Employment Standards TRIBUNAL

An appeal

- by -

Cheam Taxi Ltd.
("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 (as amended)

TRIBUNAL MEMBER: Rajiv K. Gandhi

FILE No.: 2017A/92

DATE OF DECISION: September 25, 2017

DECISION

SUBMISSIONS

Gerald Palmer	counsel for Cheam Taxi Ltd.
Tyler Siegmann	on behalf of the Director of Employment Standards

OVERVIEW

1. On June 1, 2017, a delegate of the Director of Employment Standards (the "Director") issued a determination (the Determination") pursuant to section 79 of the *Employment Standards Act* (the "*Act*") in which Cheam Taxi Ltd. (the "Appellant") was ordered to pay to Kelsey Anderson (the "Complainant") the aggregate amount of $2,617.78, representing repayment of business costs deducted from wages contrary to section 21(2) of the *Act*, vacation pay due under section 58 of the *Act*, and interest accruing according to section 88 of the *Act*. The Appellant was also ordered to pay $1,000.00 in administrative penalties.

2. In this appeal it is argued, firstly, that the Director wrongly concluded that the Complainant was an employee, as defined in the *Act* and, secondly, that the Director incorrectly calculated the amounts due to the Complainant.

3. In the briefest of submissions, the Appellant asks this Tribunal to vary the Determination on the basis that the Director:

   (a) erred in law; and

   (b) failed to observe the principles of natural justice,

   according to sections 112(1)(a) and 112(1)(b) of the *Act*.

4. In deciding this appeal, I have reviewed both the Determination, and the Director's Record, submitted on July 27, 2017. I have also reviewed the Appellant's one-half page of submissions, received on July 10, 2017.

FACTS AND ANALYSIS

5. Facts relevant to this appeal are set out in the Determination, and summarized as follows:

   (a) Between March 4, 2016, and July 24, 2016, the Complainant drove a taxi in the Appellant's taxi service, operated in Chilliwack, British Columbia.

   (b) The Complainant does not hold a taxi licence, or own her own tax vehicle; rather, she leased a vehicle from the Appellant's fleet at a cost of between $75.00 and $79.00 per day, depending on the vehicle, pursuant to the terms of an agreement (the "Driver Agreement").

   (c) The Appellant managed both driver and taxi schedules, leasing vehicles for twelve-hour shifts. The Complainant had no control over vehicle assignment, which would differ, from shift to shift.

   (d) The Complainant testified that she was not permitted to pick up fares directly, but required to rely exclusively on the dispatch system owned and operated by the Appellant, according to a taxi

queue determined by the Appellant, divided into two geographic zones and managed using tablets equipped with specialized software and GPS, owned by the Appellant and installed in each vehicle available for lease. The Appellant says that direct fares were not prohibited, and could be taken when convenient.

(e) It appears to be common ground that the Appellant exercised disciplinary authority, penalizing drivers contravening the Appellant's dispatch protocols by temporarily kicking drivers out of the taxi queue.

(f) The Appellant says the Complainant was responsible to refuel her assigned vehicle, and to clean the interior and exterior, at the end of each twelve-hour shift. According to the evidence, the Complaint did just that, although I am not sure that the Complainant agreed that she would bear the cost at the time she was hired.

(g) The Appellant equipped each taxi with a debit/credit machine for collecting non-cash fares, and payment received using those machines passed through the Appellant's accounts. Sums due to the Complainant were paid only every two weeks. It is not clear from the Determination who collected or remitted GST, but the responsibility for that task appears to be disputed between the parties.

(h) Similarly, there appears to be some dispute between the parties concerning responsibility to remit worker's compensation insurance premiums.

(i) There is also disagreement between the Appellant and the Complainant concerning replacement drivers. At the hearing, the Appellant maintained that the Complainant had discretion to employ a driver (properly qualified by the City of Chilliwack and the Passenger Transportation Board), but the Complainant testified that it was the Appellant who screened and hired drivers. The Appellant acknowledged that it would never allow an unqualified person to operate its vehicles and, anecdotally, the Determination reveals at least one instance in which the Appellant removed the Complainant from a shift and replaced her with a driver of its own choosing.

Did the Director err in law?

