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 -

The Khalsa Diwan Society of Victoria
(the Employer)

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	Hugh R. Jamieson
FILE No:	1999/613 & 1999/614
DATE OF HEARING:	November 26, 1999
DATE OF DECISION:	December 22, 1999

DECISION

OVERVIEW

This decision deals with two appeals filed by the Employer on October 14, 1999. The first appeal is brought against a Determination issued by the Director on September 22, 1999, imposing a penalty of $500.00 on the Employer for failing to produce payroll records. The second appeal is against a Determination issued on September 23, 1999, wherein it was found that the Employer owes $1,144.93 being compensation for length of service, vacation pay and interest accruing to Mr. Gurmel Singh (the Employee).

The bases for the appeals are the Employer's contention that the penalty of $500.00 is not justified in the circumstances and, that the Director erred in finding that compensation for length of service is owing as there was just cause to terminate the employment of the Employee.

It could also be mentioned here that at the hearing, the Director's representative challenged the admissibility of some of the evidence adduced by the Employer. The grounds for this objection is that the evidence is new and that it should have been presented to the Director's Delegate during the investigation stage of the process.

ISSUES TO BE DECIDED

The issues here are whether the penalty was properly imposed on the Employer. Also whether there was just cause for the Employer to dismiss the Employee without notice and, as mentioned above, the admissibility of some of the evidence presented by the Employer is also at issue.

APPEARANCES

Mr. Donald A. Farquhar, Q.C., for the Employer

Mr. Gurmel Singh, for himself

Ms. Karyn Luttmer and Mr. David Oliver, for the Director

FACTS

The Employer's Executive Committee is the governing body of the Sikh Temple located at 1210 Topaz Avenue, Victoria, B.C. The Employee was employed as a Priest at the Temple from November 1, 1993 to September 3, 1999, when he was discharged.

The contract of employment between the Employer and the Employee dated November 3, 1993, is for a period of six years, ending on December 31, 1999. There is a mutual termination clause in the contract subject to two months notice. However, paragraph number six (6) of the contract allows for termination of the emp loyment relationship without notice for just cause.

Paragraph four (4) of the contract sets the salary at $1,200.00 per month along with free accommodation in the Priest's suite at the Temple. However, it was revealed at the hearing that the salary stated is for the services of both the Employee and his brother Harbhajan Singh. Also, there had apparently been periodic raises granted during the first few years of the contract. This resulted in the salary being $1,550.00 per month at the time of the termination on September 3, 1999. Accordingly, the Employee's wages when he was dismissed was $775.00 per month.

This is confirmed in the complaint filed with the Ministry of Labour by the Employee dated November 12, 1999, where he indicates that his rate of pay was $775.00 per month. I note that it is also indicated in the complaint, where the Employee claims non payment of annual vacation pay and compensation for length of service, that the regular hours of work and the number of hours worked each week were twenty-four (24) hours per day for seven (7) days per week.

Beginning with the circumstances giving rise to the Determination dated September 22, 1999, imposing the $500.00 penalty on the Employer for failing to produce payroll records, these are set out at pages 1 & 2 of the Determination:

> " On April 30, 1999, Kary Luttmer ("Luttmer") issued a Demand for Employer Records pursuant to Section 85 (1)(f) of the *Employment Standards Act* (*"the Act"*) to The Khalsa Diwan Society of Victoria ("the Society"). Employer records were not provided by May 17, 1999. On May 18, 1999, the Society asked for an extension to the Demand for Employer Records from May 17, 1999 to June 8, 1999. Luttmer granted the extension. By June 11, 1999, the records were still not provided. On June 11, 1999, Luttmer served the Society with a **second** Demand for Employer Records pursuant to Section 85 (1) (f) of the *Act* to the Society. The records were required by June 28, 1999. On June 24, 1999, the Society submitted documentation pertaining to Singh's termination. Employer records were not provided by June 28, 1999. On June 30, 1999, Donald A. Farquhar ("Farquhar"), legal counsel being retained by the Society, requested an extension to the Demand for Employer Records from June 28, 1999 to July 23, 1999. On July 14, 1999, Farquhar put forward the Society's argument pertaining to Singh's claim for compensation for length of service. Employer records were not provided at that time nor any time thereafter. ....."

The facts relating to the issuance of the Determination dated September 23, 1999, and the finding that compensation for length of service is due to the Employee are more complex however, they can be summarized as follows.

There are basically two grounds upon which the Employer claims just cause for terminating the Employee's employment without notice or wages in lieu thereof. The first goes to the Employee's alleged improper conduct during the summer of 1998. This involved a high profile Temple issue flowing from an edict handed down by the Sikh hierarchy in India. This had the effect that tables and chairs were to be removed from the main assembly area in the Temple. The Employer says that the Employee improperly took sides in the debate over this issue and supported the removal of the tables and chairs. He also threatened to withdraw his services if this was not done.

The Employer claims that on June 2, 1998, the Employee was warned that if he did not perform his functions he would lose his job. The Employer further alleges that on July 27, 1998, the Employee did refuse to perform services as the tables and chairs had not been removed. Once again, he was warned that failure to conform would cost him his job.

The second ground for dismissal arises from what the Employer describes as the totally unacceptable conduct by the Employee in that he had an illicit sexual relationship with a woman who is a member of the Society. Furthermore, the Employer claims that the Employee had married this woman in India, notwithstanding that he was already married with a family.

In response to these claims by the Employer, the Employee conceded that there were some problems over the tables and chairs issue in the Temple, but denied that he had been warned that he would lose his job if he did not conform.

The Employee also denied the allegations concerning the sexual relationship and the marriage in India. According to the Employee, these are false trumped up accusations by the Employer in its attempts to remove him so that another Priest could be brought in from India. He claims that he had been asked to resign previously but had refused.

The Delegate, faced with those conflicting versions of the events, interviewed the woman allegedly involved and, based on her denial of a sexual relationship with the Employee, the Determination was issued finding that the Employer did not have just cause to dismiss the Employee.

THE APPEAL

In the appeal relating to the $500.00 penalty, Counsel for the Employer submits that following his involvement in the process, the only matter that was addressed in his dealings with the Delegate was the issue of the dismissal. At no time during the many exchanges between them was the question of payroll records brought up by the Delegate. Counsel says that he therefore understood that the provision of the records was no longer a necessity. In particular, the Employer points to the final letter he received from the Delegate dated September 1, 1999, where it is indicated that the Delegate was prepared to make her determination with the information gathered to date. The Employer suggests that if the records were still in demand, it should have been made clear at that stage of the process before any consideration was given to the imposition of a penalty.

In the appeal pertaining to the finding of liability for compensation for length of service, Counsel for the Employer submits that the Determination was made unfairly. This is based on the Delegate's acceptance of the denials by the Employee and the woman involved, without having at least interviewed the independent witnesses whose names and statements had been provided to the Delegate by the Employer.

The Employee did not respond to the appeals.

The Director did not respond to the appeal against the $500.00 penalty, but did file a reply dated November 9, 1999, to the appeal against the finding that there was no just cause for dismissal. In this reply, the Delegate makes brief reference to the conflicting stories facing her during the investigation, the denials of the alleged sexual relationship by the Employee and the woman in question, the Employer's failure to produce certain photographs pursuant to her request and, the conclusion she reached that the Employer had not met the burden of proof required by the legislation.

THE HEARING

At the hearing, the Employer presented evidence through Mr. Narinder Singh Bal, a Director, Mr. Sarabjit Singh Nagra, a Director and Ms. Jaswant Sandhu, a Member. The Employee testified on his own behalf. Throughout this process, I was assisted by Mr. Manjit S. Dhariwal who acted in the role of interpreter.

Starting with the evidence adduced on behalf of the Employer, Mr. Nagra testified that he was personally involved in the dispute over the chairs and tables in the Temple assembly area and knew first hand about the position taken by the Employee and his refusal to perform his duties. Mr. Nagra stated that it was he who gave the verbal warning to the Employee that failure to conform would result in his dismissal.

Mr. Nagra also testified about the rumors and gossip amongst the congregation about the Employee's affair with the woman. He said that there were many complaints about this conduct and that he raised the subject with the Employee who denied any involvement with the woman.

Mr. Nagra then explained how he had investigated these rumors and had even gone to the lengths of following the Employee when he was absent from the Temple in the evenings and at nights. According to Mr. Nagra, during many of these absences, he found the Employee's car parked on the street where this woman lived.

Mr. Nagra went on to describe how, on August 1, 1998, he had found the Employee and the woman naked in the temple grocery room engaged in sexual intercourse and how the Employee had pleaded for forgiveness.

Mr. Nagra testified that this incident was recorded by way of a warning letter to the Employee dated August 3, 1998. This letter reads as follows:

> " I have received lots of complaints regarding your behaviour in the temple, especially on the day I caught you having intercourse in the grocery room with the lady. The one that you were having an affair with and you denied to me that you were having an affair with her. I have also heard rumors in the community that you married this woman while you were in India. As I am aware you are a married person and your wife is Kuldip Kaur Multani. I would like to warn you at this time if I hear any further complaints about your behaviour in the temple and about these

> rumors your services will be terminated as stated under section six of your contract and there will be no more warnings. "

Mr. Nagra went on to explain how this whole affair became an awkward embarrassment when the Employee's family arrived from India. He spoke about being approached by the woman in question later in August when she told him personally that she had married the Employee in India. Mr. Nagra also said that she showed him pictures of her sitting on the Employee's knee.

Mr. Nagra then spoke about the continuing complaints from the community about the Employee's conduct, which ended with the Executive Committee's decision to terminate the Employee's employment on September 3, 1998.

During his testimony, Mr. Nagra produced a document which purported to be an affidavit from someone in India who had performed a marriage ceremony between the Employee and the woman in question on or about January 19, 1998. According to Mr. Nagra, he had hired a private detective agency in India that had located this person who had sworn the affidavit.

Ms. Sandhu's testimony was mainly about the general knowledge in the community about the Employee's affair and discomfort that it was causing. Ms Sandhu also gave evidence about the women in question telling her personally about being married to the Employee. She said at first she did not believe this but as the rumors increased, she began to think that it must be true.

For his part, Mr. Bal gave evidence principally about the events after the warning letter of August 3, 1998. According to Mr. Bal, the talk amongst the members and the complaints about the Employee's involvement with this woman reached a point where he was compelled to do something about it. He said that at a meeting sometime around the middle of August 1998, he addressed the congregation and asked any one who had proof of the illicit relationship to provide it. This resulted in two letters being received from members indicating that they had personally witnessed the Employee kissing the woman and having sex with her in the library in the Temple. Copies of these letters were apparently provided to the Delegate.

Mr. Bal also described the Executive Committee meeting on September 1, 1998, where the decision was taken to suspend the Employee and how the Executive Committee then decided to discharge the Employee for cause on September 3, 1998.

In response to all of this the Employee swore his innocence and claimed that he had never been given the warning letter of August 3, 1998, that was reproduced above. He also suggested that he was entitled to be present at the Executive Committee meeting where the decision was taken to dismiss him. However, he was not called. The Employee further claimed that when he was dismissed, he was not given reasons as to why and that he had tried on several occasions to have Mr. Nagra give him details but never received anything.

The Employee also denied that he had married the woman in question in India and described the aforementioned document produced by Mr. Nagra as bogus. According to the Employee, it is easy to obtain such documents in India.

The Employee went on to relate a lengthy story about his family arriving from India and how he was forced to move out of the Temple and rent a dwelling for his family. He also went on at length about a letter from immigration being withheld from him by the Employer and improperly opened. None of which is particularly relevant to the issues here.

In argument, Counsel for the Employer emphasized that in the East Indian culture, it is unacceptable for a Priest who is married to have a relationship with another woman. Moreover, a person in the Employee's position is expected to be highly scrupulous in the way that he conducts his personal life and is expected to set a high moral standard. According to the Employer, by his conduct, the Employee has ceased to be able to fulfill that role.

In closing, Counsel for the Employer submits that this case comes down to a question of credibility. He added that to believe the Employee's claims and his version of the facts, I would have to accept that all of the Employer's witnesses were lying and even worse, that they had concocted this whole story and had drawn up false documentation to support their cause. All of which in the Employer's view is simply preposterous.

