

An Application for Reconsideration

- by -

Director of Employment Standards
(“Director”)

- 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

ADJUDICATOR: April D. Katz, Panel Chair
M. Gwendolynne Taylor
Kenneth Wm. Thornicroft

FILE No.: 2001/673

DATE OF DECISION: February 6, 2002

DECISION

SUBMISSIONS:

Graeme Moore	on behalf of the Director of Employment Standards
Praveen K. Vohora, C.A.	on behalf of the Skeena Valley Guru Nanak Brotherhood Society

OVERVIEW

Chronological Background

The issues before this Reconsideration Tribunal have been considered by the Director of Employment Standards ("Director") and her delegate and by the Tribunal as follows:

1. April 30, 1999 Determination by Director ("the original Determination");
2. November 23, 1999 Decision by Tribunal Adjudicator Lawson #D470/99 ("the first Lawson decision");
3. April 14, 2000 Further Decision by Tribunal Adjudicator Lawson #D151/00 ("the second Lawson decision");
4. November 6, 2000 Reconsideration decision by Tribunal Panel Orr, Falzon and Jeffries #RD361/00("the first Reconsideration decision")
5. March 22, 2001 Determination by Director ("the second Determination")
6. July 3, 2001 Decision by Tribunal Adjudicator Orr #D349/01 ("the Orr decision"; "the Orr Tribunal")

At this point it seems useful to set out what has happened to this point in time and what we understand the matter before the Reconsideration Panel to be. We begin by setting out the factual background and how and when the issues arose and when they were considered.

Facts leading to the Dispute

In June 1996 Swaran Singh (the "Giani") was brought to Canada for a 5-year term to act as Giani, or priest, for the Skeena Valley Guru Nanak Brotherhood Society ("Society"), the Sikh religious society in Terrace, British Columbia. On October 4, 1998, the Giani arranged a three-month leave of absence with the congregation and was delayed a month in returning due to personal circumstances. In late December 1998 the Giani wrote and asked the management committee of the Society to extend his leave for one month. The Society deemed the Giani's services at an end and sent him a letter to this effect in early January. The Giani believed his relationship was with the whole congregation, the Sangat, and could not be ended by the

executive committee. When the Giani arrived in Terrace in February 1999 to resume his role he was told his services were no longer required. He believed that only the Sangat could make the decision to end his services. The executive committee refused to take the matter to the Sangat. The Giani was surprised at how matters had proceeded. He challenged the decision and the failure to consult the members of the Society in this decision.

Complaint and Investigation Findings

On February 19, 1999 the Giani filed a complaint with the Employment Standards Branch. After an investigation a Determination was issued on April 30, 1999. The Society argued that the Giani was working every day but only 2 hours every day except Sunday when he worked for about 6 hours. After the minimum daily pay provisions were explained to the Society's representatives they argued that the Giani was a volunteer and not an employee. The Society took the position that the Giani was paid an honorarium of between \$650 and \$700 per month and provided with room and board. The Society took the position that the Giani had no required duties except on Sundays as a priest. The Giani's evidence was that he worked 8 hours every day but Sunday when he worked 12 hours.

The Director's delegate concluded that the Giani was an employee and that the Giani worked for 4 hours every day but Sunday when he worked 8 hours. The Director ordered the Society to pay the Giani \$10,840 in the Determination issued on April 30, 1999.

The Society argued that room and board should be calculated as part of wages and the delegate found that it was not part of the wages but a benefit of the position.

The parties agreed on the facts leading to the end of the relationship and the delegate found that the Society had just cause to end the relationship.

First Appeal

On May 19, 1999 the Society appealed the Determination and raised two issues.

1. The first issue was that the Giani was not a Permanent Resident of Canada and therefore not entitled to work. The Director's position was that this was not relevant to the employment standards issues.
2. The Society also argued that the value of room and board should be considered wages paid to the Giani. The Director argued that room and board was not within the definition of wages in the *Employment Standards Act* ("Act") because it was not 'money' paid to the employee. The Delegate distinguished the cases cited on the basis of the facts. Giani's room and board was 'free' and without value, while the parties in other cases had agreed on a monetary 'value' of room and board in terms of money.

In April 1999 Revenue Canada had ruled that for the purposes of Employment Insurance and Canada Pension the Giani was an employee of the Society. In September 1999 Revenue Canada determined that the Giani's employment was not insurable for Employment Insurance purposes because he was not employed under a contract of service and was therefore not an employee.

Lawson Tribunal

The Lawson Tribunal heard the Society's appeal on September 23, 1999. In the Lawson Tribunal decision dated November 23, 1999 the Tribunal found the appeal was based on three points;

1. whether the individual payments from members of the congregation under a tariff should be considered wages paid to the Giani,
2. whether room and board provided should be considered wages paid, and
3. whether the Giani was an employee or an independent contractor.

All the parties were present at the hearing.

The Society argued that the delegate had misunderstood the role of a Giani in the Sikh religion and the payment of honoraria. The Tribunal allowed the new evidence about the honoraria due to the unique role of a Sikh Giani. The Tribunal heard evidence that a total of 33 payments worth \$4,722 were paid to the Giani during his term of employment. These payments were based on a tariff of fees for service set by the Society. The Lawson Tribunal held these payments were 'offerings' and not wages.

The Lawson Tribunal held that the Giani was an employee.

The Lawson Tribunal held the room and board should be considered wages in the amount of \$650 per month and referred the calculation of the adjustment for wages back to the Director.

The Director notified the Tribunal of her intention to seek reconsideration of the Tribunal's Decision that 'free' room and board were 'wages' under the *Act*.

On December 22, 1999, the delegate submitted the adjusted figures showing that after deducting the value of room and board from the calculation of wages owed the Giani was entitled to \$4,820.37. The Society argued this had already been paid to the Giani through congregation members' payments, which the Tribunal had deemed to be offerings. The Society argued the hours performing work for congregants should be deducted from the hours attributed to hours worked for the Society if these services were not wages.

On April 14, 2000 the Lawson Tribunal considered the quantum assessment of the delegate and confirmed the delegate's quantum of wages owed plus interest in the second Lawson decision.

First Reconsideration

On April 19, 2000 the Director reaffirmed her intention to ask for a reconsideration of the issue of ‘free’ room and board as ‘wages’. On May 23, 2000 the Society asked for a reconsideration of the Tribunal’s decision on the issue of the status of the offerings. The Society argued that the tariff payments by congregants were not voluntary and should be considered wages. The Society pointed out that the payments were made to the Society and then paid to the Giani.

On November 6, 2000 a three person panel of the Tribunal (Adjudicators Orr, Falzon and Jeffries) issued a reconsideration decision. The decision dealt with both requests for reconsideration.

1. On the first issue of the definition of wages the Tribunal held that free room and board was not money paid in Canadian currency as required by section 20 of the *Act* and therefore could not be considered wages.
2. On the second issue of the payment of fees by members of the congregation for services performed by the Giani, the Tribunal noted that this was not addressed in the original Determination. This issue arose at the hearing before the Tribunal in April 2000. The Tribunal found there were several factual questions, which were unclear. For example, while the Society set a tariff for the services, if the member did not pay, would the Society make the payment to the Giani in any event? Was the Giani’s assistant, who collected the fees, an agent of the Giani or the Society in this role? The Tribunal had many more questions all of which were referred back to the Director for further investigation.

The Reconsideration decision cancelled the two previous Lawson decisions.

In its closing the Tribunal stated

“To avoid any misunderstanding by the parties the reinvestigation is just that – a fresh examination of the issue of additional payments based on the best evidence available after consultation with the parties and to arrive at a fresh Determination in accordance with the evidence and the law.”

The only outstanding matter was the status of the ‘offerings’ as the Director’s delegate had not considered that issue in the original Determination. The status of the ‘offerings’ was referred back to the Director with the direction that free room and board should not be included in the calculation of wages and that there be a full investigation of the status of the payments for services by members of the congregation to determine if they were wages.

The effect of the cancellation of the two previous Tribunal Decisions was to confirm the original Determination of April 30, 1999.

The Second Determination

The delegate issued a new Determination on March 22, 2001. The Determination addressed the following issues.

1. Whether the Giani was an employee
2. Hours of work
3. Rate of pay
4. Whether the 'offerings' paid to the Giani were wages.
5. Whether wages are owing
6. Whether the Giani is entitled to compensation for length of service.

The March 22, 2001 Determination repeated much of the language in the written findings and conclusions from the original Determination of April 30, 1999. The Determination restated that the Giani was an employee under the *Act*; that the Giani worked 4 hours per day except Sunday, when he worked 8 hours; that the Giani was paid \$650 per month plus \$25 yearly increments in monthly salary; and, that the Giani's employment was ended for just cause. This was confirmed by the previous Reconsideration Panel.

All of the conclusions and analyses from the original Determination and the second Determination were, therefore, available to the parties in a single document.

The only issue that the Tribunal had directed the Delegate to address was number 4, the question of whether the 'offerings' were wages.

On the new issue of the 'offerings' the delegate concluded

- (a) that the money paid by members of the congregation to the Society for services performed by the Giani were not payments from an employer to an employee and accordingly did not meet the statutory definition of wages; and
- (b) the members of the congregation did not fall within the definition of employer in the *Act* and did not pay wages;

In light of the above conclusions the Delegate found that the 'offerings' were not wages and that the Giani was owed \$10,686.86 in unpaid wages.

