Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Jerry Becker, Operating as Becker's Pilot & Hotshot Services

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: John M. Orr

FILE No.: 2001/657

DATE OF DECISION: November 28, 2001

DECISION

OVERVIEW

This decision relates to an application by Jerry Becker ("Becker") pursuant to Section 116 (2) of the *Employment Standards Act* (the "*Act*") for reconsideration of a Decision #D406/01 (the "Original Decision") that was issued by the Tribunal on July 26, 2001.

Becker operates a pilot and trucking business in the Peace Region. He employed a Mr. Lamb as a pilot and hotshot driver and swamper. During his employment Lamb crossed the provincial boundary into Alberta on approximately 12 occasions during his 5 1/2 months of employment. When Lamb made a claim for unpaid wages Becker argued that his business is a federal undertaking and therefore not subject to the British Columbia *Employment Standards Act.* The Director did no accept this submission and determined that the normal and habitual activities of Becker's business occur within the province and therefore Lamb's employment was governed by the *Act.*

Becker appealed the Director's determination to the Tribunal. The first and primary ground for the appeal was that the Director had no jurisdiction because the business was a federal undertaking. The second involved a dispute about the number of hours worked by the complainant.

Following a hearing on June 25, 2001 the adjudicator on behalf of the Tribunal found that the Director did have jurisdiction and that on the issue of hours worked that Becker had not met the onus of showing that the findings of the Director were wrong. The determination was confirmed.

Becker has now requested that the Tribunal exercise its discretion to reconsider.

ISSUES

Becker has set out five grounds upon which he asks this reconsideration panel to set aside the original decision and the determination. Those grounds are as follows:

1. Jerry Becker asks that the Tribunal reconsider the above decision BC EST #D406/01 rendered by Mr. David B. Stevenson dated July 26th 2001.

2. The Adjudicator erred in his decision in the above matter in that he did not consider all the evidence that was presented.

3. The adjudicator did not consider the evidence properly that was submitted by Becker's (sic) in that it is the issue of **Federal Jurisdiction.**

4. The Adjudicator failed to dismiss the hours of work worked in Alberta, as BC has no jurisdiction for hours worked in Alberta.

5. The Adjudicator never dealt with all the issues of the Appeal, and did not have all the evidence in his possession.

In a subsequent letter (2001.10.04) the appellant stresses that "one very important point was missed" in the decision. He submits that, even if the employer is not a federal undertaking and is generally governed by the British Columbia *Employment Standards Act*, the A*ct* does not have extra -provincial application and its provisions cannot be applied to work performed by an employee outside of the province and British Columbia. This very important point seems to be an elaboration of item 4 in the application for reconsideration.

ANALYSIS

The exercise of the reconsideration discretion under section 116 of the *Act* is a two-stage process. The first stage is for the panel to decide whether the matters raised in the application for reconsideration in fact warrant reconsideration. In deciding this question the Tribunal considers and weighs a number of factors such as whether the application is timely, whether it is an interlocutory matter, and whether its primary focus is to have the reconsideration panel effectively "re-weigh" evidence tendered before the adjudicator of the original decision

I am satisfied that this application meets the first test, at least in part. Much of the application seeks to renew the same arguments as were presented to the Director and to the adjudicator and to that extent I do not intend to reconsider the decision of the adjudicator. However, I am prepared to address the issue raised in this application of the extra-provincial application of the *Act*. I do this only because that one point is not addressed expressly in the original decision.

Points 1, 2, 3, and 5 of the application for reconsideration address evidentiary issues. As the Director points out “Becker's has alleged that the adjudicator did not have all the evidence in his possession at the time of the appeal, however, no new evidence has been provided in the reconsideration application. The application has only provided the same evidence and information that was before the original adjudicator.” The application does suggest that the adjudicator may have failed to consider some of the evidence presented.

To the extent that this application for reconsideration seeks a reassessment of the evidence I am satisfied that the Director’s delegate and the adjudicator had the opportunity to assess and weigh the evidence in person. Both the Director’s delegate and the adjudicator have very carefully and clearly set out the reasons for their assessment of the evidence, and applied a rational approach to the weighing of the evidence. The adjudicator made careful findings of fact and applied the proper legal principles in making his decision. It is now a well-

established principle of this Tribunal that we will not exercise the reconsideration discretion in such circumstances.

However, as I noted above, the original decision does not address the issue in Point #4 – the extra-provincial application of the Act. The original decision finds that Becker's business is not a federal undertaking and is therefore subject to the *Act.* The adjudicator has made a careful and well-reasoned decision on this point and I am not persuaded that there are any grounds to disagree with this finding. The question remained however in regard to the work performed by the employee in the province of Alberta and this point was not directly addressed in the original decision.

The extra provincial application of the *Act* was addressed extensively in the reconsideration decision *Can-Achieve Consultants Ltd* (1997) BCEST #D463/97 by a three-member panel of the Tribunal. In that decision the Tribunal also referred to a number of previous decisions of the Tribunal that held that the *Act* could have extra provincial application under certain circumstances: *Zedi* BCEST #D308/96; *Borstad* BCEST #D339/96; *Finnie* BCEST #D363/96. Since that time the issue has also been considered in *Amber Computer Systems Inc.* BCEST #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 *Double 'R' Safety Ltd.* BCEST #D192/01 the employee was a BC resident but also worked on occasion in Alberta. The Tribunal found that there was a substantial and real connection to British Columbia and that the employment was governed by the *Act.*

I do not find it necessary to review all the circumstances in the above-mentioned cases, as it is clear in this case that the work performed by the employee was incidental to his primary employment, which was in the province of British Columbia. The employer's place of business was in British Columbia. The employee was a resident of British Columbia and it was his usual place of employment. The employee was required to work both within the province and outside of the province. His work outside of the province was of a brief duration and directly related to his regular employment in British Columbia. I am satisfied that on the authorities cited above and on the facts found by the Director and the adjudicator that the *Act* was properly applied in this case.

The advocate who prepared the submission on Becker's behalf gave an example that he says he uses in seminars. He says "if an employee works eight hours in Alberta and crosses the Alberta/BC border and works for eight hours in BC, then legally he would earn sixteen hours of straight time". It is most unfortunate if this is the advice that he is giving because it is clearly wrong if the employee's employment has a substantial and real connection to British Columbia. If he is to present seminars on the subject perhaps a review of the above noted authorities would be helpful.

While it is not necessary to this decision it is my opinion that in certain circumstances more than one jurisdiction may govern the employment situation. An employer may have to ensure that the employment standards of each jurisdiction are complied with. For example, an employee primarily working in British Columbia would be entitled to all British Columbia statutory holidays but if he were to be in Alberta at the time of an Alberta holiday he may also be entitled to the benefit of that statutory holiday. There may be occasions where there is concurrent jurisdiction.

In conclusion I am satisfied that in this case there was a real and substantial connection to the province of British Columbia and that the *Act* was properly applied.

ORDER

Pursuant to Section 116 of the Act the application to reconsider the decision of the adjudicator is granted but I decline to vary or cancel the original decision and it is confirmed.

John M. Orr
Adjudicator
Employment Standards Tribunal