Speaking for the Director, Mr. David Oliver took the position that much of the evidence and documentation presented at the hearing by the Employer was new evidence that was not presented to the Delegate during the investigation. Accordingly, much of it should be deemed to be inadmissible. In particular, Mr. Oliver pointed to the warning letter of August 3, 1998, and the documentation regarding the purported marriage between the Employee and the woman in India. According to Mr. Oliver, these could have and should have been provided during the investigation.

Another issue raised by Mr. Oliver, is the amount of compensation for length of service found due to the Employee. Apparently, the calculation in the determination was based on the figure of $1,200.00 per month that appears in the contract of employment. This was obviously an error in light of the revelations at the hearing about this amount being shared between the Employee and his brother and the periodic raises in the salary. Furthermore, Mr. Oliver points out that the evidence of the Employee is that under his contract of employment, he also received free food along with the free accommodation at the Temple. According to Mr. Oliver, this amounts to free board and room, the value of which should be ascertained and taken into account in the calculation of any wages found due.

ANALYSIS

The starting point for my analysis is to express my surprise that a relationship such as this between a Priest and a Governing Body of a Temple should fall within the ambit of the *Employment Standards Act (the Act)* and the *Employment Standards Regulation (the Regulation).* It strikes me as odd considering that professionals such as doctors, lawyers, architects, accountants, chiropractors, dentists, professional engineers, insurance agents, surveyors, optometrists, podiatrists, real estate agents are excluded from *the Act,* as well as many other occupations and classes of employees. Yet Priests are not specifically or implicitly excluded. At the very least, I would have thought that people in this vocation would have been excluded from the hours of work and overtime and statutory holiday pay requirements of *the Act.*

Having said all of that though, I look to the scope of *the Act* described in Section 3 and find that *the Act* applies to all employees other than those excluded by *the Regulation*. Nowhere in *the Regulation* do I see an exclusion relating to Priests.

The only other way possible to exclude Priests from the minimum standards of employment set by *the Act*, is if they were found to be independent contractors. No one has raised this issue in these proceedings and I am not about to venture into such an inquiry on my own volition. I therefore accept jurisdiction over these matters.

Dealing first with the issue raised on behalf of the Director regarding the admissibility of some of the evidence adduced by the Employer at the hearing, this of course arises from the Tribunal's well established policies that no one will be permitted to rely on evidence at an appeal that was available and could have been presented to the investigating officer, see - Tri-West Tractor Ltd., BC EST# D268/96; Kaiser Stables Ltd., BC EST# D58/97; Specialty Motor Cars (1970) Ltd., BC EST# D570/98; and, Falcon Overhead Doors Ltd., BC EST# D405/99. The rationale for the Tribunal taking this approach is of course to encourage employers in particular to cooperate fully with the investigating officers of the Ministry, which is absolutely necessary if the purposes of *the Act* are to be achieved.

However, as indicated in Specialty Motor Cars (1970) Ltd., supra., this policy of the Tribunal must be applied cautiously to ensure that the parties have their rights determined in an administratively fair manner. In that case, where a delegate declined to interview witnesses offered by an employer during an investigation, the Adjudicator found that the ability of these witnesses to testify later at an appeal hearing was not impeded by virtue of the aforesaid Tribunal policy.

Here, we are faced with a similar situation in that the Delegate was clearly aware, or certainly ought to have been aware of the Employer's position and the nature of the evidence that the Employer was relying on well before the Determination was issued. More importantly, the Delegate had ample opportunity to interview any number of people named by the Employer as witnesses to the events that were claimed to be just cause for dismissing the Employee.

In support of this, one need only look at the communication between Counsel for the Employer and the Delegate dated July 14, 1999, to see that the Employer's whole case is set out in that document. Reference is made to the tables and chairs issue, the sexual relationship that the Employee is alleged to have been involved in as well as the suspected marriage in India. All of this comes complete with the identity of the woman involved, the names of people who the Employer claims witnessed the alleged events and, a brief summary of what they would be expected to say.

Furthermore, this correspondence also indicates that a copy of the warning letter of August 3, 1998, which Mr. Oliver takes specific objection to, was attached. If by some chance, a copy of this letter was not attached as indicated, then it was entirely up to the Delegate to ask for it.

Moreover, in another letter from the Employer to the Delegate dated June 24, 1999, which was before Counsel entered the picture, Mr. Nagra invites the Delegate to conduct a hearing and offers to provide all of his witnesses.

It surely follows then that the decision by the Delegate not to interview witnesses offered by the Employer cannot cast their testimony at a later date into the category of new evidence of the kind normally rejected by the Tribunal. In the circumstances, I simply cannot see how any of the evidence adduced at the hearing by the Employer can be characterized as new evidence that was not brought to the Delegate's attention during the investigation. The objection by the Director in this regard is therefore rejected.

Before dealing with the merits of the Employer's allegation that the Delegate erred in finding that there was no just cause to discharge the Employee without notice, it should be made clear that the onus is on the Employer as the appellant to convince the Tribunal that the Determination issued on September 23, 1999, in this respect is wrong.

Also, looking at the Determination in question, I note that much emphasis is placed on the apparent lack of progressive discipline before the dismissal. This led the Delegate to find that the Employer had failed to substantiate that the Employee fully understood that failure to improve his job performance would result in the termination of his employment. With the utmost respect, I do not believe that job performance per se is the central issue here or, that progressive discipline was necessary in the given circumstances.

Granted, progressive discipline is indeed a normal prerequisite to dismissal, particularly where job performance is involved, but there are situations in given occupations where serious breaches of trust are accepted as just cause for immediate dismissal. Dishonest conduct by a banking employee or by armoured car guards immediately comes to mind as examples of industries where this waiver of the need for progressive discipline has been widely accepted - see Ivanore v. Canadian Imperial Bank of Commerce, (1983), 3 C.C.E.L. 26 (Dorsey). Re Roberts and Bank of Nova Scotia, (1979), 1 L.A.C. (3d) 259 (Adams); and Re Brink's Canada Limited and Independent Canadian Transit Union Local 1, unreported arbitration award dated December 17, 1997, (Jamieson).

In this regard, I must agree with Counsel for the Employer that this situation has to be viewed in a different light from the ordinary run of the mill dismissal case and that the Indo-Canadian culture has to be major consideration. I therefore accept that as a Priest in a Sikh community and, being the spiritual and moral leader of the congregation, the standards of behaviour expected of the Employee must necessarily be exceptionally high. Furthermore, the respect and trust that the Employee needs to command in the community also has to be beyond reproach.

As a result, I find that this situation falls into that category of employment where strict obedience to a high standard of honesty and integrity is absolutely necessary. Clearly, this is one of those vocations where any serious deviation from the required strict standards of behaviour can be grounds for instant dismissal.

Turning now to the alleged sexual relationship aspect of the just cause issue, I do not see how there can be any doubt that the Employee was indeed involved in a sexual relationship with the woman in question. The evidence supporting this claim by the Employer is overwhelming. The eye witness testimony of Mr. Nagra in particular, is simply too credible to discount.

There can also be little doubt that this conduct by the Employee and the woman was the subject of much gossip in the community. And that this, along with the rumors about their purported marriage were very disturbing to both the Employer and to the congregation, resulting in many complaints and demands for action being brought to the Employer's Directors.

As for this purported marriage between the Employee and the woman, the evidence here is not quite so strong and I am not prepared to put much weight on the affidavit evidence presented by the Employer in this regard. However, I do accept that this woman did tell Mr. Nagra and Ms. Sandhu that she had married the Employee and that in the circumstances, there was probable cause for the Employer to believe at the time of the dismissal that this may have been true.

The question then comes down to whether this behaviour by a Priest is sufficient cause to terminate an employment contract without notice. In this regard, it hardly needs to be said that in most occupations it is extremely doubtful if promiscuous conduct in an employee's personal life would be sufficient to establish just cause for instant dismissal from his or her employment. In today's society particularly, this type of behaviour by an employee would not normally affect an employee's ability to perform the duties and functions of his or her employment or diminish the trust necessary to found a continuing employment relationship. Nor would it necessarily have a detrimental effect on an Employer's business interests.

However, as indicated above, this is not an ordinary employment relationship and the Employee's behaviour clearly fell well below the extremely high standards expected. Moreover, there is more than just the illicit relationship to take into account, there is also the fact that this was occurring in the Temple. Furthermore, there were the denials by the Employee when approached by the Employer about the ongoing relationship with the woman in question. This lack of candor is also a grave concern which must be taken into account.

Taking all of the foregoing into consideration and particularly in light of the extremely high standards of trust and integrity required in this vocation, I am satisfied that the circumstances surrounding the Employee's involvement with this woman and his lack of candor in this respect are sufficient in themselves to found just cause for the immediate termination of his employment. Consequently, I must find that the Delegate did err in finding that such just cause did not exist.

Having so found, I need not dwell on the allegations involving the Employee's refusal to perform his duties and function in protest over the tables and chairs issue.

Dealing now with the appeal against the penalty Determination of September 22, 1999, I start from the premise that maintaining and the production of payroll records by employers are vital in the statutory scheme of *the Act* and more specifically to the Director's ability to fully investigate complaints. Like the desired full cooperation with the Ministry investigators mentioned earlier,

compliance with these requirements of *the Act* are also absolutely essential if the purposes of the legislation are to be attained.

To this end, the mandatory $500.00 penalty set by Section 28 (b) of the *Employment Standard Regulation (the Regulation),* for failure to keep proper payroll records or for failure to produce records when required to do so by the Director, is clearly designed to discourage recalcitrant employers from repeatedly ignoring attempts by the Director to inspect their records.

Of course, while the amount of the penalty, i.e., $500.00 is mandatory under *the Regulation*, the Director does have discretion under Section 98 of *the Act* whether to impose the penalty in the first place. Moreover, once a penalty determination is issued, the Director may reconsider the determination and vary or cancel it pursuant to Section 86 of *the Act.*

It is these reconsideration powers of the Director that I see as the being appropriate vehicle to deal with this appeal. Clearly, on the facts before me, the preconditions for the imposition of a penalty are in place. There was not only one demand for the production of payroll records served on the Employer, there were two demands, neither of which were complied with.

Also, this failure by the Employer to produce the payroll records has clearly had a detrimental effect on the investigation of the Employee's complaint, in that his claim for unpaid annual vacation pay is still not resolved (see page 4 of the Determination dated September 23, 1999).

Moreover, when on the face of any complaint, an employee indicates that he or she was working twenty-four (24) hours a day for seven (7) days per week and receiving only $775.00 per month, minimum wage alarm bells immediately start ringing. In these situations, regardless of whether this level of salary is complained about or not, the Director is obliged to determine whether there has been violation of the minimum standards set by *the Act.* The production of payroll records then becomes even more crucial to the investigation.

This is precisely the situation here and, but for the pleadings by Counsel for the Employer, I would have little hesitation in confirming the Determination. However, I do believe that the submission of Counsel is compelling. In the circumstances, it is not difficult to see how the investigation and the dealings between the Delegate and Counsel focussed essentially on the just cause issues, leaving the production of payroll records apparently unnecessary, at least in Counsel's mind.

All of which makes me hesitant to confirm the Determination as this would infer that Counsel for the Employer had somehow contributed to a violation of *the Act*, which is clearly not the case. On the other hand though, there is simply not enough before me to cancel the Determination.

Therefore, the best solution in my view, is to refer this matter back to the Director for reconsideration, thus providing a further opportunity for the payroll records to be produced which in turn will enable this whole matter to be brought to a conclusion. Whatever the outcome, the penalty Determination will still be there for the Director to do with as she deems appropriate at her discretion.

ORDER

Pursuant to Section 115 of *the Act*, the Determination dated September 22, 1999, imposing a penalty of $500.00 on the Employer for failure to produce payroll records is hereby referred back to the Director for reconsideration. The Determination dated September 23, 1999, finding that compensation for length of service is due to the Employee is hereby cancelled.

Hugh R. Jamieson
Adjudicator
Employment Standards Tribunal