6. Where an error of law is alleged, it is the Appellant's burden to show the Tribunal that the Director:

(a) has misinterpreted or misapplied a section of the *Act*;

(b) has been misapplied an applicable principle of general law;

(c) has acted in the absence of evidence;

(d) has acted on a view of the facts that can not reasonably be entertained; or

(e) has adopted a method of assessment that is wrong in principle.

(see *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam),* [1998] B.C.J. No. 2275 (BCCA) at paragraph 9).

7. The brevity with which the Appellant makes its case also makes it difficult to determine the legal basis on which it relies in arguing an error in law.

Is the Complainant an Employee?

8. A contract between two parties is formed where, in exchange for a benefit, one party provides service to another. It seems trite to say it, but every employee is a contractor. The real question is one of independence. The *Act* offers protections to employees in circumstances where parties do not bargain as equals, and where the employee does not trade as a sovereign party.

9. In deciding whether an individual is an employee under the *Act*, the Tribunal has generally followed the policy adopted by Mr. Justice Iacobucci in *Machtinger v. HOJ Industries Ltd.* [1992] 1 SCR 986 at 1002 to 1003:

> (a) Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being. (quoting Dickson, C.J., *Reference Re: Public Service Employee Relations Act (Alta)* [1987] 1 S.C.R. 313 at page 368).
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> (b) … terms of an employment contract rarely result from an exercise of free bargaining power in the way that the paradigm commercial exchange between two traders does. Individual employees on the whole lack both the bargaining power and the information necessary to achieve more favourable contract provisions than those offered by the employer... (quoting Swinton, *Contract Law and the Employment Relationship: The Proper Forum for Reform*, in *Studies in Contract Law*, Barry J. Reiter and John Swan, eds., Toronto: Butterworths 1980)
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> (c) An interpretation of the law [in the case of *Machtinger,* employment standards legislation in Ontario] encouraging employers to comply with minimum statutory requirements and extending statutory protections to as many employees as possible, is to be favoured over one that does not.

10. A more practical test is set out in *Kopchuk*, BC EST # D049/05, reconsideration refused BC EST # RD114/05, at page 6 (emphasis added):

> … 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).

11. Also of considerable assistance, are the words of the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, at paragraphs 47 and 48 (emphasis added):

> The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her own tasks.

12. Under the *Act:*

> (a) An "employee" is non-exhaustively defined as:
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> (i) a person, including a deceased person, receiving or entitled to wages for work performed for another; and

(ii) a person an employer allows, directly or indirectly, to perform work normally performed by an employee.

(b) An "employer" includes any person who has or had control or direction of an employee.

(c) The term "wages" includes salaries, commissions or money, paid or payable by an employer to an employee for work

(d) The word "work" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.

13. These definitions are unarguably broad and, in my view, designed to capture as many different contractual relationships as possible, to ensure some modicum of balance between otherwise unequal parties.

14. Considered in the context of this jurisprudence, I cannot say that the Appellant has demonstrated an error of law in any one of the five ways enumerated in *Gemex*. On the contrary, I agree with the Director's conclusion – the Complainant has performed "work", normally performed by an "employee", for "wages". The level of control exerted by the Appellant falls squarely within what the law agrees is the nexus of an employer-employee relationship:

(a) The Appellant owned the taxi licence. The Complainant had no right to independently operate a taxi service.

(b) The Appellant owned all taxi vehicles, exercised discretion in determining which taxi could be leased, when they could be leased, and to whom.

(c) The Appellant set the work schedule, start times, and shift length, and maintained significant control over the use of replacement drivers.

(d) The Appellant paid for insurance and most maintenance costs, exercised disciplinary authority over drivers, and otherwise to restrict the manner in which fares could be accepted.

(e) The Appellant operated a communication service using equipment, that it owned, supplied, and controlled, and with which it exercised the exclusive right to dispatch most if not all fares.

(f) Through the debit/credit machines used to collect non-cash fares, the Appellant exercised considerable influence over the flow of money, making payments to the Complainant on a bi-weekly basis.

15. In asking to vary the Determination, the Appellant leans heavily on the Driver Agreement which, it says, is conclusive evidence that the Complainant is no employee. I disagree. There is a considerable difference of opinion between the parties with respect to the rights and obligations conferred and imposed under that arrangement and, in the absence of a written instrument, I find it difficult to treat the Driver Agreement like a binding agreement between the parties. Even if I am wrong in that, an unwritten contract purporting to create an independent contractor relationship does not vitiate the effect of section 4 of the *Act*, which prohibits the waiver of statutory rights.

16. Nor am I swayed by the Appellant's argument concerning the Complainant's discretion to accept fares. Context is key. Taken in context, the Driver Agreement (such as it is) and the Complainant's purported discretion concerning fares is offset by the myriad of other indicia of control.

17. Ultimately, I am satisfied that the Director's conclusions concerning the Complainant's status as an employee is neither patently unreasonably nor the result of a misinterpretation or misapplication of the law of the *Act* or any other law.

18. As I read the *Act*, the Complainant is clearly an employee.

19. The Appellant goes on to challenge the Director's calculations concerning the Complainant's hours of work and income for the months of May and June 2016. It is not clear to me what, if anything, turns on that calculation, considering that the Director made no award for the payment of additional regular wages. If either the hours used or the minimum wage calculations were high, reducing those figures does not assist the Appellant.

20. Vacation pay is calculated based on actual receipts; no error appears to be alleged with respect to the same and I agree with the Director's calculations on that score.

21. Finally, the Appellant says that the Director failed to allocate the surplus of driver receipts above minimum wage to costs of operating the vehicle, as required under the unwritten Driver Agreement.

22. I agree that the Director did not make such allocation, but I do not agree that the Director was wrong in the approach taken.

23. Once again, I reject the Appellant's heavy reliance on the Driver Agreement which, as I have suggested previously, may not be worth the paper it isn't written on.

24. Section 21(2) of the *Act* provides that:

> 21 (2) An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.

25. In light of the finding that the Complainant is an employee, the Driver Agreement is trumped by section 4 of the *Act* where there is conflict with section 21. The Appellant cannot require an employee to pay any of the employer's business costs.

26. In this instance, those business costs include the cost of fuel and maintenance, and the Complainant's use of a personal cellular telephone for business purposes:

(a) The Appellant does not appear to take issue with the award relating to the Complainant's use of her cellphone.

(b) In both *Swiftsure Taxi Co Ltd.*, BC EST #D469/01 and *Duncan Taxi Ltd.,* BC EST #D471/01, the Tribunal found that requiring employees to pay fuel costs out of wages violated section 21(2) of the *Act*.

(c) The Director's conclusion that the cost to clean the Appellant's leased vehicle is the responsibility of the Appellant and not the Appellant's employee is in keeping with section 21(2) of the *Act* and entirely reasonable.

27. Once again, I find that the Appellant has failed to satisfy its burden to show an error in law as outlined in *Gemex*. The Director did not misinterpret or misapply the law, and I see nothing unreasonable in the conclusion drawn by the Director.

28. I dismiss this ground of appeal.

Did the Director violate the principles of natural justice?

29. The principles of natural justice require the Director, always, to act fairly, in good faith, and with a view to the public interest (*Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48 at paragraph 2). Fairness, in turn, means that all parties involved have the right to notice, the right to know the case to be met and the right to answer it, the right to cross-examine witnesses, the right to a decision on the evidence, and the right to counsel (*Tyler Wilbur operating Mainline Irrigation and Landscaping*, BC EST # D196/05 at paragraph 15).

30. The Appellant's appeal includes a claim that, in making the Determination, the Director failed to observe those principles. Beyond a bald assertion, however, there is nothing in the Appellant's exceptionally concise argument substantively addressing this second ground. Try though I might, I see nothing in the Determination or the Record to suggest that the principles described in *Lafontaine* or *Tyler Wilbur* have somehow been violated.

31. I conclude that there is no reasonable prospect that an appeal under section 112(1)(b) of the *Act* will succeed and, accordingly, that too, is dismissed.

Conclusion

32. The Appellant has failed to meet the onus of proving, on a balance of the probabilities, an error in law or a breach of the principles of natural justice.

ORDER

33. I dismiss the appeal, and confirm the Determination, pursuant to section 115(1)(a) of the *Act*.

Rajiv K. Gandhi
Member
Employment Standards Tribunal