

An appeal

- by -

Harpawandeep Sagoo
("Sagoo")

- 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: Carol L. Roberts

FILE No.: 2005A/83

DATE OF DECISION: July 13, 2005

DECISION

SUBMISSIONS

Harpawandeeep and Gurbachan Sagoo on behalf of Harpawandeeep Sagoo
Terry Hughes on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Harpawandeeep Sagoo (“Sagoo”) under Section 112 of the *Employment Standards Act* (“the *Act*”), against a Determination of the Director of Employment Standards (“the Director”) issued May 3, 2005.
2. Mr. Sagoo worked as a truck driver for Sabby’s Transport Incorporated (“Sabby’s”) from August 2004 until December 2004. He filed a complaint alleging that Sabby’s had contravened the *Act* in failing to pay him wages including regular wages, deductions from wages, statutory holiday pay, vacation pay and termination pay.
3. The delegate held a hearing into Mr. Sagoo’s complaint on April 19, 2005. On May 3, 2005, the delegate issued a Determination concluding that because Sabby’s was a federally regulated company, the Director had no jurisdiction over the matter, and dismissed the complaint.
4. Mr. Sagoo contends that the delegate erred in law in arriving at this conclusion. He says that the matter was settled at the April 19, 2005 hearing, and his employer was going to give him money to settle his claim. He says that the delegate dismissed his complaint after the matter was resolved.
5. In his appeal form, Mr. Sagoo indicated that he felt an oral hearing was necessary. However, having reviewed the material, I am of the view that this matter can be decided based on the written submissions of the parties. The issue is one of pure law, and the credibility of the parties is not at issue. Furthermore, there is no issue of Mr. Sagoo being unable to express himself, as the essential facts necessary to determine the jurisdictional issue are not in dispute.

ISSUE

6. Did the delegate err in law in concluding that he did not have jurisdiction to decide the matter based on the fact that Sabby’s is a federally regulated industry?

THE FACTS AND ARGUMENT

7. The facts as set out in the Determination are as follows.
8. Sabby’s operates a small truck transport business out of a warehouse in Delta, B.C. Makhan Heer is the President, and sole director and officer of the company.

9. Sabby's employs some drivers who drive one of four trucks owned by Sabby's. Two of those four carry insurance and licences that allow them to operate in the United States. One of Sabby's full time drivers travels into Washington State each day five days per week on a regular run. The other USA- licensed truck travels to the US frequently, although not on a regular basis. The two remaining trucks do not normally leave British Columbia.
10. Sabby's also contracts with some drivers who own and operate their own trucks. None of these trucks normally leave British Columbia.
11. Mr. Sagoo was one of the four drivers with Sabby's, and made approximately two or three trips into the state of Washington during his employment with Sabby's.
12. The delegate determined that Sabby's out of province hauling brought the company outside provincial jurisdiction for the purpose of employment standards. The delegate relied on the test set out in *Pioneer Truck Lines Ltd.*, a decision of the Canada Industrial Relations Board (CIRB 0031, Sept. 2, 1999) to determine that Sabby's business was federally regulated, and thus, the *Employment Standards Act* did not apply to the complaint. The delegate stopped investigating the complaint, but indicated he had forwarded the complaint and documents to Human Resources and Skills Development Canada.
13. The delegate says that the parties participated in a mediation session, and attempted to resolve the complaint voluntarily. Because they did not agree on a settlement, he had to proceed to a Determination. The delegate says that the issue of jurisdiction was canvassed at the hearing, and advised the parties that it was possible he could decide that he had no jurisdiction over the complaint.
14. Mr. Sagoo and his father, Gurbachan Sagoo, dispute this assertion.

ANALYSIS AND DECISION

15. The burden is on the appellant, Mr. Sagoo to persuade the Tribunal that the Determination was wrong and justifies the Tribunal's intervention. The Tribunal has consistently said that an appeal is not a re-investigation of the complaint nor is it intended to be simply an opportunity to re-argue positions taken during the investigation.
16. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
 - (a) the director erred in law
 - (b) the director failed to observe the principles of natural justice in making the determination;
or
 - (c) evidence has become available that was not available at the time the determination was being made
17. The analysis will address the issue of whether the Director's delegate made any reviewable error in concluding that Sabby's is a federally regulated company, and thus, Mr. Sagoo's claim for unpaid wages does not fall under the jurisdiction of the *Act*.

18. I conclude that the delegate erred in determining that Mr. Sagoo cannot avail himself of the remedies provided by the *Employment Standards Act*.
19. Section 88 of the *Act* provides that the director has no jurisdiction over constitutional questions relating to the *Canadian Charter of Rights and Freedoms* (the “*Charter*”). Section 103 of the *Act* incorporates several sections of the *Administrative Tribunals Act* SBC 2004, c 45. (“*ATA*”) Notably, section 44 of the *ATA* provides that a tribunal does not have jurisdiction over constitutional questions other than *Charter* questions. Section 44 is not incorporated into the *Employment Standards Act* under section 103. Therefore, the Tribunal continues to have jurisdiction over non *Charter* constitutional questions.
20. The *Act* is silent on the issue of the territorial scope of the statute. However, section 2 (a) provides that one of the purposes of the *Act* is to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment. However, there is a presumption against the extra-territorial application of provincial legislation, since provinces can only legislate in respect of matters that are within the province. (see R. Sullivan, *Driedger on the Construction of Statutes* (Toronto: Butterworths, 1994) at 335)
21. The evidence indicates that some of Sabby’s trucks are licensed to operate outside the province while others are not. The bulk of the work performed by the company occurs wholly within the province. It may be that Sabby’s is a federally regulated industry in respect of some of its activities, and that the *Canada Labour Code* applies to those Sabby employees who drive regularly to the United States in the US- licensed trucks. (see for example, *Ontario Hydro* [1993] 3 S.C.R. 327, where the court found that the *Canada Labour Code* applied only to those Ontario Hydro employees who were actually employed on or in connection with facilities for the production of nuclear energy, a subject matter that fell within federal jurisdiction) There appears to have been no evidence before the delegate whether Sabby’s operations were wholly or partially regulated by Canada, and I am unable to make any findings in this respect.
22. Labour relations and employment contracts are within the constitutional jurisdiction of the province. The applicability of provincial legislation in these areas is only outside provincial jurisdiction if the legislation impinges on the extra provincial aspects of the undertaking. The *Employment Standards Act* does not presume to regulate that business or industry, or prescribe how the trade is to be conducted. It does set out minimum employment standards, or how that business treats its employees, which is within provincial constitutional competence.
23. In *Can Achieve Consultants Ltd.*, BC EST #D463/97, (reconsideration of BC EST #D099/97), the Tribunal concluded that the *Employment Standards Act* is constitutionally applicable to employment relationships if a sufficient connection can be found to exist between the person’s employment and the province. (see also *Xinex Networks Inc.*, BC EST #C575/98, *Becker*, BC EST #D640/01 (a reconsideration of BC EST #D406/01), and *Saueracker* BC EST #D677/01) Some factors to be considered are the place of business of the employer, the residence of the employee, the jurisdiction where the employee was hired, the governing law of the employment contract, and whether the employee was obliged to work in more than one jurisdiction.
24. Although it is not stated in the Determination, it appears that Sabby’s is incorporated in British Columbia. Further, although the delegate does not expressly say so and there is nothing in the record provided by the delegate, it appears that Mr. Heer, Sabby’s president and owner, is also a resident of British Columbia. Sabby’s has its head office in the lower mainland.

25. Mr. Sagoo is a resident of British Columbia. With the exception of two or three trips into the state of Washington, all of his work was performed within British Columbia. There is no evidence as to the length of time Mr. Sagoo spent in the United States, but I infer it was transitory. Further, although the delegate does not address this issue in the Determination, I also infer that Mr. Sagoo's employment contract was made in British Columbia and that he was paid in Canadian funds.
26. I conclude that there is sufficient connection between the work performed by Mr. Sagoo and the province to conclude that the delegate erred in finding the *Act* was not applicable to his complaint solely on the basis that Sabby's might be a federally regulated industry.
27. I refer the matter back to the delegate to make a Determination on whether Mr. Sagoo is entitled to the benefits and protection of the *Act*.

ORDER

28. I Order, pursuant to section 115 of the *Act*, that the Determination, dated May 3, 2005, be referred back to the delegate for adjudication on the merits of the complaint.

Carol L. Roberts
Member
Employment Standards Tribunal