Employment Standards TRIBUNAL

An appeal

- by -

Virgilio L. Co

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

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

TRIBUNAL MEMBER: Yuki Matsuno

FILE No.: 2008A/133

DATE OF DECISION: February 3, 2009

Employment Standards Tribunal
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British Columbia

DECISION

SUBMISSIONS

Janie Fung Co	for Virgilio L. Co
Ji Yoon	for J.E.R. Envirotech Ltd.
Tyler Siegmann	for the Director of Employment Standards

OVERVIEW AND BACKGROUND

1. Virgilio L. Co appeals a Determination of the Director of Employment Standards issued October 17, 2008 (the "Determination"), pursuant to section 112 of the *Employment Standards Act* (the "*Act*"). The Determination was issued by a delegate of the Director of Employment Standards (the "Director") after an investigation of a complaint filed by Mr. Co against J.E.R. Envirotech Ltd. ("JER") for wages and compensation for length of service.

2. JER operates a business which custom formulates and manufactures thermoplastic biocomposite materials. JER falls within the jurisdiction of the *Act*. JER hired Mr. Co on January 9, 2007 as Managing Director of JER Envirotech Philippines, Inc. ("JEPI"), a subsidiary of JER. On February 15, 2008, Mr. Co was advised that JER was terminating his employment, retroactive to February 1, 2008. Mr. Co filed a complaint with the Employment Standards Branch on April 29, 2008.

3. The delegate found that the *Act* did not apply to Mr. Co's complaint because the employment relationship between Mr. Co and JER did not fall within the jurisdictional scope of the *Act*. The Delegate cited the leading Tribunal case regarding extra-territorial application of the *Act*, *Can-Achieve Consultants Ltd.*, BC EST #D463/97 ("*Can-Achieve*"). He found that there was no "sufficient connection" between Mr. Co's employment and British Columbia and therefore the provisions of the *Act* did not apply to Mr. Co's employment. He also found that except for one trip in May 2007, Mr. Co did not perform work for JER in British Columbia.

4. Mr. Co appeals the Determination on the ground that the Director failed to observe the principles of natural justice in making the Determination. In addition, although he did not check off this ground of appeal on his appeal form, it appears from his submissions that Mr. Co is arguing that the Director erred in law. Since the Tribunal should not be bound strictly by the grounds an appellant indicates on the appeal form, but should take a large and liberal view of the appellant's explanation regarding his appeal, I will also consider Mr. Co's appeal on the ground of error of law: *Triple S. Transmission Inc.*, BCEST #D141/03. I note that as with all appeals to the Tribunal, the burden is on the appellant to show that the Determination is wrong and should be cancelled or varied.

5. I will decide this appeal on the basis of the written materials submitted before me, namely: Mr. Co's appeal form and submissions, including a final reply; the submissions of the Director and JER; and the Record forwarded by the Director under section 112(5).

ISSUE

6. Did the Director fail to observe the principles of natural justice in making the Determination?

7. Did the Director err in law?

ARGUMENT AND ANALYSIS

Principles of Natural Justice

8. The principles of natural justice refer to the procedural rights to which a party to a dispute is entitled, such as the right to know the case against oneself, to have an opportunity to respond, to have the matter decided by an unbiased decision maker, and to be given reasons for the decision. In the present case, there is no indication that these principles have not been followed, and Mr. Co's submissions do not address this ground of appeal. I find that the Director did not fail to observe the principles of natural justice in making the Determination.

Error of Law

9. In *Britco Structures Ltd.*, BC EST #D260/03, the Tribunal adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia* (Assessor of Area #12 – Coquitlam), [1988] B.CJ. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the *Act*;
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle. (In the Employment Standards context, this may also be expressed as exercising discretion in a fashion that is wrong in principle: *Jane Welch operating as Windy Willows Farm*, BC EST #D161/05).

10. In the present case, at issue is whether the *Act* applies to Mr. Co's employment with JER, which is a question of general law. The submissions of both Ms. Co, on behalf of Mr. Co, and the Director contain arguments with respect to the proper authorities that should be followed to determine whether Mr. Co's employment comes within the jurisdiction of the Act. Ms. Co argues that the Tribunal's decision in *Marchant*, BC EST #D233/96, and particularly that decision's citation of *Driedger on the Construction of Statutes* (1994) takes precedence over *Can-Achieve*. On the other hand, the Director's delegate points out that *Marchant* pre-dates *Can-Achieve*; that *Can-Achieve* is a reconsideration decision issued by a three-person panel of the Tribunal; and that since its issuance *Can-Achieve* has been consistently applied to numerous decisions regarding the application of the *Act* to employment that occurs outside of the province. I agree with the submissions of the delegate that *Can-Achieve* is the most appropriate authority to be considered and applied to Mr. Co's case.

