

An appeal

- by -

Yellow Cabs (Kamloops) Ltd.

- 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: John M. Orr

FILE No.: 2004A/54

DATE OF DECISION: May 26, 2004

DECISION

SUBMISSIONS

Abdul Rasheed	On behalf of Yellow Cabs (Kamloops) Ltd.
Andy Hiltz	On his own behalf
Rhona Beck	Delegate on behalf of the Director

OVERVIEW

This is an appeal by Yellow Cabs (Kamloops) Ltd. (“Yellow Cabs”) pursuant to Section 112 of the Employment Standards Act (the “*Act*”) from a Determination dated February 25, 2004 by the Director of Employment Standards (the “Director”).

In the exercise of its authority under section 107 of the *Act* the Tribunal has concluded that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

Andy Hiltz (“Hiltz”) was employed by Yellow Cabs as a taxi driver for thirty years. On April 1, 2003 Yellow Cabs gave written notice to all of the drivers that their employment status was being changed unilaterally by Yellow Cabs to make all drivers lease operators and not employees. Hiltz worked throughout April but quit on May 1, 2003, as he did not agree with the altered working conditions.

The Director determined pursuant to Section 66 of the *Act* that the conditions of employment had been substantially altered and that Hiltz was deemed to have been terminated without cause and was therefore entitled to compensation for length of service. According to the *Act* the full amount of compensation would be 8 weeks wages. The Director’s delegate calculated the wages owing to be \$3,626.98 (plus interest) and imposed a penalty of \$500.00.

Yellow Cabs has appealed a breach of the principles of natural justice. The substance of the appeal is that the delegate failed to take into account that the drivers were given notice of the change. Yellow Cabs allege that all drivers were given 6 months notice of the change.

ISSUE

The issue in this case is whether the Director’s delegate took into account the notice period provided to the employee in calculating the amount of compensation for length of service.

ANALYSIS

While the appeal is framed as a breach of natural justice it would appear that the substance of the appeal is that the delegate made an error in law in not taking into account the amount of notice given to the Employee. The Tribunal is willing to be reasonably flexible in dealing with the framing of the appeal,

especially where the appellant is unrepresented. The intent of the *Act* is clearly to address the substance of the issue in dispute.

Yellow Cabs has not disputed the delegate's finding that there was a substantial change in the driver's working conditions and that Hiltz was entitled to compensation for length of service. They have not disputed the number of weeks compensation to which Hiltz would be entitled. However, Yellow Cabs says that the delegate did not take into account the period of notice given to Hiltz and all of the drivers.

Section 63 of the *Act* provides (in part) as follows:

- 63. (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service*
(subsection 2 provides for increasing amounts as length of employment increases)
- (3) The liability is deemed to be discharged if the employee*
- (a) (iii) 3 weeks notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice.*
 - (b) is given a combination of written notice under subsection 3 (a) and money equivalent to the amount the employer is liable to pay.*

Yellow Cabs maintains that Hiltz was given 6 months notice of the change of his working conditions. The Director has determined that this change amounted to termination as of the date of the change being May 1, 2003. The Director's delegate did consider the issue of notice but concluded that the issue of notice was immaterial. The delegate stated that the notice was immaterial as the "primary issue was a change in conditions of employment".

While it is correct that the primary issue was the change in the conditions of employment this does not obviate the necessity to consider the issue of notice. When the delegate determined that the employment was terminated because of the change in the conditions this created a liability for compensation for length of service.

However the delegate failed to turn her mind to Section 63 (3) that provides that the liability is discharged under certain circumstances. One of those circumstances arises if the employee is given the equivalent amount of notice. Accordingly Yellow Cabs liability would be discharged if Hiltz were given 8 weeks notice of the change of conditions of employment that amounted to termination.

Yellow Cabs submits that 6 months notice was given in writing to all the drivers and they provided to the delegate and to the tribunal copies of a notice given to all of the drivers in November. Hiltz acknowledges receiving this notice. However, in my opinion, the notice that has been submitted is more of a discussion paper. It sets out some difficulties the business is having and discusses various options but it does not give clear notice to each driver that their current working arrangement was to cease at a certain date. It does refer to the option of drivers remaining on commission employment status.

However, on April 1, 2003 a very clear written notice was given to the drivers that their employment status would be terminated as of May 1, 2003. Hiltz acknowledges this notice. He chose to work out his notice period and then terminated the employment as of May 1, 2003.

The Director's delegate should have taken into account this 4-week period of notice. Certainly it was short of the 8 weeks to which Hiltz was entitled by law but nevertheless it should have been applied against the amount of compensation to which he was entitled. Section 63 (b) allows for a combination of written notice and financial compensation.

Accordingly, the amount of financial compensation for length of service should have been 4 weeks and not eight. Thus the amount of wages would be \$1710.84 plus annual vacation pay of \$102.65 totalling \$1,813.49 (plus accrued interest). The administrative penalty would remain as \$500.00.

ORDER

I order, under section 115 of the *Act*, that the Determination herein dated February 25, 2004 is varied to find that Yellow Cabs (Kamloops) Ltd. must pay the sum of Two Thousand Three Hundred and Thirteen (\$2,313.49) dollars plus interest as calculated by the Director in accordance with the *Act* and *Regulations*.

John M. Orr
Member
Employment Standards Tribunal