Employment Standards TRIBUNAL

An appeal

- by -

Sunshine Cabs Limited
(the “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

ADJUDICATOR: W. Grant Sheard

FILE No.: 2003A/097

DATE OF DECISION: June 13, 2003

DECISION

APPEARANCES:

Sam Monfared	on behalf of the Appellant
Mohsen Anvari	on his own behalf
Victor Lee	on behalf of the Director

OVERVIEW

This is an appeal based on written submissions by Sunshine Cabs Ltd. (the "Appellant"), pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), of a Determination issued by the Director of Employment Standards (the "Director") on February 20, 2003 wherein the Director's Delegate (the "Delegate") ruled that the Appellant had contravened the *Act* and ordered annual vacation pay, statutory holiday pay, compensation for length of service, vacation pay on statutory holiday pay and compensation for length of service, and accrued interest for a total due to the Respondent of $3,584.86.

ISSUE

1. The use of new evidence not raised prior to the Determination being issued.

2. Was the Delegate correct in finding that the Respondent was terminated and therefore entitled to compensation for length of service?

ARGUMENT

The Appellant's Position

In an appeal form dated March 29, 2003 and filed with a letter dated March 28, 2003 signed by Mr. Charnjit Jawanada, Mr. Hojat Sheini and Mr. Harmikpal Jawanda, the Appellant says that the ground for appeal is that evidence has become available that was not available at the time the Determination was being made and seeks to change or vary the Determination. In the letter of March 28, 2003 filed with the appeal form the Appellant says that the Respondent quit on his own terms. The Appellant says that, "due to unavailability of Mr. Vaheh Stephanian to give a statement during the trail (sic) (he had left the company) and because his statement was very vital in supporting our claim we feel that this new evidence combined with all the other ones should make grounds for a reversal of decision for that part only of the ruling that refers to Mr. Anvari quitting. In addition are signed statements of three witnesses to the Tribunal that all heard that this was a well staged plan to park the car and not pay any lease and quit."

In addition to the appeal form and accompanying letter the Appellant submits what appear to be computer printouts of "samples of his daily trips as evidence that this gentleman was refusing trips and constantly moving from one area to the other in order to build up a case for himself". The Appellant also provides a "Sunshine Cabs zone map". The Appellant says that they did not have access to their database at the time

of the initial hearing before the Delegate. The Appellant says, "Sunshine Cabs will agree to repay the other parts of the Employment Standards ruling to Mr. Anvari (after deductions) as soon as a Determination has been made by this tribunal."

The Respondent's Position

In a written submission received by the Tribunal on April 25, 2003 the Respondent says that he demonstrated the reasons which led to his unlawful dismissal at the hearing before the Delegate. He goes on to say that he has studied the Appellant's submissions on appeal and "found them irrelevant and the witnesses are not credible since they are either a family member or a close associate or a party of interest". The Respondent submits that the Determination should be upheld.

The Director's Position

In a letter dated April 14, 2003 the Director submits copies of the record that was before the Delegate at the time the Determination was made apparently in support of the Determination.

THE FACTS

The Respondent worked as a taxi driver under a lease agreement with the Appellant dated January 17, 1996. That lease agreement states that the lessee or Respondent is self-employed. At the hearing before the Delegate the Appellant took the position that the Respondent was self-employed. On appeal, the Appellant has abandoned their argument that the Respondent was self-employed.

Although there was conflicting evidence before the Delegate as to when the Respondent commenced his employment with the Appellant, the Delegate found that the Respondent commenced his employment sometime in the week of January 10 to 17, 1996. No issue is taken with that finding on appeal The Respondent filed his complaint with the branch on August 22, 2002.

At the hearing before the Delegate Mr. Anvari alleged that on August 8, 2002 he responded to a telephone message and called the general manager of the Appellant wherein he was informed that they had another driver for his car and that his services had been terminated. The Respondent brought a witness, Mr. Hamid Mottaghian who confirmed the Respondent's evidence at the hearing that he wasn't receiving any trips from the Appellant and that the management at the Appellant "knew how to play with the computer so that a trip did not come through to a particular vehicle". The witness gave evidence that he was also fired by the Appellant and that he believed both he and the Respondent had been fired because they objected to the Appellant's application to the Motor Carrier Branch for ten additional licenses.

At the hearing the Appellant claimed that the Respondent quit because he wasn't making any money. The Appellant called the manager, Mr. Monfared, and another witness, Mr. Jawanda. Mr. Jawanda testified that the computer decides who gets a trip based on who is closest in the zone. He also stated that the Respondent phoned him and told him that he had been fired for not paying his lease payments. The Delegate found that she preferred the complainant's version of events in this regard. She said that "all parties have some interest in the outcome of this matter. That of the Employer and the complainant is obvious. The other witness for the Employer, Mr. Jawanda, is a director of the company. He also had an opportunity to hear all the testimony before giving his own." She went on to say, "I prefer Mr. Mottaghian's evidence because he was not present to hear the other testimony and because he provided

more context for how he became aware of the information. He gave the circumstances in which he was called by the complainant prior to the determination to observe the low fares he was getting and he also provided the surrounding context in which he was called by the complainant and told that he had been terminated."

On appeal, the Appellant abandoned its claim that the Respondent was self-employed. However, the Appellant maintained its assertion that the Respondent quit his employment. On appeal the Appellant submitted an affidavit sworn March 28, 2003 from Vaheh Stephanian stating that he had been a night driver for the Appellant up until November 2002 and that his co-worker, the day driver of the same cab, was the Respondent. Mr. Stephainian also stated that on August 6, 2002 he attended the Respondent's residence and the Respondent told him that he had decided not to return to work at the Appellant company and that he had decided to quit his job and not to return. Other than stating that Mr. Stephanian was unavailable for the hearing before the Delegate as "he had left the company", neither the Appellant nor Mr. Stephanian provide any reason that this witness was not presented to the Delegate at the original hearing.

In the original submission filed by the Appellant dated March 28, 2003 Mr. Harmikpal Jawanda is one of three parties who sign the letter stating "the undersigned hereby acknowledges that they overheard Mr. Mohsen Anvari declare that he quit from Sunshine Cabs because he did not make enough money for himself." It appears that Mr. Harmikpal Jawanda is the same Mr. Jawanda who testified at the original hearing before the Delegate and whose evidence the Delegate rejected. No reason is provided that the other individuals who signed the letter on appeal, Mr. Charnjit Jawanada and Mr. Hojat Sheini, were not called as witnesses at the original hearing. The Appellant also submitted, apparently for the first time on appeal, some 60 pages of computer generated time records for all the drivers during the relevant period and drivers' log sheets. Beyond simply asserting that it did not have access to its database at the time of hearing, no reason was provided for failing to disclose these documents at the original hearing and the computer generated time sheets appear to indicate only one occasion when the Respondent rejected a fare.

On February 20, 2003 the Delegate issued a Determination finding that the Appellant had contravened the Act and ordered it to pay to the Respondent vacation pay, statutory holiday pay, compensation for length of service, and interest totaling $3,584.86.

ANALYSIS

1. Use of New Evidence

The issue of the use of new evidence at appeal which was not presented to the Delegate at the investigation of the complaint has been considered several times by this tribunal. Indeed, in the case of *Specialty Motor Cars (1970) Ltd.*, BC EST # D570/98 there is reference to the "*Tri-West/Kaiser Stables Rule*". This issue was decided in *Tri-West Tractor Ltd.*, BC EST # D268/96and *Kaiser Stables Ltd.*, BC EST # D058/97. In *Tri-West* (*supra*), the adjudicator there held evidence inadmissible because:

> "This Tribunal will not allow appellants to 'sit in the weeds', failing or refusing to cooperate with the delegate in providing reasons for the termination of an employee and later filing appeals of the Determination when they disagree with it…The Tribunal will not necessarily foreclose any party to an appeal from bringing forward evidence in support of their case, but we will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative process."

Notwithstanding this exclusionary rule, the adjudicator in *Specialty Motors (supra)* held as follows:

> "However, it should also be recognized that the *Kaiser Stables* principal relates only to the admissibility of evidence and must be balanced against the right of parties to have their rights determined in an administratively fair manner. Accordingly, I would reject any suggestion that evidence is inadmissible merely because it was not provided to the investigation officer. There may be legitimate reasons why particular evidence may not have been provided to the investigating officer and, in my view, an adjudicator ruling on the admissibility of such evidence will have to weigh a number of factors including the importance of the evidence, the reason why it was not initially disclosed and any prejudice to parties resulting from such nondisclosure. I do not intend the foregoing to be an exhaustive listing of all relevant criteria."

In the present case no compelling reason was provided for the failure to call Mr. Vaheh Stephanian, Charnjit Jawanada or Hojat Sheini at the original hearing. As the issue of termination versus resignation turns on credibility I do not find that this evidence assists greatly. It is not documentary evidence recordered prior to the complaint being made which may be uncontroverted. The Delegate found the evidence of the Respondent and his witness at the hearing reliable. There is prejudice to the Respondent in allowing this evidence at this late juncture as it cannot be guaranteed that, even if these witnesses were now to be called in an oral hearing, they would not have been made aware of what other witnesses have said to tailor their evidence accordingly. The computer generated timesheets and the drivers' log sheets do not assist. Weighing all of these factors I am not allowing this evidence in support of the Appellant's appeal.

2. Was the Delegate correct in finding that the Respondent was terminated and entitled to compensation for length of service, holiday pay and vacation pay?

The onus is on the Appellant to establish on a balance of probabilities an error in the findings of the Delegate. No issue is taken by the Appellant with the calculations of the Delegate. The Delegate stated clear and compelling reasons for preferring the evidence of the Respondent's witness at the hearing with respect to the issue of termination versus resignation. I find that the Appellant has failed to meet the onus upon it to demonstrate an error in the findings of the Delegate.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination of this matter, dated February 20, 2003 and filed under number ER004-765, be confirmed.

W. Grant Sheard
Adjudicator
Employment Standards Tribunal