11. In *Can-Achieve*, the Tribunal observed that because it is a provincial statute, the *Act* is subject to the limitation imposed by the *Constitution Act, 1867* that provinces may not legislate "extra-territorially". Further, there is "a presumption that the Legislature intends its enactments to respect its constitutional limitations, including the constitutional limitation prohibiting extra-territorial legislation". After noting the broad scope of the definitions of "employer" and "employee" contained in the *Act*, the Tribunal goes on to say:

> "[w]hile 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".

12. The question then becomes the extent to which the legislation should be "read down"; more specifically in relation to the *Act*, who is entitled to enjoy the benefits of the civil rights and protections that are created by the *Act*? In determining this question, the Tribunal adopted the approach of the British Columbia Court of Appeal in *British Columbia (British Airways Board) v. British Columbia (Workers Compensation Board)* (1985), 17 D.L.R. (4th) 36 ("*British Airways*"): "In order to give the province jurisdiction to secure the civil rights of a person related to his employment there must be a sufficient connection between that person's employment and the province."

13. The Tribunal proceeded to make it clear that the test for sufficient connection would not be satisfied merely by showing that an employer is resident within the province and the hiring takes place within the province. It held:

> In our view, for a "sufficient connection" to exist so as to permit a province to confer statutory civil employment rights upon a person, a real presence performing work within the province must be established. It is clear from *British Airways* that a person need not be present a majority of the time, but there must be a real presence performing employment obligations within the province . . .

14. The Tribunal outlined the following factors considered by the Court of Appeal in the *British Airways* decision and held that a person meeting those factors would enjoy the statutory rights under the *Act*, even through some of their work was performed outside the province:

> (a) a place of business of the employer is situate in the Province;
>
> (b) the residence and usual place of employment of the worker are in the Province;
>
> (c) the employment is such that the worker is required to work both in and out of the province; and
>
> (d) the employment of the worker out of the province has immediately followed his employment by the same employer within the province and has lasted less than 6 months.

15. The Tribunal acknowledged that "the "sufficient connection" test in constitutional law may embrace fact situations" that do not strictly fall within the factors outlined above. At the same time, the Tribunal stated that "the "sufficient connection" test must be meaningful and must not be watered down to the point where two or even multiple jurisdictions are able to assert simultaneous or indeed contradictory statutory rights and obligations respecting the same work dispute".

16. In light of these factors, the following facts from the present case are of note:

(a) JER's corporate offices are situated in British Columbia;

(b) Mr. Co was employed by JER as the Managing Director of JER's partially owned subsidiary in the Philippines, JEPI, and his assignment was in the Philippines;

(c) Mr. Co was required to work in the Philippines and to report in person to the corporate offices in Delta, B.C. every six months or as needed. The Determination outlined that Mr. Co produced evidence of only one trip to the province during his employment, in May 2007. The evidence showed that the bulk of his employment duties was performed in the Philippines;

(d) Before beginning his employment as JEPI's Managing Director, Mr. Co was involved with JER and JEPI as a stockholder of WPC Envirotech Inc. which was a joint venture partner with JER with regards to JEPI. Mr. Co was employed by JER for just over one year.

17. After consideration of these facts in light of the *Can-Achieve* factors, I must agree with the Delegate that a sufficient connection between the province of British Columbia and Mr. Co's employment does not exist. As the Delegate stated in the Determination, "The evidence reveals that the parties' clear intent was for Mr. Co to perform his employment arrangement in the Philippines and Mr. Co proceeded to do so." Besides the fact that JER has corporate offices in British Columbia, no other relevant indicators of sufficient connection are present. Mr. Co brought forward numerous other facts, both before the Determination was issued and in his appeal submissions, as showing sufficient connection (e.g. he is a Canadian citizen; he has a residence in Richmond, B.C.; he received job instructions from JER in B.C.; his job duties benefitted JER in B.C.; his wages were paid in Canadian currency to a bank in B.C.; etc.). However, in light of the case law, these facts are not adequate to prove "a real presence performing work within the province".

18. I conclude that the Delegate did not err in law in concluding that the *Act* does not apply to Mr. Co's complaint. However, I would note that although I have confirmed the Determination that Mr. Co cannot avail himself of the statutory protections provided by the *Act*, the Determination and the outcome of this appeal do not affect Mr. Co's right to pursue whatever other remedies that may available to him by way of civil court action in British Columbia.

ORDER

19. Pursuant to Section 115 of the *Act*, I order that the Determination dated October 17, 2008 be confirmed.

Yuki Matsuno
Member
Employment Standards Tribunal