BC EST #D361/00
Reconsideration of BC EST #D470/99
and BC EST #D151/00

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an Application for Reconsideration pursuant to Section 116 of the

Employment Standards Act R.S.B.C. 1996, C.113

- by -

Skeena Valley Guru Nanak Brotherhood Society

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

PANEL: John M. Orr
Frank Falzon
Fern Jeffries

FILE NO.: 2000/376 and 2000/313

DATE OF DECISION: November 6, 2000

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DECISION

OVERVIEW

Before the Panel are two applications for reconsideration under Section 116 (2) of *the Employment Standards Act* (the "*Act*") arising out of a Tribunal decision dated November 17, 1999: Decision #D470/99 (the "Original Decision"). In the original decision the Tribunal referred the matter back to the Director for the calculation of wages owing and a further decision BC EST #D151/00 ("the quantum decision") was issued on April 14, 2000. Consequently the quantum decision, while not in itself disputed, is also collaterally subject to this request for reconsideration.

The facts, as briefly reviewed by the adjudicator in the quantum decision, are that the Society operates a Sikh Temple in Terrace, B.C. and it employed Swaran Singh ("Singh") as a Sikh Priest at the Temple between July 1996 and February 10, 1999. Singh was paid a monthly salary of between $650.00 and $700.00, medical benefits, and he was given room and board at the Temple without charge.

The Director's determination found wages to be owing to Singh in the amount of $10,686.86. The Society appealed this determination and in the original decision following an oral hearing in Terrace, the adjudicator held that the Director should have included room and board in the calculation of wages already paid to Singh. The adjudicator ordered that the amount of room and board should be fixed at $650.00 per month, and remitted the resulting calculation of total wages owing to Singh back to the Director. The adjudicator did not, however, consider $4,722.00 in "additional payments made to Singh by Temple members" for services performed in their homes to be "wages" and upheld the determination in this regard. The Director, while seeking reconsideration, accordingly adjusted the gross wages and arrived at an amount owing of $4,507.70.

In the quantum hearing the Society submitted that a sum equal to or greater than the amount found owing had been paid to Singh through the offerings received by Singh for the performance of religious services in Temple member's homes. The Society submitted that these offerings should have been considered wages. The adjudicator rejected this submission and confirmed his original decision on this point.

The Director seeks reconsideration of the original decision on the grounds that the adjudicator in the original decision made an error in law in including free room and board as "wages" as they are defined in the *Act.* The Society seeks reconsideration of the decision of the adjudicator in the original decision that the additional payments by Temple members for services were not wages and consequentially the Society seeks reconsideration of the quantum decision. The Society submits that both the Director and the adjudicator failed to understand the cultural context and true nature of the sums of money described as "offerings", all of which must be construed in light of the protection for religion in the *Canadian Charter of Rights and Freedoms.*

ISSUES

There are two significant issues that are the subject of these applications for reconsideration:

1. in the context of this case should "free room and board" be considered as wages paid to the employee?

2. should the sums of money, which were paid to the employee over and above his basic wage and referred to as "offerings", be properly considered as wages paid to the employee by the employer?

ANALYSIS

The current suggested approach to the exercise of the reconsideration discretion under section 116 of the *Act* was set out by the Tribunal in *Milan Holdings Ltd.*, BCEST #D313/98 (applied in decisions BCEST #D497/98, #D498/98, et al). In *Milan* the Tribunal sets out a two-stage analysis in the reconsideration process. The first stage is for the panel to decide whether the matters raised in the application for reconsideration in fact warrant reconsideration. In deciding this question the Tribunal should consider and weigh a number of factors such as whether the application is timely, whether it is an interlocutory matter, and whether its primary focus is to have the reconsideration panel effectively "re-weigh" evidence tendered before the adjudicator.

The Tribunal in *Milan* went on to state that the primary factor weighing in favour of reconsideration is whether the applicant has raised significant questions of law, fact, principle or procedure of sufficient merit to warrant the reconsideration. The decision states, "at this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general". Although most decisions would be seen as serious to the parties this latter consideration will not be used to allow for a "re-weighing" of evidence or the seeking of a "second opinion" when a party simply does not agree with the original decision.

In our opinion this is a case that warrants the exercise of the reconsideration discretion. The application was made in a timely manner and goes beyond a re-weighing of evidence or seeking a second opinion. The Director raises a significant question of law in terms of the interpretation of the *Act* and previous, allegedly inconsistent, decisions of the Tribunal. The Society raises an important issue of a possible mistake of fact or cultural misunderstanding.

