Employment Standards TRIBUNAL

An appeal

- by -

MacLean Kew
("Kew")

- 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

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2010A/180

DATE OF DECISION: March 4, 2011

DECISION

SUBMISSIONS

MacLean Kew	on his own behalf
Michael Nicholas Hills	on his own behalf carrying on business as Summerland Taxi
Joe LeBlanc	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by MacLean Kew ("Kew") of a Determination that was issued on November 26, 2010, by a delegate of the Director of Employment Standards (the "Director"). The Director concluded that the complaint filed by Kew against his former employer, Michael Nicholas Hills, carrying on business as Summerland Taxi ("Summerland Taxi") was without merit and, acting pursuant to section 76, declined to take any further action on it.

2. Kew says the Director erred in law in finding he was a taxi driver as that term is defined in the *Employment Standards Regulation* (the *"Regulation"*) and erred in finding he had been paid for all of the work he performed, which he says included acting as a dispatcher, delivery person and security guard.

3. The Tribunal has discretion whether to hold an oral hearing on an appeal. None of the parties has sought an oral hearing before the Tribunal and we have decided an oral hearing is not necessary in this case. The issues involved in this appeal can be decided from the submissions and the material on the section 112(5) Record.

ISSUE

4. The issue is whether Kew has shown there is any error in the Determination that would allow the Tribunal to interfere with the decision of the Director to refuse to take further action on the complaint.

THE FACTS

5. The Determination includes the following findings and conclusions of fact:

    1. Summerland Taxi operates as a taxi business in Summerland BC.
    2. Kew was employed as a driver for Summerland Taxi from November 11, 2009 until January 2, 2010.
    3. Kew filed a complaint alleging Summerland Taxi had contravened the *Act* by failing to pay all wages for all hours worked by him.
    4. There were two issues raised by the complaint: whether Kew was a taxi driver as that term is defined in section 1 of the *Regulation*; and whether the time Kew spent "on call" was work for which wages were payable.
    5. Kew met the definition of taxi driver under the *Regulation*.
    6. Kew was paid on a 40/60 split of the fares collected on his shift, with 40% of the fares being paid to him.

7. There were no instances where the amount paid to Kew was less than the minimum wage for the hours he was found to have worked.

8. Kew was "on call" while he was on shift but not attending customers.

9. Kew was not required to be on call at a location designated by Summerland Taxi. While "on call", the only requirement placed on Kew was that he remained within a twenty minute radius of Summerland; otherwise Kew was free to do as he wished.

10. The hours Kew was "on call" were not hours worked for which wages were required to be paid because he was not at a location designated by the employer.

ARGUMENT

6. Kew says the Director erred in finding he was a taxi driver. He says he was not an independent contractor, but was an employee. He does not say he did not drive a taxi for Summerland Taxi, but submits he was an employee performing the work of dispatcher, delivery driver and security guard. In respect of the dispatcher work, Kew relies on the evidence that during his shift he was responsible for answering calls from customers. In respect of the delivery work, Kew says he was assigned to deliver auto parts, alcohol and cigarettes around town. In respect of the security work, Kew says that Summerland Taxi expected him to ensure the safety of any Summerland Taxi vehicles parked at his house and of any Summerland Taxi radios/telephones that were in his house during off hours. Kew also says he incurred costs related to the use of his cell phone for Summerland Taxi's business.

7. He submits that the conclusion of the Director that he was free to do what he wanted while on call is unrealistic and ignored all of the responsibilities he had while waiting for and then receiving a call, or calls, from one or more customers.

8. Summerland Taxi and the Director have responded to the appeal.

9. Mr. Hills, responding on behalf of Summerland Taxi disagrees with Kew's characterization of his job; he says Kew's only job was to drive a taxi. In that capacity, he says Kew would answer a two way radio call from a customer which he would complete and be paid for. He acknowledges Kew made deliveries of alcohol and cigarettes to customers, but says he was paid for each delivery he made. Mr. Hills says Kew never delivered auto parts, as he has alleged, and was never asked to use his own personal phone for any reason related to his job.

10. As a general response, the Director says Kew has raised a number of matters in the appeal that were not identified or argued during the complaint process.

11. The Director reiterates the reasoning set out in the Determination for finding Kew was a taxi driver for the purposes of the *Act*. The Director says the *Act* and *Regulation* do not require that a person must lease a taxi cab from the employer or provide his own vehicle for use as a taxi in order to meet the definition of "taxi driver" in the *Regulation*. The Director says the finding made in the Determination is consistent with both the facts and the clear wording of the definition in the *Regulation*. The Director also says there was never a dispute that Kew was an employee and not an independent contractor.

12. The Director also reiterates the analysis and findings made in the Determination concerning whether Kew's "on call" hours should be considered work, as that term is defined in the *Act*, and for which wages are required to be paid.

13. The Director addresses what are considered to be new matters raised for the first time in the appeal: that Kew worked as a dispatcher, delivery person and security guard and provided his cell phone for the employer's use. The Director says none of these matters were "overlooked" as Kew claims, but were not considered in the Determination because they were never raised by Kew. Having said that, the Director says the evidence provided during the complaint process indicated there was no dispatch position in Summerland Taxi; each driver received calls directly from the customer while on shift and responded to them. The Director says there was no indication in the evidence that the few deliveries made by Kew would have altered his status as a taxi driver under the legislation. The matters of the cell phone and the security functions were never previously raised and no evidence was provided in respect of them.

14. In his final reply, Kew makes several comments that are not relevant and do not assist his appeal. Otherwise, he restates, and in some respects expands on, the main points raised in his appeal. I have already outlined his position on those matters, above. The submissions do not add anything further to the issues raised in the appeal.

15. In my view, however, there is one matter that justifies particular comment. Kew takes issue with a statement made in the Director's response about the delegate's experience with the taxi industry. I agree with his concern. There is no evidence in either the Determination or the material contained in the Record that supports the assertion made in the Director's response. A submission on an appeal is not an appropriate place for the Director, or any other party, to either add evidence to the process or supplement the Determination with additional facts or reasoning. If the manner in which the taxi industry operates was relevant to the Determination, the parties should have been alerted to that fact, been provided with any evidence going to that point and been allowed the opportunity to respond. Further, that matter, and any findings related to it, would have to be addressed in the Determination and be open to appeal. Accordingly, I have ignored that assertion in considering the issues raised in this appeal.

ANALYSIS

16. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:

> *112. (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*
>
> *(a) the director erred in law:*
>
> *(b) the director failed to observe the principles of natural justice in making the determination;*
>
> *(c) evidence has become available that was not available at the time the determination was made.*

17. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds. A party alleging a denial of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.

18. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.

19. This appeal does not directly challenge any findings of fact. The appeal squarely raises questions relating to the interpretation of the *Act* and *Regulation*, specifically whether Kew fell within the definition of "taxi driver" in section 1 of the *Regulation* and whether the circumstances under which he was "on call" was work, as that term is defined in the *Act*.

20. The definition of taxi driver reads:

> ***"taxi driver"*** *means a person employed to drive a taxi;*

21. I agree with the Director that the definition is clear. There is no ambiguity in its terms. There is nothing in the definition that would suggest it includes only persons who operate a taxi leased to them by the employer or who supply their own vehicle as a taxi, as Kew submits. If it was the intention of the legislature to include only those persons in the definition it would have been easy enough to craft the definition accordingly. The definition makes no distinction between the two kinds of persons referred to by Kew – the lessee and the owner-driver – and the person who drives a company owned taxi. A reading of the *Act* generally indicates the term "employed" has an expansive meaning that covers a broad spectrum of relationships between those who use the services of persons and those who provide those services and most obviously includes the use of an employee in a traditional employer-employee relationship. The evidence, and the finding made in the Determination, was that Kew was employed by Summerland Taxi as a taxi driver. There was nothing unreasonable in that finding and it must govern my assessment of whether the Director erred in applying those facts to the applicable definition.

22. The interpretation given to that definition by the Director is also supported by a reading of section 37.1 of the *Regulation*, where subsection 37.1(1) is clearly identified as applying to taxi drivers whose employer leases them a taxi and subsection 37.1(4) equally clearly applies where the taxi is not leased to the taxi driver by the employer; the taxi driver contemplated in subsection 37.1(4) is one who has an "employment arrangement" and no lease arrangement which exactly correspond to Kew's circumstances.

23. I find there was no error in law made by the Director in concluding Kew was a taxi driver for the purposes of the *Act* and *Regulation*.

24. Kew argues, however, that he worked as a dispatcher, delivery person and security guard. The difficulty with this position is twofold. First, and primarily, the evidence that is available on this part of the appeal does not support the arguments made. I agree with the Director and Mr. Hills that the evidence does not allow for a finding there was a dispatcher position at Summerland Taxi. The system used by Summerland Taxi was that calls for a taxi went directly to the driver and the driver responded. In my view, while each driver performs a dispatch function, that function is part of the over-all responsibilities of a driver and does not convert a taxi driver into a dispatcher. That is not to say performing dispatch functions has no effect on how the taxi driver position should be viewed and I will have more to say on this later in the decision.

25. There was some evidence that Kew delivered alcohol and cigarettes with the taxi. I accept, however, the deliveries made by him were a small part of his duties as a taxi driver and were insufficient to convert his employment from taxi driver to delivery person. In any event, it is difficult to see how finding he was a delivery driver would alter the Determination, as the material in the Record would indicate he was paid when he made deliveries with the taxi. There is no evidence that Kew exercised a "security guard" function.

26. The second problem, and this concern also applies to the allegation regarding the cell phone use, is that most of these matters were never raised in the complaint process. As I indicated above, the appeal process is not the place for raising new claims and arguments or altering old claims. If Kew wished to make the claims that

are now being advanced, he should have done so in the complaint process and provided evidence and argument to support those claims.

27. This aspect of the appeal is dismissed.

28. The other question raised is whether the Director was correct in finding Kew was not performing work when he was on shift but not attending customers because during those periods he was not *"on call at a location designated by an employer"*. This issue involves a question that falls within the authority of the Tribunal under section 112(1) (a). The question is one of law: whether, on the facts as found, was Kew performing work, as that term is defined in section 1 of the *Act*, when he was not attending customers (see *Britco Structures Ltd.*, *supra*). The relevance of this question is that if the Director was wrong, all of the time Kew spent on shift would fall within the definition of "work" in the *Act* and would attract the requirement to pay wages for that work.

29. As I read the evidence, which at times is not entirely clear or complete, Kew signed in advance to work a particular shift and was, accordingly, obligated to be available for that shift and to perform whatever he was assigned to do during the shift. The Record contains no shift schedule, so I have no specific information indicating the length of each shift, but there is also no indication any of the shifts Kew signed to work was a "split shift". Kew was required to be available to take over the taxi and the radio phone from another driver at the beginning of his shift and, presumably, transfer the taxi and radio phone to another driver at the end of his shift. While on shift, Kew was required, at least, to receive and respond to any calls made by persons wanting the taxi to transport them from one location to another or, in some cases, to make a delivery for them, to complete the task the customer had requested and to record that task in his log. Between customer calls, Kew was free to do what he wished, provided he remained within a twenty minute radius of town. Again, although the evidence is unclear on this point, presumably Kew would retain control of the taxi and would be required to carry the radio phone with him during these periods. The Determination and the Record do not indicate whether Kew was assigned to take a designated break during his shift. The Determination and Record do not indicate whether the time Kew spent driving to the location of the customer for pickup was considered working time. Presumably that could have been up to twenty minutes. While the Director makes no finding of fact on this point, the Record suggests there were very rarely less than eight "on call" periods in a day, which refers to periods of time where Kew was not attending a customer, and there were frequently more than fifteen such periods a day. There is no analysis or finding in the Determination indicating how long each of these "on call" periods were, although the material in the Record suggests most were of quite short duration

30. I agree with the comments in the Determination adopting the view of the Tribunal expressed in *Ana R. Hicks*, BC EST # D031/07, that while the *Act* is remedial legislation and should be interpreted in a way that extends its protection, its words should not be strained to produce an unreasonable result. I disagree, however, that finding Kew was not performing work for periods of time during each of his shifts would produce an unreasonable result in the circumstances.

31. In fact, I find it unreasonable that Kew could be considered to be off work and "on call" while working a scheduled shift.

32. An employee has an expectation that when he or she has been assigned to work a scheduled shift, reports to work that shift, remains available throughout that shift to perform whatever labour and services are required and completes the shift, that employee will be appropriately compensated for committing his or her time and efforts on behalf of the employer for that shift and not simply for spurts of activity that occur during that shift. In the circumstances of this case the evidence shows Summerland Taxi expected Kew to report for

each shift, accept and maintain care and control of the taxi through his shift, carry the radio phone throughout his shift, receive customer calls, respond to each call received and, at the end of his shift, pass care and control of the taxi and radio phone to another driver. Even if Summerland Taxi indicated to Kew he had some freedom of movement between calls, such freedom of movement was, in my view, illusory since it was bounded by geographic limits and by the requirement that Kew would be available to take and respond to every call throughout his shift.

33. It is inconsistent with the purposes of the *Act* stated in section 2, specifically those stated in paragraphs (a), (b), (e) and (f) to find an employee who reports for his or her scheduled shift, as that employee is obligated to do, and is required to remain on the job for the entirety of that shift, performing whatever work is available, may at the end of the day receive wages for only a fraction of the time the employee has, as the employee was required to do, committed to the employer.

34. As well as being unfair to the employee, the idea that an employer can place an employee "on call" several times during a shift has the potentially unexpected and, I am certain, unwelcome result that would work a significant unfairness to the employer. Because the Director considered only those periods where Kew was attending customers to be work, the only logical conclusion is that after each of those periods was complete, under the *Act* Kew would no longer be considered to be at work, but would be off work at the instance of Summerland Taxi and would automatically revert to a state of being on call at a location not designated by his employer. Each period of being "on call" was ended with the receipt of a call from a customer requiring Kew to report for work in accordance with the demands of the call. As a result, each and every reporting for work potentially entitled Kew to the applicable minimum daily hours provided in section 34 for the period he returned to work before being put off work – and "on call" – again: see *Labour Ready Temporary Services Ltd.*, BC EST # D457/99 (Reconsideration denied, BC EST # D426/00). As I have indicated above, there were often as many or more than fifteen such periods in a shift. If each of those attracted minimum daily wage, the ramifications for Summerland Taxi would be enormous in terms of cost. In this respect I note that while taxi drivers are exempted from sections 10, 35, 40 and 42 of the *Act*, their employment is not exempted from section 34. Clearly such a result would be unreasonable and not be justified on fairness considerations and should be avoided. The way to avoid that result is to find Kew was not off work and "on call" when he was not attending to customers, but throughout his shift remained at work.

35. Finally, and in any event, I find the Director has not given sufficient weight to the opening words of the definition of work as *"labour or services an employee performs for an employer whether in the employee's residence or elsewhere"*. The Director has focused on the labour aspect of the work performed by Kew and has apparently failed to recognize the work also involved services a dispatcher would perform in a larger taxicab business. As the Tribunal has recognized in several decisions, the use of technology has significantly expanded the workplace. Kew was required to respond to customers' calls wherever he was. In meeting this requirement of his job, in my view, Kew was doing nothing more away from the workplace than providing the services – waiting for, receiving and responding to calls from customers – that a dispatcher would provide at the workplace and for which the dispatcher would be paid wages for the entire time spent performing those services.

36. For the above reasons, I find the Director erred in law in concluding Kew, in the circumstances, was not at work, as that term is defined in the *Act* in those periods during his shift where he was not attending customers. Rather, I find Kew was at work when he was on shift, except during designated breaks (meal and coffee breaks) where it is shown he was not required to respond to customer calls.

37. Accordingly this part of the appeal succeeds.

ORDER

38. Pursuant to section 115 of the *Act*, I cancel the Determination dated November 26, 2010, and refer the matter back to the Director to address in accordance with this decision.

David B. Stevenson
Member
Employment Standards Tribunal