Second Appeal of Second Determination

On April 13, 2001 the Society appealed the Determination disputing the finding that the Giani was an employee, the hours of work on Sunday, the finding that wages did not include free room and board, and the finding that the offerings were not wages.

Orr Tribunal

On July 3, 2001 the Orr Tribunal issued a decision based on the written submissions of the parties. The Tribunal concluded that the relationship between a Giani and the Society was not an employer-employee relationship, which fell within the *Act*.

Reconsideration of the Orr Decision

The Director asked for a Reconsideration of the Orr Tribunal decision, which is the matter before us. This matter proceeded by way of written submission.

ISSUE

The issues raised by the Director regarding the July 3, 2001 Orr Tribunal decision are:

- (a) that the Tribunal's decision of July 3, 2001 raises a question of law, fact, principle or procedure which is so significant that it should be reviewed because of the importance to the parties and /or the implications for future cases;
- (b) that there has been a demonstrable breach of the principles of natural justice;
- (c) that the decision is inconsistent with another decision that is not distinguishable on the facts; and
- (d) that the decision is a serious mistake in applying the law.

ARGUMENT

The Director raised five arguments in support of this reconsideration.

1. 'Natural Justice'

The Director submits that when the Reconsideration Panel decision of November 13, 2000 referred the matter back to the Director the only issue for investigation was the status of the 'offerings' i.e. were the 'offerings' wages paid to the Giani.

At no time did the Orr Tribunal indicate to the Director that the issue of the employment relationship was before the Tribunal on this appeal. The Director argues that failing to invite the Director to make submissions on an issue that the Tribunal unexpectedly decides to consider is contrary to the rules of natural justice.

2. 'Faulty Factual Foundation Allegation'

The Director argues that the Orr Tribunal relied on untested facts in the decision. The Society's evidence was accepted by the Tribunal and stated as follows:

‘a Giani is an honorary position and in not one of master/servant. The relationship is one of volunteerism matched with respect and a mutual moral obligation to provide for the needs of the Giani. It is a symbiotic relationship. It would not be culturally acceptable to ask for payment for room and board form a Giani nor would it be culturally acceptable for the Giani to demand such room and board. It is an honour system rooted in culture and tradition. It is not intended to be enforceable at law. In my opinion it would be fundamentally wrong to impose a legal obligation upon a relationship where none was intended.’”

The Director argues this conclusion of fact is based on a faulty foundation. Had the Director been aware that this would be argued the Director would have lead evidence that the modern North American Giani is ‘not of the wandering holy messenger ilk as set out in D349/01’.

3. ‘Extraneous Comment Issue’

The Director objects to the Tribunal’s characterization of John the Baptist, Jesus of Nazareth, Lord Buddha, Mother Theresa as volunteers and indicates that they were not ‘volunteers’.

4. ‘Consistency in Decisions’

The Director argues that consistency in decision-making assists in resolving employment complaints the Director argues. The Director argues there are no factual differences between the Tribunal’s decisions in *Golden Sikh Cultural Society* BC EST 357/98, *Khalsa Diwan Society* BC EST D114/96 and *Khalsa Diwan Society of Victoria* BC EST E530/99 and the facts presented here. In particular the Director argues on the same facts the Lawson Tribunal decided the Giani was an employee.

5. ‘Serious Mistake of Law’

The Director argues that the intent of the parties is not a factor in determining whether the parties have entered into an employment relationship. To find that intent was a factor would go contrary to the established employment law, which turn on the conduct of the parties not their intention. To find that a Giani is exempt from coverage by the *Act* would require specific language, which is found in the Ontario equivalent to the B. C. *Act* exempting ‘political, religious or judicial office’. No similar exemptions exist in British Columbia.

The Society argued that the Orr Tribunal was correct in finding there was no employment relationship with the Giani and that this issue was constantly before the Director. The Society disputes the other grounds of the Director’s application for reconsideration indicating the powers of the Giani to summon the congregation is wrong in fact and experience with this

congregation. The facts are different from the other cases cited and that the Orr Tribunal understood the special relationship between the Giani and the Society.

ANALYSIS

Applications for reconsideration will proceed where an error of law or fact is alleged to ensure that the matter is properly dealt with to resolve a dispute. After a Tribunal has considered the matter a reconsideration of that decision will be on more limited grounds.

One of those grounds is where there was a misunderstandings or a failure to deal with a significant issue. We believe the Orr Tribunal erred in reopening the issue of the employment relationship, which was not in question after the Reconsideration Tribunal referred the single issue of the ‘offerings’ back to the Director. For the Orr Tribunal to reconsider the matter was contrary to the principle of *res judicata* because the issue had been determined by a tribunal of competent jurisdiction.