Free Room And Board As Wages:

The adjudicator's analysis of this issue is setout in two paragraphs in the original decision as follows:

> The Society submitted that room and board should be treated as wages paid to Singh, and that these wages should be computed at the rate of $450 per month for accommodations and between $200 and $350 per month for board. It is acknowledged by the Society, however, that there was no written assignment by

> Singh that allowed the Society to "deduct" this sum from Singh's monthly salary. There is no dispute that room and board was described as being "free" to Singh in the minutes of the Society executive meeting which defined the terms of Singh's employment. In the Determination, Mr Molnar emphasized the agreement that room and board was to be "free", and ascribed no value to it in calculations of wages paid.
>
> I have the benefit of a previous decision of this Tribunal on this very issue in the context of the terms of employment of priests in Sikh Temples: *Khalsa Diwan Society* [1996] B.C.E.S.T.D. 320.18.50-01 (BCEST #D114/96*); confirmed on reconsideration [1996] B.C.E.S.T.D.320.39.75-07. In that case, a Sikh Priest was employed at a modest salary, plus medical benefits and "free" room and board. It was held that the value of room and board should be included in the calculation of wages paid to the Priest. Although the issue of a written assignment of wages (or the lack thereof) does not appear to have (been *sic*) considered in the *Khalsa Diwan Society* case, I had the opportunity of examining that issue in *Sophie Investments Inc.* [1998] B.C.E.S.T.D. 84.00.00-01 (BCEST #D528/97*). In that case, the employer agreed to provide its resident caretaker with "free" accommodations plus a wage below the statutory minimum; when the caretaker complained that the minimum wage was not paid, I held that the value of accommodations should be counted as wages paid. Where there is no ambiguity that the terms of employment included accommodations, s.22 (4) can be interpreted liberally and an assignment of wages may be implied in the employment contract itself. (* citations added)

The adjudicator heard evidence and fixed the value of the room and board at $650.00 per month and remitted the matter back to the Director.

The Director has sought reconsideration. She submits that the adjudicator was wrong to ascribe a value to the "free" lodging and finding it to be "wages".

The Director points out that throughout the investigation and appeal of the Determination, the Society acknowledged that the employment agreement was for "free" room and board. It was not until after the Determination was issued that the Society attached an intrinsic value to the room and board. The Director submits that the adjudicator was in error to accept an *ex post facto* dollar value for the room and board and then to consider that value to be wages paid to the employee.

The Director submits that section 20 of the *Act* is explicit and unambiguous in directing that wages must be paid in Canadian currency or a negotiable item. It does not permit wages to be paid "in kind". The Director allows that "free" room and board may constitute part of the total compensation package and may be a taxable benefit for income tax purposes but it cannot be used by an employer to meet the minimum "wage" requirement of the *Act*. The Director relies upon a decision of this Tribunal in *Re: Heichman (c.o.b. Blue Ridge Ranch)* [1997] BC EST #D184/97.

The Society says that the *Khalsa Diwan Society* decision is identical to this case and the Tribunal found that the value of free room and board should be considered wages for the purpose of calculating compensation for length of service. The Society also refers to the Tribunal decision in *Re: Gateway West Management Corp.* [1997] BC EST #D356/97 which allowed the value of accommodation to be considered for calculating the minimum wage to be paid to a resident caretaker.

The Legislation:

The relevant sections of the *Act* are as follows:

> *Definitions*
>
> *1. "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*
>
> * * * *
>
> *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*
>
> ***Requirements of this Act cannot be waived***
>
> *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 (collective agreements).*
>
> ***Employers required to pay minimum wage***
>
> *16. An employer must pay an employee at least the minimum wage as prescribed in the regulation.*

How wages are paid

20. An employer must pay all wages

(a) in Canadian currency,

(b) by cheque, draft or money order, payable on demand, drawn on a savings institution, or

(c) by deposit to the credit of an employee's account in a savings institution, if authorized by the employee in writing or by a collective agreement.

Deductions

21. (1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.

Assignments

22. (4) An employer may honour an employee's written assignment of wages to meet a credit obligation.

