Citation: Dayton Boots Company Ltd. and Eric Hutchingame (Re)
2022 BCEST 29

EMPLOYMENT STANDARDS TRIBUNAL

Appeals

- by -

Dayton Boots Company Ltd. and Eric Hutchingame
("Dayton Boots" and "Mr. Hutchingame")

- of Determinations issued by -

The Director of Employment Standards

pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: David B. Stevenson

FILE NOS.: 2021/084 and 2021/085

DATE OF DECISION: June 1, 2022

DECISION

SUBMISSIONS

Nazeer T. Mitha, QC and Graeme A. Hooper	counsel for Dayton Boots Company Ltd. and Eric Hutchingame
Jason Tyler	on his own behalf
Kieran Dunn	on his own behalf
Annie Jones	on her own behalf
Jermaine Spence	on his own behalf
Tara MacCarron	delegate of the Director of Employment Standards

OVERVIEW

1. On April 8, 2022, this panel of the Tribunal issued a decision on appeals by Dayton Boots Company Ltd. and Eric Hutchingame (the "Appellants") of Determinations of the Director of Employment Standards (the "Director"). The decision confirmed all aspects of the Determinations except as it related to persons who were identified by the Appellants as persons residing and performing work outside of the province. It was not apparent on the face of the record that this group of persons could be considered employees for the purpose of the *ESA*. The decision included the following statement:

> The Director did not address the question of whether the provisions of the *ESA* apply to those employees identified on pages 6 – 7 of the Dayton Boots and Mr. Hutchingame appeal submissions as Brand Ambassadors and as having addresses outside the province (the "out-of-Province Employees"). The question of whether the provisions of the ESA can apply to the out-of-Province Employees is a matter which goes to the Director's jurisdiction to process a claim under the ESA relating to them.

2. On that basis, the Tribunal, in correspondence dated April 11, 2022, invited the Director and the out-of-Province Employees to address whether the *ESA* could apply to their employment. The Tribunal received submissions from four of the out-of-Province Employees and from the Director.

3. Jason Tyler, whose address in the record shows as being in Cambridge, Ontario has filed a submission that does specifically address the concern raised in the decision. He says he has received a T4 from Dayton Boots Company Ltd. ("Dayton Boots") indicating he had received earnings for the year 2020 in the amount of $34,200.00, but all he had received from Dayton was three gift cards totalling $3,000.00.

4. Kiernan Dunn has filed a submission stating he never did any work for Dayton Boots in British Columbia nor did he travel to British Columbia for training; that all the work he did perform for them as part of the Brand Ambassador Program was done in the province of Quebec.

5. Annie Jones has filed a submission arguing the provisions of the *ESA* found in section 2 and the definition of employee in section 1 do not limit its application solely to employees residing in British Columbia. She says the out-of-Province Employees must be considered to be on the same footing as employees working for Dayton Boots in the province as they are not excluded from coverage by the *ESA*.

6. Jermaine Spence has filed a submission. He lives in Ottawa, Ontario and was part of the Brand Ambassador Program there. He says he is not an employee of Dayton Boots, that he had withdrawn from the Brand Ambassador Program as he was "no longer comfortable being apart [sic] of it" and does not wish to receive any wages that might be owed to him.

7. The Director has indicated in correspondence that she has no submissions to make on the specific issue of whether the provisions of the *ESA* can apply to out-of-province employees.

8. Dayton Boots and Mr. Hutchingame submit the *ESA* cannot apply to the out-of-Province Employees because those persons do not have the "sufficient connection" to the province that would allow their employment to be covered by the *ESA*. They point out that the residences of all the out-of-Province Employees are outside of the province, there is some evidence that none of these persons performed any work in British Columbia and no evidence indicating otherwise.

ANALYSIS

9. In *Can-Achieve Consultants Ltd.*, BC EST #D463/97 (reconsideration of BC EST #D099/97), the Tribunal examined the constitutional limits of the *ESA*. In answer to the argument made by Ms. Jones, while noting the definitions of "employee", "employer" and "work" in the *ESA* are expansive the Tribunal recognized that there are presumptive constitutional limitations in the legislation:

> There is a presumption that the Legislature intends its enactments to respect its constitutional limitations, including the constitutional limitation prohibiting extra-territorial legislation.
>
> . . .
>
> What this presumption means in effect is that the "statutory interpretation" question cannot be finally determined without reference to the constitutional limits of provincial legislative power. While it is fair to say from reading the *Act* as a whole that the Legislature wanted to legislate as broadly as it could, it is also fair to say that it did not intend to exceed the limits of its constitutional jurisdiction. To the extent that a literal reading of the Act would exceed these constitutional limitations, the legislation must be "read down". As noted by Sullivan, at p. 336: "By presuming that extra-territorial effects are not intended, the legislation is effectively read down to avoid application that would violate the constitutional limitations". (pages 8-9)

10. The Tribunal has constitutional jurisdictional over an employment relationship only if a "sufficient connection" can be found to exist between the person's employment and the province. A "real presence" performing employment obligations in the province is essential and a number of factors are relevant, including whether the residence and usual place of employment are in the province, whether the worker is required to work both in and out of the province and the extent to which other jurisdictions may legitimately claim jurisdiction over the person's employment.

11. In sum, in order for the *ESA* to govern the employment of the out-of-Province Employees there must be a "sufficient connection" shown between the employer and those employees, on the one hand, and the province of British Columbia, on the other (see *Can-Achieve*, *supra*; and *Xinex Networks Inc.*, BC EST # D575/98).

12. On the facts of this case, I conclude that there is an insufficient connection between the employment of the out-of-Province Employees and the province.

13. The evidence, which indicates that, even though Dayton Boots' primary business location is in British Columbia, none of the employment services performed by the out-of-Province Employees were performed in the province, that all services performed were undertaken outside the province, and that all these persons resided outside of the province, does not show a "sufficient connection" between Dayton Boots, the out-of-Province Employees and the province so as to render the *ESA* applicable to their employment relationship with Dayton Boots.

14. The Determinations relating to the out-of-Province Employees cannot stand.

ORDER

15. Pursuant to section 115 of the *ESA*, I order those parts of the Determinations dated September 10, 2021, finding there are amounts owing to the out-of-Province Employees be cancelled and the Determinations are referred back to the Director to re-calculate the wages owed by Dayton Boots Company Ltd. and by Eric Hutchingame. I continue to have jurisdiction to confirm the variance and finalize the appeals.

David B. Stevenson
Member
Employment Standards Tribunal