

An appeal

- by -

Sunshine Cabs Limited/Dalvinder Jawandha,
Hossein Ataei associated corporations
("Sunshine Cabs" or the "Appellant")

- 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: Ib S. Petersen

FILE No.: 2003A/253

DATE OF DECISION: January 27, 2004

DECISION

SUBMISSIONS

Mr. D.C. Creighton	counsel, on behalf of Sunshine Cabs
Mr. Hamid Mottaghian	on behalf of himself
Ms. Joanne Kembel	on behalf of the Director

OVERVIEW

This is an appeal by the Appellant, Sunshine Cabs, pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), of a Determination of the Director’s Delegate issued on August 14, 2003 (the “Determination”). In the Determination, the Delegate concluded that Mr. Hamid Mottaghian, who had worked as a taxi driver from October 1993 through September 2002, was an employee, not an independent contractor, and was owed \$12,492.01 on account of statutory holiday pay, vacation pay, compensation for length of service, business expenses and interest.

A hearing was held on April 23, 2003. In the Reasons for the Determination dated July 31, 2003, attached to the Determination, it is apparent that the issues before the Delegate were four fold: first, whether Mr. Mottaghian was an employee or an independent contractor; second, the identity of the employer (Sunshine Cabs, the owners of the taxi driven by Mr. Mottaghian or a combination of those); three, whether Mr. Mottaghian quit or was fired; and, four, quantum.

In the proceedings before the Delegate, the Appellant did not take issue with Mr. Mottaghian’s employee status. Its position was that he was an employee of the taxi owners. The taxi owners’ position was that he was an independent contractor. As suggested, the Delegate concluded that the relationship between the parties was one of employer-employee. The Delegate based her conclusion on the language of the *Act* and various common law tests often utilized in making determinations of this nature.

The Delegate determined that Mr. Mottaghian was an employee of both Sunshine Cabs and the two taxi owners in question. In her view they were associated employers under the *Act*. The Delegate explained: “Together they own the vehicles, dispatch the drivers, and otherwise run a taxicab company. Each owner shares control of his vehicle with Sunshine.”

The Delegate did not accept that the Mr. Mottaghian quit his employment. The Delegate considered the explanations put forward by Mr. Mottaghian and the Appellant. Sunshine Cabs’ view was that he “simply faded away.” The Delegate accepted that Mr. Mottaghian--who had worked as a driver for some nine years, working long hours, relied on his earnings from Sunshine Cabs as his main source of income--was told that there was no room for him in the company and was, in fact, terminated.

ISSUES

The issues raised by the appeal are:

1. Whether Mr. Mottaghian was an employee or an independent contractor?
2. Whether Sunshine Cabs was an associated employer with the taxi cab owners under Section 95 of the *Act*? and
3. Whether new evidence in relation to Mr. Mottaghian's termination ought to be considered?

ARGUMENT

The Appellant argues that the Director erred in law and says that new evidence has become available which was not available at the time of the Determination.

The emphasis in the appeal is on the (new) argument that Mr. Mottaghian is an independent contractor.

The Appellant also attacks the conclusion under Section 95 and says: "The extent of s. 95 could not be interpreted as a basis for disregarding the separate legal entity of the corporation from the shareholders..."

Finally, the Appellant takes issue with Mr. Mottaghian's termination. It says that there is evidence that was not before the Delegate because Sunshine cabs was represented by a layperson who was not aware of the relevance of the evidence in the outcome. This evidence was that Mr. Mottaghian worked in conjunction with another taxi driver to obtain their own taxi cab license. They failed and blamed Sunshine Cabs and set about to obtain compensation on the basis of a forced termination.

The Delegate and Mr. Mottaghian argue that the Determination should be upheld.

FACTS AND ANALYSIS

As has been noted in many decisions of this Tribunal, the onus is on the Appellant to satisfy the Tribunal that the Delegate erred. I have carefully considered the material on file, including the submissions and documents filed earlier. I am of the view that the appeal must be dismissed.

I turn first to the second and third grounds of appeal. In my view there is little merit to these grounds.

Section 95 of the *Act* reads:

Associated employers

- 95.** If the director considers that businesses, trades or undertakings are carried on by or through more than one corporation, individual, firm, syndicate or association, or any combination of them under common control or direction,
- (a) the director may treat the corporations, individuals, firms, syndicates or associations, or any combination of them, as one employer for the purposes of this Act, and
 - (b) if so, they are jointly and separately liable for payment of the amount stated in a determination, a settlement agreement or an order of the tribunal, and this Act applies to the recovery of that amount from any or all of them. It is, therefore, clear that the

appellant's argument that Section 95 does not provide the "basis for disregarding the separate legal entity of the corporation from the shareholders," is entirely wrong. It is, in fact, exactly the purpose for which it is there.

I also reject the attempt--as it is characterized in the appeal-- to introduce new evidence. I am not satisfied that the evidence was not available at the time of the hearing before the Delegate. The fact that the Appellant was represented by a layperson who was not aware of the significance of the evidence, is, in my view, of no consequence.

I now turn to the argument that Mr. Mottaghian was an independent contractor and, thus, outside the protection of the Act. The Appellant did not take issue with his status at the initial hearing.

As often stated by this Tribunal and others, the application of the statutory definitions of "employee" and "employer" is not as easy as one might expect in the context of employment standards. It is well established that the basic purpose of the *Act* is the protection of employees through minimum standards of employment and that an interpretation which extends that protection is to be preferred over one which does not (*Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986). With those principles in mind, a useful summary (in my view) is set out in my decision in *Knight Piesold Ltd.*, BCEST #D093/99:

"Deciding whether a person is an employee or not often involve complicated issues of fact. With the statutory purpose in mind, the traditional common law tests assist in filling the definitional void in Section 1. The law is well established. Typically, it involves a consideration of common law tests developed by the courts over time, including such factors as control, ownership of tools, chance of profit, risk of loss and "integration" (see, for example, *Wiebe Door Services Ltd. v. Minister of National Revenue* (1986), 87 D.T.C. 5026 (F.C.A.) and *Christie et al. Employment Law in Canada* (2nd ed.) Toronto and Vancouver: Butterworth). As noted by the Privy Council in *Montreal v. Montreal Locomotive Works*, [1947] 1 D.L.R. 161, the question of employee status can be settled, in many cases, only by examining the whole of the relationship between the parties. In some cases it is possible to decide the issue by considering the question of "whose business is it"."

The Appellant suggests that from the "lease arrangement" and other evidence is clear that Mr. Mottaghian enjoyed a significant degree of independence and freedom in the operation of the taxi, which was owned by a separate legal person. The Appellant points to the following in support of its position:

1. Mr. Mottaghian was not paid wages. He was responsible for the lease payments to the Appellant whether he worked or not. The Appellant negotiated or fixed the lease rates.
2. He was responsible for CPP, WCB and income taxes.
3. He paid \$1.00 per shift to an accident fund.
4. Mr. Mottaghian could drive for his personal clients.
5. Mr. Mottaghian set his own hours.
6. Given fixed lease payments, his profit and/or loss depended on how hard he worked.
7. He drove one of 40 taxis belonging to different owners. The Appellant provided only dispatch services to the owners and drivers.

Mr. Mottaghian obviously does not agree with the Appellant's argument. He says, in response:

1. The Appellant set the lease rates. The lease was paid to the Appellant, not the taxi owner. The Appellant provided drivers with credit card slips, receipts and driver sheets.
2. Mr. Mottaghian was employed as a road supervisor by the Appellant for which he was paid \$100 per month and \$200 for cell phone.
3. He agrees that he was responsible for CPP, WCB and income taxes. He says, however, that EI premiums were remitted and taxi owners issued T-4s.
4. He says that his hours were, in fact, recorded and scheduled (and attaches several "Sunshine Cabs Daily Running Sheets).
5. The appellant regulated the conduct of its drivers: dress code, shifts, vehicle cleaning, driving for personal clients and discipline.
6. He went to work wondering if he was going to lose or earn money. He says he witnesses the manager give better trips to his friends.
7. Mr. Mottaghian takes issue with the assertion that he was working with another person to obtain a taxi licence.

Having carefully considered the final ground of appeal, based on the submissions and the material on file, I am of the view that it cannot succeed. I am not persuaded that the Delegate erred.

The Delegate considered and based her Determination on the definition of "employee" and "employer" in the *Act*. It appears, as well, that she also considered the definition of a "taxi driver" and notes that lease drivers are specifically regulated in the *Employment Standards Regulation* (Section 37.1). Finally, the Delegate considered the various common law tests. The Delegate accepted that none of the tests are independently determinative and that all of the circumstances have to be considered.

The factual basis for her Determination includes the following:

- The Appellant exercised control over Mr. Mottaghian through the dispatch system. If the Appellant failed to dispatch him, his earning were affected.
- Towards the end of the relationship, the Appellant denied Mr. Mottaghian a taxi, thus depriving him of the ability to earn a living.
- The Appellant set the lease rate.
- Although Mr. Mottaghian had personal customers, the bulk of the customers are the Appellant's and came to him though the dispatch system.
- Complaints against drivers are directed through the Appellant.
- The Appellant owns the significant tool, the dispatch system and the corporate identity. The (associated) Employer--the taxi owner/shareholder--owns the taxi. The responsibility for the care, maintenance and insurance rests with the Appellant or the taxi owner.
- Mr. Mottaghian has no significant investment.

In my view, considering the legal principles summarized above, these and other facts point to the existence of an employment relationship, not an independent contractor relationship. To suggest, for example, that Mr. Mottaghian set his own hours, in the context of short term lease arrangements, is disingenuous and, in my view, does not point to contractor relationship.

As mentioned above, I am not persuaded that the delegate erred and, therefore, uphold the Determination.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination, dated July 31, 2003, be confirmed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal