemi, Douglas and Intercity Appraisals Ltd.*, BC EST #D151/97. The *Act* does not contemplate, or allow, vacation pay to be calculated solely on an employee's regular hourly wage.[1] By doing so, Advance has calculated vacation pay for its employees, including Markin, on an amount which is, after the first year of employment, *at least* 4% less than the amount required by the *Act* to be used for calculating vacation pay. It should also be apparent from this conclusion that Advance is still in contravention of its statutory obligation respecting payment of vacation pay. Compliance with the *Act* is not achieved simply by separating the hourly rate and 4% of that rate on the pay statements of employees. Further, payment of vacation pay on each scheduled pay day is not allowed by the *Act* unless the employer and the employee agree (assuming no trade union is involved).

It follows that the Director did not err in refusing to accept that vacation pay and statutory holiday had been included in amounts already paid to Kohaly.

On the issue of length of service compensation, I conclude the Society has not shown the conclusion of the Director to be wrong. The evidence did not show Kohaly quit his employment with the Society and I do not conclude, as a matter of law under the *Act*, that Kohaly's refusal to sign the revised terms and conditions of employment are indicative of an intention to quit his employment. Nor did the evidence show Kohaly gave the Society cause to terminate his employment.

On the final issue, I conclude the evidence does demonstrate an error by the Director in determining the Kohaly's regular wage for the purpose of the *Act*. The director concluded Kohaly worked a total of 952 hours from June 1, 1995 through May 31, 1997 and calculated his "regular wages" on that conclusion. There was some confusion on the part of the Society about how or why the Director arrived at an hourly rate for Kohaly. It was explained during the hearing that the *Act* provides a method for determining an hourly rate of wage regardless of how an employee is paid and that is found in the definition of "regular wages" in Section 1 of the *Act*. In this case, subsection (d) of the definition would be applied:

> ***"regular wages"*** *means*

[1] The caveat to this statement is if the regular hourly wage also represents "total wages" during the first year of employment.

> *(d) if an employee is paid a monthly wage, the monthly wage multiplied by 12 and divided by the product of 52 times the lesser of the employee's normal or average weekly hours of work; . . .*

On the evidence, I find Kohaly worked an average of 19 hours a week, 6 days at 2.5 hours a day and one day at 4 hours a day. I see no difference here between the "normal" and "average" hours of work. The conclusion about the number of hours worked in a week is reached taking into account the evidence of the tasks he was required to perform each day and the opinion of a number of witnesses, including Kohaly, that these tasks would require from 2 to 3 hours to complete, except on Sunday, when 4 to 5 hours were required. This would mean that Kohaly worked 1976 hours during the period June 1, 1995 and May 31, 1997, rather than 952 hours, as determined by the Director.

In summary, the appeal of the Society is dismissed except as it relates to the calculation of Kohaly's "regular wages". This conclusion will result in an adjustment to what Kohaly's "regular wages" will be for the purpose of determining the compensation he is owed by reason of the contravention of the *Act* by the Society and the matter will be referred back to the Director for that purpose. Interest will be payable according to Section 88 of the *Act.*

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated April 22, 1998 be referred back to the Director.

David Stevenson
Adjudicator
Employment Standards Tribunal