We also find that the appeal to the Orr Tribunal was on the issue of the status of the ‘offerings’ after the second Determination. We find that the Orr Tribunal did not address this issue.

We believe that the length of the proceedings in this matter contributed to some confusion on the part of the Society about the issues that were before the Orr Tribunal. The fact that the Order of the Reconsideration Tribunal #D361/00, in November 2000, referred to a ‘fresh Determination’ may have confused the parties involved in these proceedings. Although the March 22, 2001 Determination (the second Determination) may appear to have freshly decided a number of issues, in fact the only “fresh” Determination was on the status of the ‘offerings’. This was the only decision from which an appeal could be taken.

This claim has proceeded over a number of years and there are voluminous materials. We are uncertain if the Orr Tribunal had all the materials we have before us, but we know it took some time for us to have a comprehensive picture of all that had transpired prior to July 3, 2001.

The Determination dated March 22, 2001 addressed all the issues raised since the original complaint except the status of room and board.

The matters before the Tribunal on July 3, 2001 had proceeded by way of written submissions and oral clarification of any misunderstanding was not available to the Tribunal.

The Society raised a number of issues, which had been considered by the previous Tribunals and are repeated in this reconsideration.

We find that the matter of the Giani’s employment status had already been finally determined by the Tribunal and thus it was not proper for the Society to raise it before the Orr Tribunal. Accordingly and in light of the fact that the Giani was an employee of the Society at the material time the decision of the Orr Tribunal in this regard is set aside.

Offerings

The Reconsideration Tribunal concluded that it could not determine on the facts before them if the ‘offerings’ were wages and referred that single issue back to the Director for further investigation, which was done and included in the Determination dated March 22, 2001.

In as much as the Orr decision did not address whether the offerings were wages as defined in section 1 of the *Act* we propose to address that question. All of the relevant material to adjudicate this issue is before this reconsideration panel.

One of the purposes of the *Act* as stated in section 2 (d) is “to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act” and on reconsideration, the Tribunal has the statutory authority to vary the original decision (section 116). We consider it fair and efficient to vary the Orr decision to address the issue of the offerings.

The relevant definitions are in section 1 of the *Act* and state as follows.

"employer" includes a person

- (a) who has or had control or direction of an employee, or
- (b) who is or was responsible, directly or indirectly, for the employment of an employee;

"wages" includes

- (a) salaries, commissions or money, paid or payable **by an employer** to an employee for work,
- (b) money that is paid or payable **by an employer** as an incentive and relates to hours of work, production or efficiency,
- (c) money, including the amount of any liability under section 63, required to be paid **by an employer** to an employee under this Act,

but does not include

- (f) gratuities,
- (g) money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency,
- (h) allowances or expenses, and
- (i) penalties;

The Delegate determined that the members of the congregation who paid the Giani when he performed services for them were not ‘employers’ within the meaning of the *Act*. The Giani was employed by the Society not the members of the congregation individually. The Giani had a single employer, the Society, not a collective of individual employers.

The Society did set the tariff of fees for the services performed but the money paid to the Giani by members was not guaranteed by the Society if the member did not pay the sum. The arrangement for the services was between the member and the Giani and was not assigned by the

Society as an employer. The delegate found that the ‘offering’ could be compared to a gratuity for a service, where it would not be considered wages under the *Act*.

The Society’s appeal suggests that it wanted to be seen as a single entity in making the decision to end the Giani’s employment as an employer, but as multiple entities when considering who was paying the Giani’s wages. The finding of the delegate that the Society was the employer and not the members is consistent with the Society’s contention that the members had no say in the decision to end the Giani’s employment. The payment from the members was therefore not payment from the Giani’s employer. To be considered wages under the *Act* money must be paid by an employer. The offerings were not made by the employer and are therefore not within the definition of wages under the *Act*.

Based on this analysis we find that the offerings were not wages paid to the Giani. In the end result, the Determination is confirmed

CONCLUSION

Based on our finding that the issue of the employment relationship was not properly before the Tribunal., we cancel the Orr Decision dated July 3, 2001.

Based on our finding that the ‘offerings’ are not wages under the *Act* the Determination dated March 22, 2001 is confirmed.

ORDER

The Orr decision dated July 3, 2001 is varied as follows:

- 1) the finding that the Giani was not an employee is set aside; and
- 2) the Determination dated March 22, 2001 is confirmed.

April D. Katz
Adjudicator, Panel Chair
Employment Standards Tribunal

M. Gwendolynne Taylor
Adjudicator
Employment Standards Tribunal

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal