Employment Standards TRIBUNAL

An appeal

- by -

Randy Saueracker
- and –
Laura Saueracker
Jointly operating 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.: 2001/728

DATE OF DECISION: December 18, 2001

DECISION

OVERVIEW

This an appeal filed by Randy Saueracker and Laura Saueracker, jointly operating as "RALA Associates" (the "Employers"), pursuant to section 112 of the *Employment Standards Act* (the "*Act*"). The Employers appeal a Determination that was issued by a delegate of the Director of Employment Standards (the "Director") on November 17th, 2000 pursuant to which the Employers were ordered to pay their 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 Employers pursuant to section 98 of the *Act* and section 29 of the *Employment Standards Regulation*.

This matter comes back before me following further investigation by the Director's delegate which was conducted pursuant to an order made by me under section 115(1)(b) of the *Act*--see B.C.E.S.T. Decision No. D399/01 issued on July 23rd, 2001.

The relevant facts are more fully set out in my earlier decision. Briefly, the Employers supply skilled aircraft maintenance personnel to firms in British Columbia and Alberta on a temporary basis. DeJong, an Alberta resident, was hired in Alberta (and signed an employment contract in Alberta) to undertake a temporary work assignment in Kelowna, British Columbia; the Employer's client was a firm known as "Kelowna Flightcraft". While working in Kelowna, DeJong resided in a local hotel and was paid a *per diem* expense allowance. DeJong was on the job in Kelowna for only about 2 weeks when his employment was terminated for cause.

The Employers appeal the Determination on the ground 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 (a position the Employers had also taken during the delegate's initial investigation--see Determination, page 2). Alternatively, the Employers 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 Employers to DeJong and which DeJong had agreed to repay.

In my previous reasons for decision issued in this matter, I held that the delegate erred in determining that the *Act* applied to DeJong's temporary work assignment in British Columbia based solely on the fact that DeJong's work was undertaken in British Columbia. Since I was unable to conclude, based on the material before was, whether or not the *Act* governed DeJong's employment, I referred the matter of jurisdiction back to the Director for further investigation.

Similarly, since I was not able to determine, based on the material before me, whether some or all of the wage deductions were lawful, I also referred that latter question back to the the Director to be further investigated if the *Act* was determined to apply to DeJong's employment.

THE DIRECTOR'S FURTHER INVESTIGATION

By way of a letter dated July 30th, 2001, the Director's delegate advised the Employers that "the jurisdictional issue will be addressed by our policy advisor" and asked for further copies of any written authorization given by DeJong with respect to the wage deductions in question. According to the delegate's submission to the Tribunal dated and filed October 15th, 2001, the Employers "did not respond to this attempt at contact by us and did not provide additional evidence on the case pursuant to our request". The delegate's July 30th letter was the one and only attempt to contact the Employers during the reinvestigation process.

With respect to the matter of jurisdiction, the delegate's October 15th submission continues: "...we have reviewed the matter, and confirm our position as enunciated in the Determination". The delegate did not take issue with any of the factual assertions made by the Employers which were set out in my earlier reasons for decision.

The only other submission from the delegate is dated November 26th, 2001 in which the delegate states:

> We cannot comment further on the jurisdiction issue. B.C. has accepted it, Alberta has declined it. The Director's position on it has not changed from the Determination...

Similarly, in the November 26th submission, none of the Employer's factual assertions touching on the jurisdictional question is challenged. Mr. DeJong has not filed any submission with the Tribunal and, accordingly, I assume that he does not challenge any of the relevant factual assertions made by the Employers with respect to the jurisdictional issue.

THE JURISDICTIONAL ISSUE

It bears repeating that the only basis upon which the Director initially asserted jurisdiction was as follows:

> 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)

The first assertion, namely, that the work was undertaken in British Columbia, is not disputed, however, as noted in my earlier reasons, the Employers *do*, in fact, "maintain a permanent base of operations in Alberta".

Although not relevant to the jurisdictional question, it should perhaps be noted that DeJong himself apparently did not consider his employment to be governed by the *Act*--he only filed his complaint under the *Act* after having first unsuccessfully filing complaints under the federal, and then Alberta's, employment standards legislation. DeJong appears to have been caught in a

jurisdictional "maze" in which only British Columbia's Employment Standards Branch is prepared to offer him a safe harbour. However, as I noted in my earlier reasons: "...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."

Thus, despite the delegate's attempts to further investigate this matter (which have largely been frustrated by the Employer's lack of cooperation), the following facts remain uncontested (I quote from my earlier reasons):

> 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...
>
> 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...
>
> 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.

The *Act* cannot be said to have governed DeJong's temporary employment in British Columbia unless there was 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. The *only* factor auguring in favour of British Columbia jurisdiction is the fact that the work in question was undertaken in this province. Each and every other factor suggests that the *Act* does not apply in this case. This case is essentially a mirror image of *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 light of the foregoing jurisdictional considerations and the uncontested facts before me, I am of the view that DeJong's employment was not governed by the *Act* and that DeJong's complaint should have been dismissed pursuant to section 76(2)(b) of the *Act*.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be cancelled.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal