

An Application for Reconsideration

- by -

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

- of a Decision issued by -

The Employment Standards Tribunal
(the “Tribunal”)

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Robert E. Groves

FILE No.: 2014A/150

DATE OF DECISION: March 26, 2015

DECISION

SUBMISSIONS

Andres Barker	counsel for Cariboo Gur Sikh Temple Society (1979)
Ash R. Aylifee	counsel for Daljit Singh Sodhi
Michael Thompson	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an application brought by the Cariboo Gur Sikh Temple Society (1979) (the “Society”). The application has been brought pursuant to section 116 of the *Employment Standards Act* (the “Act”).
2. The Society requests a reconsideration of a decision of a Member of the Tribunal (the “Member”) dated October 9, 2014, and numbered BC EST # D091/14 (the “Original Decision”).
3. The Original Decision resulted from an appeal by the Society of a determination (the “Determination”) issued by a delegate of the Director of Employment Standards (the “Delegate”) on June 10, 2014. The Delegate issued the Determination after conducting an investigation of a complaint against the Society filed by one of its former employees, Daljit Singh Sodhi (the “Complainant”).
4. The Delegate determined that the Society had contravened sections 18, 36, 40, 46, 58 and 63 of the *Act* in respect of the Complainant’s employment. The Determination ordered that the Society pay wages and accrued interest to the Complainant in the amount of \$7,451.11. It also ordered the Society to pay administrative penalties in the amount of \$4,000.00. The total found to be owed, therefore, was \$11,451.11.
5. The Original Decision confirmed the Determination.
6. I have before me the Determination, the Reasons for the Determination, the record supplied to the Member by the Delegate pursuant to subsection 112(5) of the *Act*, submissions delivered in the appeal proceedings, the Original Decision, the application for Reconsideration delivered by Society, as well as further submissions from the parties on this application
7. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 8 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings on applications for reconsideration. Having reviewed the materials before me, I find I can decide this application based on the written materials filed, without an oral or electronic hearing.

FACTS

8. I adopt the detailed recitation of the relevant facts provided by the Member in the Original Decision.
9. Briefly put, the Complainant was employed by the Society as its Granthi, or Priest, from January 30, 2009, until January 15, 2015. The parties subsequently disagreed as to the terms of the Complainant’s employment, and the amounts that he was to be paid. They also disagreed as to his hours he had spent at work.

10. The Delegate accepted the Society's submission concerning the Complainant's rate of pay. He also accepted the Society's position concerning the days on which the Complainant worked. However, the Delegate found that the Complainant had worked more hours than the Society had credited to him. This led the Delegate to conclude that the Society had failed to pay minimum wage, had not paid wages semi-monthly, had failed to provide wage statements to the Complainant, had not provided him with at least 32 hours free from work each week, had not paid overtime for hours worked in excess of eight in a day, had failed to pay the Complainant statutory holiday pay, and had neglected to pay him annual vacation pay. In addition, the Delegate found that the Society had terminated the Complainant's employment in contravention of section 66 of the *Act*, with the result that the Complainant was entitled to compensation for length of service.
11. The Society appealed the Determination on the grounds that the Delegate erred in law and failed to observe the principles of natural justice.
12. The crux of the Society's argument on appeal was that the Delegate acted unfairly when he neglected to consider whether the Complainant had tendered false evidence on the issue of the amount he was to be paid, and if so, the effect that should have on the Delegate's assessment of the Complainant's evidence concerning his hours of work, in particular. The Society asserted that in order to deal with the credibility issues raised in the proceedings the Delegate should have conducted an oral hearing.
13. Alternatively, the Society submitted that the Delegate's failure constituted an error of law, as the Delegate had acted on a view of the facts which could not be reasonably entertained.
14. The Member declined to accept the Society's submissions. He concluded that they did no more than ask the Tribunal to challenge the Delegate's findings of fact without any legal basis for doing so.
15. The Member noted that the Delegate made no finding the Complainant had committed a fraud. Rather, the evidence relating to the terms of the Complainant's employment contract that the Delegate found unreliable had come from a third party witness. But even if it could be said that the Complainant may have participated in the tender of false evidence on this issue, the Member stated that there was no rule of law which required the Delegate to reject all the other evidence offered by the Complainant, or to hold an oral hearing. Notwithstanding that the Complainant's other evidence might need to be viewed with caution for this reason, that was not the same thing as saying that it was fraudulent, or that the circumstances required the Member to interfere with the Delegate's discretion to decide whether to hold an oral hearing.
16. For these reasons, too, the Member decided that it had not been demonstrated the Delegate had acted on a view of the facts which could not reasonably be entertained. The Delegate had weighed the Complainant's evidence on the issue of his hours of work. The Member concluded that the Society had failed to show the Delegate's view of the Complainant's evidence on this point was wrong in law.
17. A further matter raised in the appeal related to the Society's contention that the Delegate failed to disclose in the record his notes of interviews with the parties and the Complainant's third party witness concerning the alleged fraudulent evidence, as well as other documents. In response to the Society's objection, the Delegate stated that the discussions were subsequently affirmed in written submissions which were shared with all parties, and in any event the substance of the parties' evidence was well known. As for the other documents, the Delegate said that many of them were irrelevant, and as for the others they supported the Society's position, they had been acknowledged by the Complainant, and there was nothing in the documents of which the Society was unaware.

18. On this issue, the Member determined that the Society had not shown how the failure to produce the notes, or the other documents, had prevented it from knowing the substance of the case being made against it, or deprived it of an opportunity to respond.
19. The Society's application for reconsideration raises the same issues it asked the Tribunal to consider on the appeal. It asserts that the Original Decision should be varied to cancel the Determination and remit the matter back to the Director for an oral hearing before a new delegate, on the grounds that:
- The Member did not find the Delegate failed to observe the principles of natural justice by not conducting an oral hearing or otherwise allowing the Complainant to be cross-examined;
 - The Member did not find the Delegate failed to observe the principles of natural justice, or alternatively committed an error in law, by disabusing himself or otherwise neglecting the clear and cogent evidence that a party was actively attempting to commit fraud within the proceedings; and
 - The Member did not consider that the Delegate's failure to disclose a complete record constituted a failure on the part of the Delegate to observe the principles of natural justice.

ISSUES

20. There are two issues which arise on an application for reconsideration of a decision of the Tribunal:
1. Does the request meet the threshold established by the Tribunal for reconsidering a decision?
 2. If so, should the decision be confirmed, cancelled, varied or referred back to the original panel, or another panel of the Tribunal?

ANALYSIS

21. The power of the Tribunal to reconsider one of its decisions arises pursuant to section 116, the relevant portion of which reads as follows:
- 116 (1) On application under subsection (2) or on its own motion, the tribunal may
- (a) reconsider any order or decision of the tribunal, and
 - (b) confirm, cancel or vary the order or decision or refer the matter back to the original panel or another panel.
22. The reconsideration power is discretionary, and must be exercised with restraint. Reconsideration is not an automatic right bestowed on a party who disagrees with an order or decision of the Tribunal in an appeal.
23. The attitude of the Tribunal towards applications under section 116 is derived in part from section 2 of the *Act*, which identifies as purposes of the legislation the promotion of fair treatment of employees and employers, and the provision of fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*. It is also derived from a desire to preserve the integrity of the appeal process described in section 112 of the *Act*.
24. With these principles in mind, the Tribunal has repeatedly asserted that an application for reconsideration will be unsuccessful absent exceptional circumstances, the existence of which must be clearly established by the party seeking to have the Tribunal's appeal decision overturned.

25. The Tribunal has adopted a two-stage analysis when considering applications for reconsideration. In the first stage, the Tribunal considers the applicant's submissions, the record that was before the Tribunal in the appeal proceedings, and the decision the applicant seeks to have reconsidered. The Tribunal then asks whether the matters raised in the application warrant a reconsideration of the decision at all. In order for the answer to be "yes" the applicant must raise questions of fact, law, principle or procedure flowing from the appeal decision which are so important that they warrant reconsideration.
26. In general, the Tribunal will be disinclined to reconsider if the primary focus of the application is to have the reconsideration panel re-weigh arguments that failed in the appeal. It has been said that reconsideration is not an opportunity to get a "second opinion" when a party simply does not agree with an original decision (see *Re Middleton*, BC EST # RD126/06).
27. If the applicant satisfies the requirements in the first stage, the Tribunal will go on to the second stage of the inquiry, which focuses on the merits of the Tribunal's decision in the appeal. When considering that decision at this second stage, the standard applied is one of correctness.
28. I have decided that the Original Decision should be reconsidered, as the Society's submissions raise important issues of law, principle and procedure. I have also decided, however, that the Original Decision should be confirmed.
29. In giving my reasons, I will address the grounds for reconsideration in the order the Society has presented them.

The Delegate did not conduct an oral hearing or otherwise allow the Complainant to be cross-examined.

30. The Society repeats its assertions made in the appeal proceedings that the Complainant participated in the tender of fraudulent evidence concerning his rate of pay, which should have led the Delegate to conduct an oral hearing so that the Complainant's evidence could be tested in relation to all of his claims. The Society submits that the failure to conduct an oral hearing constituted a failure to observe the principles of natural justice.
31. The Member noted, and the Society agrees, that the Tribunal has a very limited jurisdiction to interfere with a delegate's discretion in determining whether a hearing should be conducted (see *Sarmiento*, BC EST # RD082/13).
32. The pith of the Society's argument is that since the Complainant led fraudulent evidence, the Delegate had no choice but to conduct a hearing.
33. I disagree.
34. As the Member noted, the Delegate did not find as a fact that the Complainant had participated in tendering fraudulent evidence. Instead, the Delegate rejected the Complainant's position as to his rate of pay because the Delegate decided that the evidence of a third party witness, on whom the Complainant relied, lacked credibility.
35. The Society argues that the Delegate was wrong to characterize the evidence supporting the Complainant's position in this way. It says that the Delegate should have found as a fact that the Complainant had

committed a fraud. That may be what the Society wishes the Delegate had done, but it is not, in fact, what the Delegate did.

36. As the Member also noted, the Tribunal has no authority to consider appeals that do no more than challenge findings of fact. In order for a successful challenge to be made, an appellant must show that no reasonable person, acting judicially and properly instructed as to the relevant law, would have come to the same factual conclusions (see *Gemex Developments Corp. v. B.C. (Assessor)* (1998) 62 BCLR 3d 354; *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)* [2000] BCJ No.331).
37. In my view, the manner in which the Delegate characterized the facts was not perverse or inexplicable. It was sufficient for the Delegate's purposes in rejecting the Complainant's position regarding his rate of pay that the Delegate decided the evidence of the third party witness on whom the Complainant relied lacked credibility. There was no necessity for the Delegate to make a finding of fraud in order to reach the conclusion that the Complainant's submission on this issue should be rejected.
38. Like the Member, I am also not persuaded, and no authority was cited in support of the proposition, that a finding of unreliability on one aspect of a party's case inexorably leads to the conclusion that a hearing must be conducted in relation to every other aspect of the party's case.
39. As the Member stated in paragraph 47 of the Original Decision, on the issue of the Complainant's hours of work there was no direct evidence suggesting that the Complainant's evidence was tainted in any way. The Society disagreed with the Complainant's position, to be sure, and it tendered evidence to bolster its case, but in the end the Delegate found that the Complainant's evidence on this point was more reliable than the evidence tendered by the Society (see the Delegate's Reasons at R7, affirmed in the Original Decision at paragraph 48). It is no part of the Tribunal's task to re-weigh evidence that has been considered at first instance before a delegate.
40. In these circumstances, I find no basis for disturbing the Member's conclusion that the Society had failed to show a legal basis for interfering with the Delegate's decision not to conduct a hearing.

The Delegate improperly ignored evidence that the Complainant was attempting to commit fraud in the proceedings.

41. The Society argues that the Delegate failed to observe the principles of natural justice by not considering whether the Complainant was entering false evidence into the proceedings, and considering the effect that had on his other evidence.
42. Again, the basis for this submission rests, fatally, on the mistaken assumption that the Delegate made, in effect, a finding that the Complainant had participated in a fraud when tendering evidence relating to his rate of pay. As the Member pointed out, and I have repeated, the Delegate made no finding of fraud.
43. The Delegate did find that the evidence of the Complainant's third party witness relating to the Complainant's rate of pay lacked credibility. The Society's position is that the Delegate's rejection of the Complainant's evidence on this point should have informed the manner in which the Delegate scrutinized the Complainant's evidence relating to his hours of work and the circumstances under which his employment ended. It says, however, that it does not seem to have done so.
44. A reading of the Society's argument on this point suggests that it wishes me to conclude the Delegate ignored his finding of unreliability on the issue of the Complainant's rate of pay merely because the Delegate accepted

the Complainant's submissions regarding his hours of work and the termination of his employment. It submits, in effect, that had the Delegate scrutinized the Complainant's evidence on these other issues in light of the finding of unreliability concerning the evidence tendered relating to his rate of pay, the Delegate should also have rejected the Complainant's evidence regarding these other matters.

45. Again, I disagree.
46. There is no evidence that the Delegate disabused his mind of his own finding that the Complainant's evidence was unreliable concerning his rate of pay when he evaluated the evidence concerning these other matters. The Society's assertion that he did so is entirely speculative.
47. As the Member stated, again in paragraph 47 of the Original Decision, even if the Delegate had found that the Complainant's evidence relating to his rate of pay was fraudulent, no principle was referred to which would support a conclusion that any other representation made by the Complainant, including representations, as here, which were at times based on other objective evidence must, therefore, be summarily rejected.
48. As I indicated earlier, the Delegate weighed the parties' conflicting evidence regarding the Complainant's hours of work, and the events surrounding his termination. In the absence of compelling proof that the Delegate misconducted himself when he weighed that evidence, it is not for me to second guess his conclusions.

The Delegate did not disclose all relevant information prior to making the Determination.

49. In the appeal proceedings, the Society raised a concern that the record provided to the Tribunal was incomplete. It submitted that the Delegate had failed to provide notes of interviews with the Complainant and his third party witness relating to the impugned evidence concerning his rate of pay. It also alleged that there were other documents provided in the record that were not disclosed to the Society during the investigation.
50. The Delegate responded to these concerns by explaining that he did not rely on the verbal communications of the parties reflected in his notes. Instead, he relied on their written submissions. As for the evidence of the Complainant's third party witness, while this individual did not make a written submission, the Delegate shared the substance of his evidence with the Society. The Society made a submission in response and, in the result, the Delegate did not accept the third party's evidence relating to the Complainant's rate of pay. Regarding the other documents, the Delegate stated that he shared the relevant content with the Society, any prejudicial allegations in them were largely irrelevant to the Complainant's claims under the *Act*, the statements that were relevant largely supported the Society's position, and were acknowledged by the Complainant.
51. The Member declined to accede to the Society's objection to the contents of the record on the basis that the Society had failed to identify the documents which might have been relevant to the issues on the appeal and how the failure to receive those documents had affected the ability of the Society to know and respond to the claims made by the Complainant. The Member's comments reflect the position expressed by the Delegate in his explanation of the record, where he stated that natural justice does not require that a party be provided with every document submitted. Instead, he stated, it is sufficient under the *Act* that a party be provided with a reasonable opportunity to respond to any claims made. In essence, the Delegate stated that there were no allegations of any substance in documents received by him which were not shared with the Society.

52. On this application, the Society submits that the Member accepted there was a failure to observe the principles of natural justice when the Delegate failed to disclose all documents during his investigation, but that the breach was capable of being cured by the Tribunal on appeal. The Society says that this approach is contrary to the decision of the Court of Appeal in *Taiga Works Wilderness Equipment Ltd.* 2010 BCCA 97.
53. The Society is correct in stating that the *Taiga* decision stands for the principle that if relevant documents are not disclosed during an investigation in breach of the principles of natural justice, there are circumstances where the breach cannot be cured by the Tribunal on appeal. In those cases, the matter should be referred back to the Director to conduct a fair investigation. However, this is not one of those cases. In this case, the Member confirmed that the Delegate did not disclose certain notes and documents. That said, the Member decided that the non-disclosure did not constitute a failure to observe the principles of natural justice, for the reasons I have discussed earlier.
54. If there was no failure to observe the principles of natural justice, there was no breach that needed to be cured on the appeal.
55. The Society also argues that the Member erred in deciding that the notes and documents were irrelevant, or would have made no difference to the outcome, and so the Member acted so as to cure a failure of natural justice in the form of a failure to disclose. However, that is not what the Member said. The Member said that the Delegate had advised that some of the documents were irrelevant, and that the allegations in the ones that were relevant had been shared with the Society. In this case, I do not see that the Delegate's choosing not to produce irrelevant documents, or relevant documents the substance of which was communicated to the Society can amount to a failure of natural justice.
56. The Society implies that the mere failure to disclose a relevant document must constitute a failure of natural justice. That, however, is not what the *Act* requires in all cases. What section 77 requires is that a person who is the subject of a complaint has a reasonable opportunity to respond. Nowhere is it stated that in all cases all relevant documents must be disclosed.
57. There will, of course, be many cases where natural justice requires that a relevant document be disclosed. The Member decided that this was not one of them, insofar as the undisclosed documents were concerned. A reason given by the Member was that the Society had not identified in its submissions any undisclosed documents that might have been relevant to an issue in the appeal; nor had it established that the receipt of any such documents was essential in order for it to have a reasonable opportunity to respond to the complaint.
58. The same conclusions can be drawn regarding the Society's submissions on this application.
59. For these reasons, I see no basis for disturbing the Member's decision regarding the contents of the record.

ORDER

- ⁶⁰. Pursuant to section 116 of the *Act*, I order that the Original Decision, BC EST # D091/14, be confirmed.

Robert E. Groves
Member
Employment Standards Tribunal