Tribunal Jurisprudence:

The parties have referred to the following decisions of the Tribunal:

In *Re: Khalsa Diwan Society* [1996] BC EST #D114/96 the Society hired a Priest who was paid a monthly salary of $800.00 plus free room and board. Subsequent to the termination of employment an issue arose as to what amount should be used as the basis for calculating unpaid vacation pay. Section 54 of the *Act* requires the employer to pay at least 4% of the employee's *"total wages"* as vacation pay. The question to be decided was whether a value should be ascribed to the free room and board and added to the cash wages to arrive at the total wages. In the Determination the Director had included the value of room and board in the calculation of "total wages". The Tribunal agreed with the Director and included an amount (apparently agreed by the parties as a reasonable value of the free room and board) of $325 to the salary component for the purpose of calculating the vacation pay owed to the employee.

It should be noted that sections 4, 20, 21 and 22 were not apparently argued by the parties in this decision nor were they discussed in the reasons for decision.

In *Re: Gateway West Management Corp.* [1997] BC EST #D356/97 two resident caretakers were paid the sum of $1,075 per month and at the end of each month the sum of $225 was deducted from each of their pay-cheques for rent. In this case the Director determined that the rent should not be included as "wages" for determining whether the minimum wage had been paid. The

Tribunal applied the reasoning in *Khalsa Diwan* above and pointed out that the Tribunal had held that the value of "free" room and board was to be taken into account as "wages" for the purpose of calculating compensation for length of service. The adjudicator found that it would be wrong to conclude that the value of accommodation provide by an employer is to be considered "wages" for one purpose (vacation pay) and not for calculating whether minimum wage had been paid.

Again it may be noted that the issues of whether the deduction of rent was allowed under section 21, whether there was a written assignment, or whether the provision of an apartment complied with section 20 were not specifically argued or discussed in the reasons for decision. Although, the adjudicator suggests that it could have been argued that the employer had violated section 21.

The adjudicator in *Gateway* goes on to suggest that it may have been better to document the total compensation to have been $850 per month plus the value of the room and board. However it is not clear whether the adjudicator, in making this suggestion, considered section 20 that provides that wages must be paid in Canadian currency.

The Director relies on the decision in *Re: Heichman (c.o.b. Blue Ridge Ranch)* [1997] BC EST #D184/97 in which the Tribunal found that the value of free accommodation could not be deducted against wages owing. The adjudicator finds as follows:

> The answer to the issue of whether the wages payable to Guthrie may be adjusted by the value of the accommodation provided to him by the employer lies in whether the definition of "wages" in the *Act* can be interpreted to include the value of the accommodation where it is provided by the employer.
>
> * * * *
>
> While the definition is inclusive, rather than exhaustive, it would be unreasonable to extend the definition to include the value of a gratuitous benefit provided by the employer. That conclusion is reinforced by Section 20 of the *Act* that requires all wages to be paid in negotiable Canadian currency. Such an interpretation would also destroy the certainty of the minimum wage provisions of the *Act* and would seriously undermine administration of the annual holiday pay provisions, the length of service provisions and other parts of the *Act* that depend on finding an hourly rate in assessing whether there is compliance or the remedy in the absence of compliance. The appeal fails on this issue and Blue Ridge may not take into account or set off the value of the accommodation provided to Guthrie with the job.

The adjudicator in the original decision refers himself to his own previous decision in *Re: Sophie Investments Inc.* [1998] BC EST #D527/97. In that case two resident caretakers alleged they were not paid minimum wage and the Director found that rent in the amount of $320 per month had been improperly deducted from their wages. The adjudicator in the original decision here states that in *Sophie:*

> I held that the value of accommodations should be counted as wages paid. Where there is no ambiguity that the terms of employment included accommodations, s.22 (4) of the *Act* can be interpreted liberally and an assignment of wages may be implied in the employment contract itself.

In *Sophie* the employer paid the gross wage but then deducted the stipulated value of the rent. The adjudicator found that the employment contract included a written assignment from the employees that allowed the employer to deduct the rent as a credit obligation pursuant to section 22(4). The Director sought a reconsideration of the decision and referred the Tribunal to section 20 (Canadian currency). However the Tribunal on the reconsideration (BC EST #D447/98) did not address the section 20 argument saying that it "put the cart before the horse" and concluded that where there is a clear assignment in writing then s.22 (4) allows for the deduction of rent from the gross wages.

Sophie does not specifically find that accommodations can be considered "wages" for the minimum wage issue because it was found that the employer paid equal to, or greater than, minimum wage and then accepted a written assignment of a stipulated amount of money for rent. The rent for room and board was considered a credit obligation.

There are a number of other relevant decisions of the Tribunal not referred to by the parties that we will summarize.

In a decision closely on point on its facts *Re: Golden Sikh Cultural Society* [1998] BC EST #D357/98 the Society hired a Priest for $500 per month plus "room and board". The Tribunal however did not consider whether the room and board could be considered wages and did not consider sections 20, 21, and 22 but, having found that the compensation (however defined) was substantially below minimum wage, applied section 4 to hold that any agreement to waive the minimum wage requirement was ineffective.

Section 20 was considered in *Re: Granville Island Seafood Co.* [1999] BC EST #D036/99 and in that decision the Tribunal held that the *Act* did not allow for someone to work for free room and board. The adjudicator concludes:

> The last of the issues before me is one that goes to what has been paid. Section 20 of the *Act* requires wages to be paid in Canadian currency. The *Act* does not allow work to be in exchange for room and board.

There are a number of decisions which find that the employer may not deduct room and board without a written assignment, even where the value of the room and board is understood by the parties, see: *Qualified Contractors Ltd.* [1999] BC EST #D086/99 (silviculture employees deducted $15 per day); *Re: High Mountain Tree Services* [1996] BC EST #D119/96 (silviculture workers); *Re: Haymour* [1998] BCEST #D176/98.

In *Re: Voight* [1999] BC EST #D172/99 the Tribunal considered the effect of sections 20, 21, and 22 in a case where a cook received a rent subsidy while living in a cabin at the worksite. The Tribunal concluded as follows:

> Thus s.22 (4) of the *Act* would be the only possible means by which Ives (the employer) could claim authority to withhold a portion of Mr. Olson's wages and apply those monies to his rent. But there is no written assignment to authorize that, and, therefore, it is not permitted under the *Act*. Taken together, section 20 and 22(4) of the *Act* led me to find that the Director erred in determining that $4,800 in "cabin subsidy" formed part of the wages ...

Also in *Re: Howard House Apartments Ltd* [1999] BCEST #D358/99 the Tribunal held that "free rent" could not be considered wages because of the application of s.20 (Canadian currency).

A number of decisions have found likewise for other items see:

> *Re: Jacobsen* [19997] BC EST #D558/97 (free merchandise from a furniture manufacturer);
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> *Re Godby* [1999] BC EST #D410/99 (free clothing from a clothing manufacturer);
>
> *Re: Park* [1998] BC EST #D009/98 (free food from Subway);
>
> *Re: Sanpreet Enterprises Inc.* [1998] BC EST #D558/98 (free videos from a video store);
>
> *Re: Butch Wright Trucking & Hauling Ltd.* [1999] BC EST #D356/99 (free truck and accommodations);

Summary:

It is apparent from the foregoing review of the jurisprudence that the Tribunal has considered the issue of "free room and board" from a number of different perspectives depending on the facts of each case, the framing of the Determination, and on the submissions made at the time. It would appear from *Khalsa Diwan* and *Gateway* that the value of the room and board was indeed considered wages for the calculation of severance pay and to "top-up" a wage to meet the minimum standard.

On the other hand in the cases which considered the application of section 20 of the *Act* the value of room and board was not allowed to be considered wages, see above: *Heichman*, *Granville Island, Howard House,* and *Voight.*

The *Sophie* decisions are in a different category because the gross wages exceeded minimum standards and the Tribunal found that there was an effective written assignment of wages to pay rent as a credit obligation.

Having considered carefully the submissions of the parties and having reviewed the legislation and the Tribunal jurisprudence we conclude that the line of decisions which specifically considered section 20 and those decisions which deal with payments "in kind" are to be preferred over the *Khalsa Diwan* and *Gateway* decisions. We find that section 20 does not contemplate the

payment of wages "in kind"; as a result, we find that "free room and board" cannot *per se* be considered "wages" within the meaning of the *Act*. It is not appropriate to convert free room and board into a dollar value and then to consider it a wage.

As pointed-out in a number of decisions it may be permissible to deduct payments for rent where there is a written assignment of wages in a specific amount to meet a specific credit obligation. We do not decide in this decision, as it is not necessary to do so, whether free room and board could be considered a "credit obligation".

The Additional Fees/"Offerings":

The facts relating to this issue are setout in some detail in the original decision but may be summarized to say that in addition to his basic wage the Priest received other sums of money. These amounts relate to fees and/or gratuities paid by members of the Temple for certain religious services performed by the Priest at the homes of Temple members. The question arose as to whether these amounts should be considered "wages" already paid by the employer to the Priest and therefore whether they should be deducted from any amount found to be owing by the employer to the Priest.

We note that this issue was not addressed in the original determination. It arose for the first time before the adjudicator at the hearing of the quantum issue. The general practice of this Tribunal is that the parties should raise such issues during the investigative stage of the proceedings. However, the adjudicator has discretion under some circumstances to allow new evidence to be introduced at the hearing. The circumstances under which new evidence will be allowed have been quite limited and it is not necessary to enumerate them here.

Suffice it to say that one of the reasons the Tribunal has generally held that such new evidence should not be introduced at the appeal is to encourage a full investigation of the facts before the Determination is issued. In this case the adjudicator agreed to hear the employer's submission that these payments should be considered "wages".

The adjudicator heard evidence and concluded that:

"when Temple members made indirect payments to Singh in return for religious services, these payments should not be considered "wages"; they are instead offerings of respect given in accordance with established practice in the Sikh tradition. Although it can be said these payments were made to others - including the Society executive - who then paid them to Singh, I have difficulty treating them as wages paid to Singh by the Society.

The Society asks for reconsideration of this decision pointing-out that there is a difference between true donations, or offerings of respect, made by members to the Society or the Priest, which can include cash, food or clothing, and the minimum fee prescribed for the performance of the special services.

As the adjudicator notes it is not solely an issue about whether the payments were fees or gratuities but also significantly whether they were payments "by the Society". It seems to us that there are several unclear factual issues that would have been more usefully resolved during the investigation by the Director's delegate.

While the fees appear to be set by the Temple and are referred to in the employment contract it is not clear if it was a common intention that if a Temple member did not pay, that the Society would assume the obligation and pay. It is also not clear, either from the determination or from the original decision, whether these additional services were performed on time already included in the wage calculation by the Director's delegate.

It is also not clear whether the Priest's assistant was working as an agent for the Priest or as an agent for the Temple when he collected the fees from the members. If he was an agent of the Temple would that alter the answer as to whether payments were "by the employer"? It appears that on some occasions the executive of the Temple collected the fees and then paid some or all of that amount to the Priest. Do those payments then become payments from the employer or was the executive a mere trustee of the money as it flowed from the member to the priest?

While the performance of these special religious services was referred to in the documents describing the duties of the Priest were they part of the employment contract? Did the Society employ the Priest to perform these services? Was the Priest obligated to perform the services? Were they services performed for the employer? To what extent was payment for this work gratuitous or discretionary?

A further issue arises if it were found that the payments were "wages" and that is whether the Society had fulfilled other various statutory obligations flowing from the characterization of this money as "wages", as for example the obligation to pay vacation pay based on these wages and whether the money paid by Temple members was included in the "income" of the Society for any other purpose under the law of Canada.

It may well be that there was a common understanding about the ultimate obligation for payment of these fees to the Priest and that the fees were payable by the employer to the Priest even if the Temple member failed to pay the prescribed fee. It may be that the money paid by the members was included in the income of the Society even though some portion of that was paid out to the Priest. It may also be that the Society included these amounts as wages paid to the Priest and calculated vacation pay on the total wages including these amounts.

We conclude that the appropriate disposition is to cancel the original decision and refer this matter back to the Director for investigation of the factual and legal questions arising out of these extra services performed by the Priest for Temple members. Without limiting the scope of the Director's investigation, it is necessary to investigate to what extent these payments were fixed fees for service or gratuities. It is also necessary to investigate whether these sums of money should be considered payments by the employer to the employee for labour or services performed for the employer.

CONCLUSION

Based on the foregoing analysis, we conclude that both of the original decisions should be cancelled and the matter referred back to the Director with the direction that the free room and board should not have been included as wages paid and to reinvestigate the issues surrounding the additional payments made to the Priest for the special services.

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.

ORDER

This Tribunal orders that, pursuant to Section 116 (1)(b) of the *Act*, both of the original decisions, BC EST #D470/99 and BC EST #D151/00, are cancelled and the matter is referred back to the Director with the direction that the "free room and board" should not have been included in the calculation of wages and for investigation of the question relating to the nature of the fees paid by Temple members for special services and whether these fees were "wages" paid by the employer to the employee, and for the issuing of a fresh Determination.

John M. Orr

John M. Orr
Adjudicator
Employment Standards Tribunal

Fern Jeffries
Fern Jeffries
Tribunal Chair
Employment Standards Tribunal

Frank Falzon
Frank Falzon
Adjudicator
Employment Standards Tribunal