Employment Standards TRIBUNAL

An appeal

- by -

Randy & Laura Saueracker op. as RALA Associates
(the “Employer” or “Appellants”)

- 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

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2001/334

DATE OF DECISION: July 23, 2001

DECISION

OVERVIEW

This is an appeal filed by Randy Saueracker and Laura Saueracker, jointly operating as "RALA Associates" (the "Employer" or "Appellants"), pursuant to section 112 of the *Employment Standards Act* (the *"Act"*). The Employer appeals a Determination that was issued by a delegate of the Director of Employment Standards (the "Director") on November 17th, 2000 pursuant to which the Employer was ordered to pay its former employee, James H. DeJong ("DeJong"), the sum of $915.65 on account of recovery of unauthorized wage deductions ($848.70) and section 88 interest ($66.95).

Further, by way of the Determination, the Director also assessed a $0 penalty against the Employer pursuant to section 98 of the *Act* and section 29 of the *Employment Standards Regulation.*

The Employer's appeal was filed some 10 days after the appeal period expired, however, in a decision issued on April 26th, 2001 the Tribunal extended the appeal period (see B.C.E.S.T. Decision No. D184/01) and thus the merits of this appeal are now before me.

By way of a letter dated July 5th, 2001 the parties were advised by the Tribunal's Vice-Chair that this appeal would be adjudicated based on the parties' written submissions and that an oral hearing would not be held (see section 107 of the *Act* and *D. Hall & Associates v. Director of Employment Standards et al.,* 2001 BCSC 575).

ISSUES ON APPEAL

The Appellants seek the cancellation of the Determination on two grounds. First, they say that the Director's delegate did not have any jurisdiction to investigate DeJong's complaint since the latter's employment was governed by Alberta's employment standards legislation. Second, they say that any wage deductions were proper since such deductions only amounted to a lawful recovery of previous advances (primarily for out-of-pocket expenses) given by the Employer to DeJong and which DeJong had agreed to repay.

I shall address each issue in turn.

ANALYSIS: JURISDICTION

The Employer supplies skilled aircraft maintenance personnel to firms in British Columbia and Alberta. As I understand the situation, the Employer only provides skilled labourers on a temporary basis; in effect, it acts as a labour contractor in the aviation industry. The work is, of

course, undertaken at the client's location. So far as I can gather, most of the Employer's clients are situated in Alberta but it also has some B.C.-based clients.

The firm is based in the province of Alberta; its only office is located in Edmonton. The Employer is licensed to carry on business in Alberta and is registered with, and pays premiums to, the Alberta Workers' Compensation Board. The Employer is registered as an Alberta company with the federal taxation authorities.

Mr. DeJong is an Alberta resident. He was hired by the Employer, in Alberta, to undertake a temporary assignment in British Columbia; the Employer's client was a firm known as "Kelowna Flightcraft". While working in Kelowna, Mr. DeJong resided in a local hotel and was paid a *per diem* expense allowance. Mr. DeJong travelled from Edmonton to Kelowna in his own personal vehicle and the Employer agreed to advance Mr. DeJong monies to offset his travel expenses as well as certain other expenses. Mr. DeJong was on the job in Kelowna for only about 2 weeks when his employment was terminated, for cause, at the insistence of Kelowna Flightcraft.

Upon being hired, DeJong apparently signed (I only have a blank copy of this standard-form contract before me) the Employer's "Technician Work Agreement", a 2-page document that sets out the employee's rate of pay (per hour) and other terms and conditions of employment. Pursuant to this agreement (which I assume DeJong actually signed), DeJong was to receive a *per diem* expense allowance for each day that DeJong was to be working in Kelowna; the Employer agreed to pay DeJong's transportation and hotel expenses.

DeJong originally filed a complaint with the federal employment standards agency (I believe that agency is now called Human Resources Development Canada) who refused to investigate the complaint on the grounds that DeJong's complaint fell under Alberta's employment standards legislation. Alberta's employment standards branch, in turn, also declined jurisdiction stating that DeJong should file his complaint under B.C.'s employment standards legislation.

DeJong apparently filed a timely complaint under the *Act* and the delegate determined that the *Act* applied. The delegate held that: "Because the work was performed in B.C. and because [the Employer] does not maintain a permanent base of operations in Alberta, [DeJong's] employment falls under B.C. jurisdiction" (Determination, page 1). For its part, the Employer contests the delegate's finding that it does not have a "permanent base of operations in Alberta". Indeed, the uncontradicted evidence before me unequivocally indicates that the Employer *does,* in fact, have a permanent business presence in Alberta.

I should note, at this point, the fact that both the federal and Alberta employment standards authorities declined to accept DeJong's complaint on jurisdictional grounds does not, in my view, determine the matter of jurisdiction. Ultimately, it falls to the courts to settle these sorts of jurisdictional disputes. DeJong's complaint may well fall under federal jurisdiction because the nature of the work undertaken by the Employer (aircraft maintenance and repair) could be considered to be an integral part of the federal government's exclusive constitutional authority

with respect to aeronautics--see *Johannesson v. West St. Paul,* [1952] 1 S.C.R. 292; *Construction Montcalm Inc. v. Minimum Wage Commission,* [1979] 1 S.C.R. 292; *Northern Mountain Helicopters Inc. v. W.C.B. et al.,* Vancouver Registry No. A972432, October 30th, 1998 (B.C.S.C.); *International Express Aircharter Ltd.,* B.C.E.S.T. Decision No. D268/99.

Further, even assuming that the Employer's operations are governed by provincial, rather than federal, employment standards legislation, I am not satisfied that the British Columbia *Act* applies in this case simply because DeJong's "work was performed in B.C.". The *Act* may apply even though the work in question may have been undertaken outside the province (see *Zedi,* B.C.E.S.T. Decision No. D308/96; *G.A. Borstad Associates Ltd.,* B.C.E.S.T. Decision No. D339/96; *Finnie,* B.C.E.S.T. Decision No. D363/96). For example, in *Borstad,* the Tribunal held that the *Act* governed all work undertaken by Borstad's employees even though about 20% of that work was undertaken outside British Columbia. In the present case, there is no evidence before me regarding the amount of the Employer's work that is undertaken outside Alberta although it appears that the bulk of the Employer's work is undertaken in Alberta. Accordingly, and by analogy, Alberta's employment standards legislation may well apply in this case even though some percentage of the Employer's work is undertaken in British Columbia.

In order for the B.C. *Act* to govern DeJong's employment there must be a "sufficient connection" between the employer and the employee, on the one hand, and the province of British Columbia, on the other (see *Can-Achieve Consultants Ltd.,* B.C.E.S.T. Reconsideration Decision No. D463/97; *Xinex Networks Inc.,* B.C.E.S.T. Decision No. D575/98). Some of the factors that are relevant to this latter inquiry include 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.

In this case, the Employer is headquartered in Alberta, most of its employees (including DeJong) are Alberta residents who were hired in, and paid from, Alberta. As I understand the situation, most of the Employer's activities are undertaken in the province of Alberta. It must be remembered that DeJong's work in British Columbia was pursuant to a *temporary* short-term assignment. The fact that DeJong worked *only* in British Columbia flows more from the fact that he was discharged a mere 2 weeks after having been hired than from any prior contractual agreement that DeJong would work exclusively, or even primarily, in British Columbia. In many respects, this case is similar (indeed, it is almost a mirror image) to *Amber Computer Systems Inc.* (B.C.E.S.T. Decision No. D216/00) where the Tribunal held that the *Act* governed the employment of certain British Columbia residents even though much (if not most) of their work was undertaken in the state of Wisconsin on a "temporary assignment" basis.

In my view, the delegate erred in determining that the Act applied to DeJong's temporary work assignment in British Columbia based solely on the *situs* of that work. However, I am not in a position to fully address the jurisdictional question simply because I do not have before me all of the relevant information that must be considered in order to determine the jurisdictional issue. Accordingly, I propose to refer this matter back to the Director for further investigation.

ANALYSIS: WAGE DEDUCTIONS

In the Determination (page 2), the delegate noted that that the Employer did not provide any information with respect to the matter of the wage deductions. The Employer, for its part, says that the only communications it had with the delegate were in regard to the jurisdictional issue. I cannot resolve this conflict in the evidence given the dearth of material before me.

It may well be that the Employer was entitled to deduct the monies in question if DeJong gave his written authority to the Employer to do so--in which case, the deductions might constitute "credit obligations" within section 22(4) of the *Act.* It appears, although this is far from clear, as though DeJong accepts that the Employer was lawfully entitled to deduct $270 from his pay.

I am unable to assess, based on the material before me, whether some or all of the deductions were lawful. Thus, and since the jurisdictional question is being referred back to the Director in any event, the matter of the wage deductions can also be reinvestigated at the same time assuming, of course, that the Director concludes the *Act* applies.

ORDER

Pursuant to section 115(1)(b) of the *Act,* I order that this matter be referred back to the Director for further investigation. Following that further investigation, and if appropriate, the Director may vary or cancel the Determination in accordance with section 86 of the *Act.*

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal