

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

Xinex Networks Inc., In Receivership
("Xinex")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE No.: 98/647

DATE OF DECISION: December 29, 1998

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Jean Davenport (“Davenport”) of a Determination which was issued on September 21, 1998 by a delegate of the Director of Employment Standards (the “Director”) in a matter involving Xinex Networks Inc., In Receivership (“Xinex”). In that Determination the Director found Xinex had contravened Sections 17, 18, 40 and 63 of the *Act*, concluded wages and interest were owing to former employees of Xinex in an amount of \$421,873.10 and ordered those wages to be paid. The Determination attached a spreadsheet which listed the names of former employees to whom wages were owed and the amounts each of those former employees were owed. Davenport’s name was not on that spreadsheet, although she was included in the distribution list for the Determination as one of the Directors/Officers of Xinex.

Davenport has appealed the conclusion of the Director that she was not an employee of Xinex for the purposes of the *Act*. The Tribunal has reviewed the appeal and has decided an oral hearing is not required in this case.

ISSUES TO BE DECIDED

The issue in this appeal is whether Davenport was an “employee” within the meaning of the *Act*. There are two aspects to this appeal: first, whether her employment was within the constitutional jurisdiction of the *Act*; and second, whether her employment was excluded from the *Act* by reason that she was a Director/Officer of Xinex. The second aspect of the appeal will only be considered if I find Davenport’s employment to be within the constitutional jurisdiction of the *Act* and, because this aspect has not been fully addressed by either party in their submissions on this appeal, will require further submissions.

FACTS

The facts are as follows:

1. Xinex was engaged in high tech research and development. Its office and principal place of business was in New Westminster, British Columbia.
2. On or about May 11, 1995, Davenport executed a Contract of Employment with Xinex, which is described in the document as “a Washington State corporation and a wholly owned subsidiary of **Xinex Labs Inc.**, a British Columbia corporation”. At the time the contract of employment was executed Davenport was resident in Santa Clara, California and her employment duties with Xinex were primarily performed from her place of residence. There is no evidence that would allow me to conclude the contract was negotiated and entered into in the Province of British Columbia.
3. Under the contract, Davenport held the position of Vice President, Marketing and Sales, reporting to the President of Xinex Labs Inc. and was responsible for “managing Xinex’s marketing and sales effort”. She directed and managed a marketing and sales staff who worked at its office in New Westminster and at other locations across North America, including Ontario, New York, Florida, Texas, Illinois and California.

4. Under paragraph 18 of the contract Davenport and Xinex agreed that it would be governed by the laws of the State of Washington.
5. Davenport commenced her employment on June 1, 1995. During her employment she had daily communication with the New Westminster office by telephone and claims to have had some physical presence in British Columbia relative to her employment duties, although no evidence of the nature or scope of that presence has been provided.
6. She was paid in United States dollars and Xinex made remittances on her behalf to the relevant American authorities as required by American payroll regulations. Davenport paid taxes on her income to the government of the United States.
7. Xinex went into receivership on June 5, 1998 and Davenport's employment was terminated June 6, 1998.

ANALYSIS

In *Can-Achieve Consultants Ltd.*, BC EST #D463/97 (reconsideration of BC EST #D099/97), the Tribunal examined the constitutional limits of the *Act*. While noting, as Davenport does in her submission, that the definitions of "employee", "employer" and "work" in the *Act* 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)

The Tribunal will have constitutional jurisdiction 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. In respect of this last factor, the material in the file shows that Davenport has filed an identical wage claim with the Department of Industrial Relations, Division of Labor Standards Enforcement in San Jose, California and that agency has accepted jurisdiction over the claim.

Davenport listed several factors in her submission which she said supported a conclusion her employment was "sufficiently connected" to the province. I find, however, that the factors listed by Davenport are either not relevant because they are unrelated to employment or are not helpful to her on the question of whether, for jurisdictional purposes, there was sufficient connection between her employment and the province of British Columbia.

On the facts before me, I am regrettably unable to conclude that Davenport's employment was sufficiently connected to the province to bring her within the meaning of "employee" in the *Act*. The fact that her residence and usual place of employment were outside the province is determinative.

As a result of this conclusion, it is not necessary to consider whether her employment was excluded from the *Act* by reason that she was a Director/Officer of Xinex.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated September 21, 1998 be confirmed in respect of its conclusion that Davenport is not an employee within the meaning of the *Act*.

David Stevenson
Adjudicator
Employment Standards Tribunal