

An appeal

- by -

Trendtham Group Enterprises Inc. carrying on business as Star Taxi  
(“Star Taxi”)

- 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* (as amended)

**TRIBUNAL MEMBER:** David B. Stevenson

**FILE No.:** 2008A/6

**DATE OF DECISION:** April 1, 2008

## DECISION

### SUBMISSIONS

Ross Davidson, Esq.	on behalf of Trendtham Group Enterprises Inc.
Lloyd Zudel and Jana Zudel	on their own behalf
Jennifer R. Redekop	on behalf of the Director

### OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) brought by Trendtham Group Enterprises Inc. carrying on business as Star Taxi (“Star Taxi”) of a Determination that was issued on December 20, 2007 by a delegate of the Director of Employment Standards (the “Director”). The Determination found that Star Taxi had contravened Part 3, Section 18, Part 5, Sections 45 and 46, Part 7, Section 58, and Part 8, Section 63, of the *Act* and Section 37.1 of the *Employment Standards Regulation* in respect of the employment of Lloyd Zudel and Jane (Jana) Zudel (together, the “Zudels”) and ordered Star Taxi to pay the Zudels an amount of \$11,276.50, an amount which included wages and interest.
2. The Director also imposed administrative penalties on Star Taxi under Section 29(1) of the *Employment Standards Regulation* (the “Regulation”) in the amount of \$1500.00.
3. The total amount of the Determination is \$12,776.50.
4. Star Taxi has filed an appeal of the Determination, alleging the Director erred in fact and law in finding the Zudels were employees of Star Taxi under the *Act* and has asked that the Determination be cancelled.
5. Star Taxi seeks an oral hearing on the appeal.
6. The Tribunal has a discretion whether to hold a hearing on an appeal and, if a hearing is considered necessary, may hold any combination of written, electronic and oral hearings: see Section 36 of the *Administrative Tribunals Act* (“ATA”), which is incorporated into the *Employment Standards Act* (s. 103), Rule 16 of the Tribunal’s Rules of Practice and Procedure and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575. In this case, the Tribunal has reviewed the appeal, the submissions and the material submitted by all of the parties, including the Section 112 (5) record filed by the Director, and has decided an oral hearing is not necessary in order to decide this appeal.

### ISSUE

7. The issue in this appeal is whether the Director erred in finding the Zudels were employees of Star tax under the *Act*.

## THE FACTS

8. There were two issues addressed in the Determination: whether the Zudels were employees of Star Taxi and, if so, whether there were wages owed. The appeal challenges only the conclusion of the Director on the issue of whether the Zudels were employees of Star Taxi. Obviously, if the Director erred on that issue, and the Zudels were not employees of Star Taxi under the *Act*, no wages would be found owing under the *Act*.
9. The Determination sets out some background information. Lloyd Zudel owned and operated a taxi cab, which he drove for Star Taxi. Jana Zudel also drove the taxi cab. Until November 1, 2004 the Zudels were directors and shareholders in Star Taxi. As of that date both ceased to be directors of Star Taxi and disposed of their shares in that company. After November 1, 2004, the Zudels continued to drive the taxi cab for Star Taxi under a Licence issued to Star Taxi by the Passenger Transportation Branch of the Ministry of Transportation (the “PTB”) to provide passenger transportation services with a fleet of up to eleven vehicles. Lloyd Zudel paid Star Taxi a weekly, then monthly, monetary amount for a licence plate that allowed him to operate under the Licence issued to Star Taxi by the PTB. This arrangement was an unwritten one until September 1, 2005, when Star Taxi and Lloyd Zudel signed an agreement setting out the terms and conditions under which the licence plate would be leased to Lloyd Zudel.
10. During the complaint process, the parties provided submissions and extensive documentary evidence, including affidavits from several individuals.
11. The Determination, under the section headed “Argument and Evidence”, contains an extensive review of the facts provided by the parties on the issue which is central to this appeal. Star Taxi challenges some of those facts, and the conclusions based on them. It is appropriate to group the facts, the findings of fact and the challenges to those findings, under the individual headings used in the Determination. I will address only those findings and conclusions of fact that are challenged in this appeal. It should be noted that the Determination indicates the summaries provided in the “Argument and Evidence” section comprise all of the evidence and arguments presented by the parties on the issue of whether the Zudels were employees of Star Taxi under the *Act*.

### *The Lease Agreement*

12. Star Taxi takes issue with the statement in the third paragraph in this section in which the Director says that the licence plate number leased to Lloyd Zudel under the agreement was “owned” by Star Taxi. Star Taxi says that as a matter of fact and law, no taxi company or carrier can “own” a carrier plate or licence.

### *Fares*

13. Star Taxi refers to the statement in the Determination that:

The parties agree that the Company sets the taxi fares and that drivers cannot offer discounts on those fares. The fares that are charged are the standard fares set by the Passenger Transportation Board (PTB) and the Company has no discretion to change those fares. The drivers were told to avoid offering flat rates.

14. Star Taxi says the above statement indicates that fare variation and value was not a matter within the control of Star Taxi and should not have been used by the Director as an indication of the control exercised by Star Taxi over the Zudels.

### ***Equipment and Expenses***

15. Star Taxi contests the reference by the Director in this section that Star Taxi “owns” the taxi licence. Star Taxi also argues that their providing the 2-way radio and debit/credit card machine is irrelevant because the Zudels were free to purchase these items on their own.
16. Similarly, Star Taxi says the requirement to have the Lloyd Zudel provide copies of any and all maintenance and vehicle inspection records is not the Company’s requirement but a requirement of PTB and other regulatory authorities and should not be relevant to the status of the Zudels under the *Act*.
17. Star Taxi takes issue with the finding that the Zudels were prohibited by them from using their taxi cab for personal use. Star Taxi says the use of the vehicle – and limitations on that use – is mandated by the PTB and the *Passenger Transportation Act* and not by Star Taxi.

### ***Operational Control and Direction - Scheduling***

18. This part of the appeal mainly provides an explanation by Star Taxi of the rationale for developing a work schedule and an argument that scheduling is less about “control” than about ensuring compliance with the requirements of regulatory bodies. Star Taxi submits they had less control in respect of scheduling than was found by the Director.
19. The Zudels and the Director have responded to the appeal.
20. In their reply, the Zudels say the suggestion that Star Taxi does not “own” the carrier plate or licence is simply playing with words. They agree that the actual carrier plate is the property of the PTB, but that Star Taxi owns the right to operate those plates through the authority, or Licence, granted by the PTB.
21. The Zudels say that Star Taxi is wrong to assert they did not exercise control over fares which the drivers could charge. They also say the suggestion by Star Taxi that they could have purchased their own 2-way radio and debit/credit machine is untrue and absurd.
22. The Zudels say they were required to follow the work schedule made up by Star Taxi and were reprimanded if they did not. They also say the suggestion that taxi drivers could operate their vehicles longer hours than scheduled ignores the statutory scheme that limits the number of hours which a taxi driver is allowed to drive.
23. The Director also says the use of the term “own” in reference to the licence or carrier plates was to convey the point that once the Licence was issued by the PTB to Star Taxi, they had effective control over the plates, both in terms of to whom such plates would be issued and on what terms and conditions they would be issued.
24. The Director says the matter of setting the fares is largely dealt with in the Determination. The Director says the evidence presented during the complaint investigation that the Zudels used Star Taxi’s 2-way

radio and debit/credit card machine and that any debit/credit charges went through the company's merchant account.

25. The Director points out that the only reference to Star Taxi requiring Lloyd Zudel to provide maintenance and vehicle inspection records is found in that section of the Determination setting out the facts and arguments presented by the parties. The Determination does not indicate that it was relied on as an element of control.
26. The Director says the finding that the Zudels were prohibited by Star Taxi from using their taxi cab for personal use was based on the evidence acquired during the complaint process. The Director says the evidence was that the company had a rule on personal use, under which Lloyd Zudel's taxi cab could only be used for Star Taxi's business and not for any other use, including personal use. The Director says the position of Star Taxi in the appeal is very different from the position which was taken by them during the complaint investigation, which was that there were no rules regarding personal use of the vehicle. The Director also notes that, as a matter of fact, the PTB regulations only bind Star Taxi and Star Taxi imposes those regulations on the Zudels through the control they exert over them.
27. The Director says the position taken by Star Taxi in respect of scheduling is in direct conflict with their position during the complaint investigation, which was that the work schedule was never really enforced and that drivers could easily alter the schedule as they saw fit. The Director also says the evidence acquired and reviewed during the complaint process did not reflect a level of flexibility in adhering to the schedule, but rather that Star Taxi set and controlled, through discipline, the work schedule.
28. Star Taxi has provided a final reply to the submission of the Director. Much of it reiterates the assertions made in the appeal in the first instance.

## **ARGUMENT**

29. The argument of Star Taxi is that the decision of the Director that the Zudels were employees for the purposes of the *Act* is wrong because the Director made errors in analyzing the facts and the law. In this respect, Star Taxi argues the Director's incorrect view of the facts in the areas set out above led to a wrong conclusion on the central issue because a correct view of the facts would have resulted in less weight being given to some factors and greater weight to others, tipping the balance against the conclusion reached by the Director.
30. Star Taxi also argues the Director failed to give sufficient weight to "various factors" or to the written agreement between Star Taxi and Lloyd Zudel as indicating the nature of the relationship between them. Exactly what "various factors" were not given sufficient weight is not clearly identified in the submissions of Star Taxi. In the final reply, Star Taxi has listed what it considers to be the eight "most relevant facts" on the central issue. Many of these facts incorporate what Star Taxi says are matters which are legislatively controlled and not within their control, thus presuming both the correctness of their submission on those matters and that I have the authority to alter findings of fact made in the Determination.
31. In response, the Director argues that the Determination was properly grounded in findings of fact based on, and supported by, the evidence provided by the parties during the complaint investigation. The Director says the basic premise of the appeal, that Star Taxi cannot be said to exercise "control" in respect of those matters which are statutorily imposed or mandated on Star Taxi under the Licence issued by the

PTB or by other regulatory bodies, is not supported by the facts which show that Star Taxi did control the terms and conditions under which the Zudels worked under the Licence issued to Star Taxi.

## ANALYSIS

32. 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.*

33. 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.

34. 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). The Tribunal has adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

35. A key element of this appeal is that the Director has made errors of fact. These are outlined above, but for convenience, I will summarize them:

- (i) the Director erred in stating Star Taxi “owned” the licence, or carrier, plates or the Licence issued by the PTB;
- (ii) the Director erred in stating Star Taxi controlled or set the taxi fares;
- (iii) the Director erred in stating Star Taxi provided the 2-way radio and debit/credit card machine because the Zudels could have purchased their own 2-way radio and debit/credit card machine;

- (iv) the Director erred in stating Star Taxi required Lloyd Zudel to provide copies of any and all maintenance and vehicle inspection records;
- (v) the Director erred in stating Star Taxi prohibited the Zudels from using their taxi cab for personal use; and
- (vi) the Director erred in finding scheduling was a reflection of control, rather than an aspect of the requirement imposed by the PTB on Star Taxi to serve the public.

36. As indicated above, Star Taxi bears the burden of persuasion in this appeal. In the context of the above assertions of factual error in the Determination, that burden requires them to show the alleged errors of fact raise an error of law.

37. As well, even if I were persuaded that the above matters were errors of law, I must still be persuaded that the Director's conclusion on whether the Zudels were employees under the *Act* was, in result, an error of law.

38. Clearly there is no error by the Director in the analytical framework applied to the facts as found. The Director referred to the definitions of "employee", "employer", and "work" in Section 1 of the *Act*, the common law tests and properly noted that the common law tests, while helpful, are subordinate to the statutory definitions and the policy objectives of the *Act*. This approach is consistent with several decisions of the Tribunal, some of which are referred to in the following extract from *Kimberly Dawn Kopchuk*, BC EST #D049/05:

The common law tests of employment status are subordinate to the statutory definitions (*Christopher Sin*, BC EST #D015/96), and have become less helpful as the nature of employment has evolved (*Kelsey Trigg*, BC EST #D040/03). As a result, the overriding test is found in the statutory definitions: that is, whether the complainant "performed work normally performed by an employee" or "performed work for another" (*Web Reflex Internet Inc.*, BC EST #D026/05). Despite the limitations of the common law tests, the factors identified in them . . . provide a useful framework for analyzing the issue.

39. The Tribunal has said that it will consider any factor that is relevant (see *Larry Leuven*, (1996) BCEST No. D136/96). The Director looked at several factors, correctly noting the importance of control factors in assessing the nature of the relationship:

One of the most important factors in distinguishing between an employment relationship and an independent contractual one is the issue of control. In evaluating the degree of control exercised by one party over another, it is imperative to review not only whether one party controls what work is to be done, but also how it is to be done. The issue of control also examines who has the ability to select, discipline and terminate the relationship, as well as the method of remuneration for the work performed.

40. The relative importance of control is not only reflected in the common law approach to the question of employee status, but in Section 1 of the *Act*, which defines an employer to include a person "*who has or had control or direction of an employee*".

41. It also bears repeating that the *Act* is remedial and benefits-conferring legislation and is, in general, to be given a broad and liberal interpretation, as are definitions contained within the *Act*. An interpretation of the *Act* which encourages employers to comply with the minimum requirements of the *Act*, and so

extends its protections to as many persons as possible, is to be favoured over one that does not. (see s. 8, *Interpretation Act*, R.S.B.C. , *Fenton v. Forensic Psychiatric Services Commission* (1991) 56 BCLR (2d) 170, and *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986).

42. Star Taxi has argued that the Director failed to give sufficient weight to the nature of the contractual relationship. The appeal does not, however, elaborate on that argument. The Determination does indicate the Director did consider the contract – the lease agreement – and found it was not particularly useful in determining the issue, because it did not specifically address the kind of relationship that was contemplated by the parties and, in any event, could not be given effect if it attempted to put form over substance. I am not persuaded there is any error in the Director’s analysis of the contract or its effect on the issue.
43. Apart from the argument relating to the alleged failure to “consider the nature of the contract” between Star Taxi and Lloyd Zudel, which I have not accepted, the appeal does not submit the Director failed to consider relevant factors or considered irrelevant factors. The appeal challenges the conclusion of the Director within factors which, by inference, Star Taxi accepts as relevant. The challenge comes primarily by way of challenging findings of fact and conclusions made from those findings.
44. I reject any suggestion that the Director erred in any way in respect of the comments relating to the fares. Star Taxi has misstated the analysis of the Director on whether the Zudels had a chance of profit and carried a risk of loss. The Determination states that the parties agreed Star Taxi set the fares and that drivers were unable to offer discounts on those fares. The Determination also notes that the fares charged were the standard fares set by the PTB. There can be no dispute with those facts; they are entirely correct. It may have helpful if the Determination had said: “... the Company sets the taxi fares for the drivers ...”, but the point of the findings of fact is adequately expressed in the analysis, where the Determination states:
- The complainants had no control over setting the fares and were discouraged by the Company from using flat rates.
45. In other words, the Zudels had no ability to increase the fares, in order to increase their “profit”, nor discount the fares, in order to attract more business. The Zudels were not bound by the fares set by the PTB except to the extent they were required by Star Taxi to comply with the same fare structure that was established by the PTB for Star Taxi. In making this argument, Star Taxi is only saying the Zudels are bound by the same fare structure that binds them. In a very real sense, Star Taxi’s argument in this regard, while not completely accurate from a legal perspective, reflects their appreciation of the high degree of integration of the taxi drivers into their business.
46. In context, however, this point was only one of many factors that led the Director to conclude, “. . . the Company exercised a high degree of influence and control over significant factors that affected the complainants’ earnings.”
47. The first, fourth, fifth and sixth alleged errors summarized above go to the Director’s analysis and conclusion in respect of the control factors. The Director’s analysis of these factors covers nearly six pages of the Determination. I am not persuaded that any of the alleged errors amount to errors of law or in any way affect the Director’s conclusion on the central issue.



48. The first alleged error relates to the director's use of the term "own" to describe the right which Star Taxi had in the licence or carrier plates and the Licence issued by the PTB. Star Taxi says there is an error because "no taxi company or individual can own [in the sense of having property rights to] the carrier plate or the licence". While that may be true, the term "own" is also commonly used in the sense of "having power over" and can be used to identify the claim of the holder of a legal right. In this case and in this sense, Star Taxi owns the legal right, granted through the Licence issued by the PTB, to provide passenger transportation services on the conditions contained in the Licence, and has been given 11 licence, or carrier, plates with which to exercise that right. It is obvious Star Taxi considers it has power over the legal right granted under the Licence, as they dealt with it in that way through the agreement with Lloyd Zudel which allows him to lease their legal right.
49. Even if one can find fault with the use of the term "own" in connection with the plates or the Licence issued to Star Taxi by the PTB, one cannot dispute that issuance of the Licence gave Star Taxi control over the licence plates – a control which is clearly reflected in the lease agreement and which is identified in the Determination.
50. Star Taxi makes a similar argument in respect of the references in the Determination to the maintenance and vehicle inspection records, the personal use of the taxi cab and scheduling. Star Taxi says none of these things can be considered control factors as between them and the Zudels because they are all requirements imposed on Star Taxi by outside authorities.
51. I reject the argument out of hand as it relates to scheduling. The Determination deals comprehensively with that matter and I have not been pointed to any error in respect of it. In sum, the Director found that Star Taxi had control and direction over the work schedule, the assignment of work and the method of work on each shift. This control was exercised by imposing rules regarding dispatching. Star Taxi controlled the work schedule and enforced it by threat of fines and possible suspension or termination. Even accepting the schedule incorporated Star Taxi's obligation to "serve the public", the supervision exercised by them over the schedule, including the disciplinary consequences of non-compliance, is clearly demonstrative of the control which the Director found to exist.
52. I reach the same conclusion in respect of the arguments relating to the requirement to provide maintenance and vehicle inspection records and the personal use of the taxi for substantially the same reasons.
53. In respect of the former, I am cognizant of the response of the Director to this argument – that the challenged reference was not specifically included in the analysis nor referred to as a control factor. The Determination does, however, find that elements of the lease support a finding that Star Taxi exerted a high degree of control over the lessee. One such provision identified in the Determination is that which requires the lessee to maintain their vehicle in a condition satisfactory to the company; that requirement arguably includes the requirement to provide the vehicles maintenance and inspection records.
54. I choose to reject this argument on the basis that while Star Taxi's lease provision might include the requirement imposed on Star Taxi by outside authorities, their supervision of those rules assumes disciplinary connotations and can result in cancellation of the lease agreement and loss of employment. These consequences are over and above any possible statutory consequences. As well, on its face the lease requirement doesn't simply mirror the requirements of the outside authorities, but supplements them, imposing a broader range of compliance and consequences which in its application appears to be within the sole discretion of the company.

55. The final alleged error of fact relates to the contention that the Director should not have given weight to the fact that Star Taxi provided the 2-way radio and the debit/credit machines because the Zudels were free to purchase their own equipment and obtain their own merchant accounts. In some respects this is new evidence, because there is no indication this was ever suggested during the complaint process. More to the point, however, there is nothing to support this assertion and it is strongly contested by the Zudels, both as a matter of fact and logic. The finding of fact relating to this point was made on the available evidence. Star Taxi has not persuaded me there was any error. In fact, they do not contest that finding of fact, but only provide argument that the finding should not have relevance for reasons which are not supported by anything in the record. This argument is also rejected.
56. For the above reasons, I am not persuaded the findings and conclusions of the Director are affected by anything in this appeal or that there is any reviewable error in the Determination. No error of law in the facts has been shown. Accordingly, the appeal is dismissed.
57. In any event of the above, if I were persuaded the Director, as a matter of law, should not have placed any weight on some factors, I am not persuaded the result would be different. In my view, the answer on this issue was not a close call at all. In addition to the multitude of factors which are identified in the Determination, it must be kept in mind the issue of employee status can frequently be decided simply by answering the question: “whose business is it?”. It strains credulity to suggest the Zudels were operating their own taxi business after they had disposed of the shares in Star Taxi and resigned as directors. The key, and essential, asset in a taxi business is a Licence from the PTB and that Licence was held by Star Taxi. The right secured by Lloyd Zudel through the lease agreement to use one of the carrier plates was granted by Star Taxi, virtually at their leisure, and was on the facts terminable by them for little or no reason. Without a Licence from the PTB and without a carrier plate, Zudel could not operate as a taxi business. This common sense view of the relationship between Star Taxi and the Zudels, viewed against the backdrop of all of the factors identified in the Determination – regardless of the relative weight assigned them individually by the Director – is highly persuasive on the question of the Zudels’ status under the *Act*.

## **ORDER**

58. Pursuant to Section 115 of the Act, I order the determination dated December 20, 2007 be confirmed in the amount of \$12,776.50, together with any interest that has accrued under Section 88.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**