

An appeal

- by -

Herschel Rick Misener
("Misener" or "employee")

- 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: Paul E. Love

FILE No.: 2001/412

DATE OF DECISION: September 26, 2001

DECISION

OVERVIEW

A delegate of the Director of Employment Standards issued a Determination, pursuant to the Employment Standards Act (the “*Act*”), R.S.B.C. 1996, c. 113, finding that it had no jurisdiction to investigate the complaint of Rick Misener. While Mr. Misener lived in British Columbia, he worked for a company based in Ontario, which performed services in the U.S market and in other provinces in Canada. The Delegate ceased to investigate the complaint of Mr. Misener once the Delegate determined that there was no jurisdiction in British Columbia. I confirmed the decision of the Delegate, as the employee did not identify any error in the findings of the Delegate concerning the location of the employee, location of the employer, or location of the performance of work. Here there was no sufficient connection with the Province of British Columbia in order to give jurisdiction to the Delegate to determine the claims of the employee.

ISSUE

Did the Delegate err in determining that the Director had no jurisdiction to investigate the complaint of Mr. Misener?

ARGUMENT

Mr. Misener argues that the facts were not presented and not investigated properly. He complains that the Delegate did not clearly explain the jurisdictional issue and seemed to have his mind made up. Mr. Misener would like the case “investigated thoroughly and no rock unturned to determine proper jurisdiction and the amount owed to me”.

The employer argues that the burden is on the appellant to demonstrate error, and the task of the Tribunal is not to “re-investigate” the facts. The delegate in his written submission argued that it thoroughly investigated the issue of jurisdiction.

THE FACTS AND ANALYSIS

Misener was employed by Inweld Canada as their technical service manager to sell, develop and train customers on new procedures for their welding project. Mr. Misener resided in British Columbia. He worked , primarily in United States of America, for the employer. The employer’s offices are located in Ontario. The Delegate determined that there was no jurisdiction to investigate the complaint. The Delegate relied upon the decision of the Tribunal in *Marchant*, *BCEST #D233/96*. The Delegate held that there was a presumption that the legislature did not intend the extra-territorial effect of an enactment, unless it did so expressly. The Delegate referred to section 119 of the *Act* and the reciprocal enforcement of extraprovincial certificates. The Delegate also referred to section 2 of the *Act* and a statutory purpose “to ensure

employees in British Columbia receive at least basic standards of compensation and conditions of employment". The Delegate held that simply because an employee lived in British Columbia, did not give the Director jurisdiction to investigate a complaint.

In an appeal under the *Act*, the burden lies with the appellant, in this case the employee, to identify an error in the Determination such that I should vary or cancel the Determination. In this case, the Delegate analyzed fully the facts and found that while the employee lived in British Columbia, the employer was an Ontario based company, which carried on an international business, and business in other provinces of Canada. The only connection with British Columbia is that the complainant resides in British Columbia. The employee has not alleged further facts which show that the Delegate erred in the findings with regard to the location of the employee, the location of the work or location of the employer.

In order for the British Columbia legislation to apply there has to be a connection between the employment obligations and the jurisdiction: *RE Xinex Networks Inc., BCEST #D575/98*. Sometimes that connection is satisfied by the physical presence of the workplace within British Columbia, and sometimes with the presence of the employer in British Columbia, and the performance of work within British Columbia and abroad. In this case the only connection is the physical presence or residence of the employee within the province. This is not a sufficient connection for the application of the *Act* to the employment relationship between the parties. The Director does have the discretion to refuse to investigate a complaint if the *Act* does not apply to the complaint (see s. 76(2)(b)). In this case, the *Act* does not apply to the complaint because the complaint is not one that is connected with an employment relationship within British Columbia.

ORDER

Pursuant to section 1215 of the *Act*, I confirm the Determination dated May 9, 2001

Paul E. Love
Adjudicator
Employment Standards Tribunal