



**BC EST #091/96**

**EMPLOYMENT STANDARDS TRIBUNAL**  
In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act S.B.C. 1995, C. 38*

- by -

Burnaby Select Taxi Ltd.  
("Select Taxi")

-and-

Zoltan Kiss  
("Kiss")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

<b>A</b> DJUDICATOR:	David Stevenson
<b>F</b> ILE NO:	95/004
<b>D</b> ATE OF HEARING:	April 29, 1996
<b>D</b> ATE OF DECISION:	May 17, 1996

**DECISION**

**APPEARANCES:**

For Zoltan Kiss	In person
For Select Taxi	Douglas Oldham
For the Director	Leslie Christensen

**OVERVIEW**

This matter involves three appeals under Section 112 of the *Employment Standards Act* (the “Act”). The first is an appeal by Burnaby Select Taxi Ltd. (“Select Taxi”) from a Determination of the Director of Employment Standards (the “director”), number CDET 000016, dated November 7, 1995. Select Taxi seeks to have the Determination set aside pending the outcome of an “Inquiry Commission study” of the taxi industry which, presumably, will address whether parts of the *Act* will continue to apply to employers and employees in the taxi industry.

The second and third are appeals by Zoltan Kiss (“Kiss”) from two determinations of the director, number CDET 000016, dated November 7, 1995, and number CDET 000104, dated November 17, 1995. In the former, Kiss seeks to have the Determination varied to include, among other things, unpaid wages for the 24 month period prior to his complaint, rather than the 6 month period calculated by the director. In the latter, Kiss challenges the conclusion of the director that he was not terminated for reasons related to the filing of a complaint under the *Act*, and says that in any event he was terminated without notice and without cause and is owed four weeks severance pay, based on his four years of service with Select Taxi.

On February 28, 1996, a pre-hearing conference was held in the offices of the Tribunal. The following matters were agreed on:

1. Determination number CDET 000016, which originally include the claims of two employees of Select Taxi, Kiss and Douglas Reid, would be varied to delete the claim of Douglas Reid; and
2. If Kiss was owed severance pay, the amount payable would be \$1,314.49.

It was also agreed as between Kiss and the director that if Kiss was entitled to unpaid wages for a twenty-four month period prior to the filing of his complaint the total amount payable would be \$2,535.87. Douglas Oldham, the representative of Select Taxi, took no position at the pre-hearing conference, but agreed to indicate his position on the calculation no later than seven days prior to the hearing. He did not do so.

**FACTS**

Kiss was an employee of Select Taxi from January 14, 1991 until July 7, 1995. On (July 5, 1995) Kiss filed a complaint with the director. The complaint raised the following matters that were within the scope of the *Act*

- no regular pay cheques;
- no written wage statement provided on a regular basis;
- no minimum wage; and
- no overtime pay.

Kiss also complained to the director about what he described as “the inequities of the dispatch system” at Select Taxi. Such matters are not within the scope of the *Act* or the jurisdiction of the director. It is mentioned because it had long been a source of dispute between Kiss and the management of Select Taxi and explains much of what occurred on July 7, 1995. On that day, following an incident in which Kiss felt he had been “cheated” out of a dispatch, he had what would be the last of many discussions with Wayne Fisher, the manager of Select Taxi, about the perceived inequities of the dispatch system. The discussion was a lengthy one, lasting from just before 6:30 am to approximately 8:30 am. According to Mr. Fisher, Kiss was, at times during the discussion, “loud, volatile and emphatic”. Early in the discussion Kiss said that if changes were not made to the dispatch system, he would quit. Later, after making clear to Kiss that changes would not be made to the dispatch system, Mr. Fisher told Kiss that he accepted his resignation. Kiss immediately replied that he had put nothing in writing and had not quit. Mr. Fisher told him to go away while he checked with the Employment Standards Branch whether Kiss had effectively quit. Mr. Fisher testified that he called the Branch and spoke with someone who confirmed that Kiss had effectively quit. Mr. Fisher called Kiss, asked him to return to the office and turn in his keys and cards. Kiss returned and while there asked if he was being fired. Mr. Fisher replied that he was not firing him, but was accepting his resignation, to which Kiss responded that he had no intention of quitting. Mr. Fisher took the keys and cards and sent Kiss home.

## **ISSUES TO BE DECIDED**

### **APPEAL BY SELECT TAXI**

This appeal raises two issues; first, whether there is any legal basis upon which I may set aside the Determination while the taxi industry inquiry is conducted and its recommendations issued; and second, whether Select Taxi can show the calculations of hours of work of Kiss are wrong.

### **ANALYSIS**

Until February 29, 1996 the *Act* applied in its entirety to employers and employees in the taxicab industry. On that date, the legislature amended the *Employment Standards Act Regulations* to temporarily exempt employers and employees in the taxicab industry from some provisions of the *Act*, including the overtime provisions in Section 40. What I must do is determine if the amending legislation can be interpreted as having retroactive or retrospective application. If it does, then the *Act* did not apply to Kiss at the time the Determination was made. That is the only basis upon which this ground of the appeal could succeed.

The amending legislation was not made retroactive nor is there any reference in the Order in Council that it was to operate retrospectively. Retrospective operation of legislation is presumed in many circumstances. However, one of the principles of statutory interpretation says that I may not presume a retrospective operation of legislation if I find that it adversely affects vested rights. It is unarguable that employment rights which accrued under the *Act* to taxicab drivers, such as Kiss, would be at least temporarily, and possibly permanently, lost by retrospective operation of the amending legislation. This potential loss of rights constitutes an adverse affect. As there is nothing in the amending legislation that would rebut the presumption against retrospective operation, I conclude that the *Act* applied to the employment of Kiss. This ground of appeal is dismissed.

Turning to the second issue, I conclude that Select Taxi has not established that the calculations made by the delegate of the director are wrong. I note at the outset that the calculations made by the delegate to establish the hours of work for Kiss were necessitated by the failure of Select Taxi to fulfill its statutory obligation to maintain payroll records for each of its employees. An employer in such a circumstance who subsequently challenges the calculations made by the delegate will be required to show on clear and convincing evidence that those calculations are wrong, provided they are reasonable and are supported by reference to some objective criteria.

In this case, the manner by which the delegate established the hours of work for Kiss was reasonable and was objectively supported by reference to the daily logs and information acquired from Select Taxi. It was argued by Select Taxi that the calculations were wrong because it did not account for personal time off taken by Kiss during the day. While I accept drivers taking personal time off is a common practice, the evidence presented by Select Taxi was neither clear nor convincing in establishing that personal time off taken by Kiss on any particular day would have exceeded the ½ hour meal break to which Kiss was statutorily entitled.

For the above reasons, the appeal of Select Taxi is dismissed.

### **APPEALS BY KISS**

I shall address each of the appeals and the issues raised by them separately.

### **FIRST APPEAL**

Kiss filed the appeal of Determination number CDET 000016 on December 14, 1995. In that appeal Kiss added five new items of complaint:

- minimum daily pay for his last day of employment, July 7, 1995;
- that as of November 1, 1995, Select Taxi became responsible for a 24 month period on the wage claim;
- his last week of employment had not been taken into account in calculating his wage claim, and it should have been;
- during his four years of employment with Select Taxi vacation pay had never been paid in the manner required by the *Act*; and
- medical appointments had to be taken on days off because Select Taxi would not allow time off or leave during the work day.

Relative to the above, Kiss expanded his claim, asking for 24 months of unpaid wages and for vacation pay in one lump sum.

### **PRELIMINARY ISSUE**

Before addressing any other issue in this appeal, I must decide whether I should address any aspect of the expanded claim, as I have several concerns with this aspect of the appeal.

First, Part 10 of the *Act* sets out a comprehensive complaint process in which the director, or her delegate, are given broad investigative powers and discretion in respect of a claim or complaint. Those powers exist for the purpose of ensuring compliance with the *Act*. The *Act* contemplates the director, not an adjudicator appointed by the Tribunal under Part 13, will be the first level of application for relief.

Second, while the powers of an adjudicator in Sections 108 and 109 are similar to those of the director in Sections 84 and 85 of the *Act*, there are practical, and possibly jurisdictional, limitations to the scope of these powers. An adjudicator's impartiality in considering an appeal could be compromised by adopting a more adversarial role of investigator in seeking out evidence and ensuring compliance. It is doubtful that in providing an independent tribunal to consider appeals from determinations of the director the legislature intended the tribunal to take as interventionist or investigatory a role as that taken by the director or her delegates.

On the other hand, I cannot ignore the purposes of the *Act* nor certain common sense realities respecting the administration of complaints. Section 2 sets out the purposes of the *Act*:

2. The purposes of this Act are to
  - (a) ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment,
  - (b) promote the fair treatment of employees and employers,
  - (c) encourage open communication between employers and employees
  - (d) provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act,
  - (e) foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia, and
  - (f) contribute in assisting employees to meet work and family responsibilities.

I am of the opinion that these purposes require me to avoid a multiplicity of proceedings and ensure appeals are expeditiously dealt with, where that is adjudicatively practical and consistent with the rules of natural justice.

Also, common sense dictates that from time to time a delegate investigating a complaint on behalf of the director may overlook a valid claim. The degree of co-operation and forthrightness from the parties, the informality of the investigation process and the heavy

work load of the delegates can all contribute to error and omission. In appropriate circumstances these errors and omissions should be addressed in an appeal.

On balance, I would not presumptively exclude a new claim from consideration on appeal. It will be a matter of discretion whether I consider it. Much will depend upon whether the new claim is of a kind which is predominantly administrative, meaning it is based upon information already acquired by or given to the delegate in the investigation process, or predominantly investigative, meaning that it places the adjudicator in a more adversarial role of actively seeking out evidence of non-compliance.

Applying the above considerations, I have decided that the first three of the new matters of complaint will be considered.

### **ANALYSIS**

I find that Kiss was entitled to minimum daily pay for July 7, 1995, pursuant to Section 34 of the *Act*. Kiss reported for work that day as required by the employer and the work was not suspended for any reason beyond the control of the employer. The parties agreed if Kiss was entitled to minimum daily pay, that amount would be \$26.00.

On the issue of whether Kiss is entitled to a 24 month claim period, that depends upon whether Section 80 applies to the Determination. Kiss filed the complaint under the former *Act* and the Determination was issued after the repeal of the former *Act*. Section 80 states:

80. The amount of wages an employer may be required by a determination to pay an employee is limited to the amount that became payable in the period beginning
  - (a) in the case of a complaint, 24 months before the earlier of the date of the complaint or the termination of employment, and
  - (b) in any other case, 24 months before the director first told the employer of the investigation that resulted in the determination,

plus interest on those wages.



The transitional provisions specifically address this section. Section 128(3) says:

- (3) If, before the repeal of the former Act, no decision was made by the director, an authorized representative of the director, or an officer on a complaint made under that Act, the complaint is to be treated for all purposes, including Section 80 of this Act, as a complaint made under this Act.

Section 128(3) is a clear statement of legislative intent for the retrospective operation of Section 80 to complaints that were pending when the former *Act* was repealed. Kiss is therefore entitled to a claim period of 24 months prior to his complaint, which was July 5, 1995.

The documents calculating this period were prepared by the delegate and had been presented to all parties prior to February 28, 1995. They showed a total unpaid wage entitlement for Kiss of \$2,535.87 for the 24 month period. Select Taxi did not show that calculation to be wrong. The Determination will be varied to show this amount owing to Kiss as severance pay.

The next issue is whether I should consider two appeals, both of which raise matters which are academic. In my opinion, the onus is on the appellant to show some reason why the Branch and the Tribunal should be compelled to expend time and resources to deal with an academic claim or complaint. The appellant may meet this onus by demonstrating personal prejudice if the claim or complaint is not addressed or that there is some compelling statutory purpose for making what would amount to a declaration concerning the *Act*. Kiss has demonstrated neither of these elements are present in these two appeals. Consequently, they are both dismissed as being academic.

The remaining aspects of the appeal on this Determination involve matters of complaint and claim that do not fall within the scope of the *Act* and I will not deal with them.

## **SECOND APPEAL**

Kiss filed an appeal of Determination number CDET 000104 challenging the conclusion of the delegate that he was not terminated for reasons prohibited by Section 83 of the *Act*. He also says that in any event he is entitled to severance pay. Select Taxi says that Kiss was not terminated for reasons prohibited by the *Act* and he is not entitled to severance pay because he quit.

## ANALYSIS

Kiss has the burden of establishing on a balance of probabilities that the conclusion of the delegate on the Section 83 complaint was wrong. This requires, at a minimum, some evidence that the actions of Select Taxi were motivated in whole or in part by his direct or potential involvement under the *Act*. Kiss has not met this burden. On the evidence presented, I cannot conclude that the management of Select Taxi was even aware Kiss had filed a complaint with the Branch at the time of his termination. There was some evidence that Kiss had brought some employment standards booklets into the office, but there was nothing to suggest that Mr. Fisher held any negative view of Kiss doing that or that it was in his mind when he had his discussion with Kiss on the morning of July 7. There was considerable evidence from both parties about the discussion, but there was no suggestion in that evidence that either Kiss or Mr. Fisher made any reference to matters, current or potential, relating to the *Act*. In my experience, if Mr. Fisher was motivated to terminate Kiss for matters related to the *Act*, it would be unique that some reference or allusion to the *Act*, however small, was not made. According to Mr. Fisher, and I accept his evidence, he simply seized upon a comment made by Kiss during the discussion that he would quit if changes were not made and accepted that as a resignation.

The appeal on the Section 83 complaint is dismissed.

The issue on the severance pay claim is whether Kiss quit. The right to quit is personal to the employee and there must be clear and unequivocal facts to support a conclusion that this right has been voluntarily exercised by the employee involved. There is both a subjective and an objective element to a quit: subjectively, the employee must form an intent to quit employment; objectively, the employee must carry out an act inconsistent with his or her further employment. The rationale for this approach has been stated as follows:

. . . the uttering of the words “I quit” may be part of an emotional outburst, something stated in anger, because of job frustration or other reasons, and as such it is not to be taken as really manifesting an intent by the employee to sever his employment relationship.

**Re University of Guelph**, (1973) 2 L.A.C. (2d) 348

I conclude that Kiss did not quit. While at one point in the discussion on the morning of July 7 Kiss did state that he would quit if changes were not made, he retracted that statement on two subsequent occasions that morning, once during the discussion and once in the yard in the presence of another employee, Bruce Simpson. Mr. Fisher testified that Kiss was “loud, volatile and emphatic” at times during the discussion. There are no clear

and unequivocal facts supporting a conclusion that his conduct during the discussion was more than an emotional response to the belief that he had been cheated and an expression of frustration with his failed attempts to change the dispatch system. At the first mention by Mr. Fisher that he was accepting his “resignation”, Kiss began backing off his threat to

quit, saying he hadn't put anything in writing; he hadn't quit. When he was asked to go home, his last comment to Mr. Fisher was that he had no intention of quitting.

The claim of Kiss for severance pay is allowed. Because of the timing of the termination, his claim is determined by reference to Section 42 of the former *Act*. It was agreed at the pre-hearing conference that if there was entitlement to severance pay the amount owing to Kiss would be \$1314.49, which represents four weeks pay, one for each year of service.

### **FINAL COMMENTS**

On March 6, 1996, following the pre-hearing conference, Kiss filed a document which he identified as "Amendments to the Issues in Dispute". In reality it was nothing more than a further expansion of the claims against Select Taxi. It included a claim for punitive damages and a demand that Select Taxi be given a "black mark". There are three comments I will make about that document: first, many of the claims are outside the scope of the *Act* and I would not have addressed them in any event; second, most of the remaining "amendments" sought remedies that would not have been available based on the conclusions reached in this decision; and third, I dismiss any remaining claims as they were not brought forward by Kiss within the time prescribed by Section 112 for filing an appeal of a determination of the director.

### **ORDER**

Pursuant to Section 115 of the *Act*, I make the following Orders:

1. That Determination number CDET 000016 be varied:
  - (a) to include minimum daily pay for July 7, 1995 of \$26.00; and
  - (b) to show the unpaid wage claim for the period July 1, 1993 to June 30, 1995 and the amount as \$2,535.87; and
2. That Determination number CDET 000104 be varied to show a severance pay entitlement to Kiss in the amount of \$1,314.49.

*"David Stevenson"*

---

**David Stevenson**  
**Adjudicator**

**Employment Standards Tribunal**

:jel