

An appeal

- by -

Brian French
("French")

- 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: C. L. Roberts

FILE No.: 2000/813

DATE OF HEARING: April 17, 2001

DATE OF DECISION: April 26, 2001

DECISION

APPEARANCES:

Brian French: On his own behalf (by telephone)

Judy Brassington: On behalf of the Director of Employment Standards.

Hafizur Khan On behalf of Royal City Taxi Ltd.

OVERVIEW

This is an appeal by Brian French ("French"), pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued November 3, 2000.

Mr. French filed a complaint under the *Act* alleging that Royal City Taxi Ltd. ("Royal") terminated his employment without notice or compensation in lieu of notice. He also alleged that Royal owed him wages.

The Director's delegate found that Royal had not contravened the *Act*, that French was not owed compensation, and ceased her investigation under section 76 of the *Act*.

ISSUE TO BE DECIDED

Whether the Director erred in determining that Mr. French was not owed compensation for length of service. Although Mr. French made written submissions on the issue of compensation for wages, he did not pursue an appeal on those grounds, as he contended it was not at issue in the first instance.

FACTS

Mr. French was employed by Royal as a taxi driver on a lease commission basis from September 1986 through to 1993, and again from January 1994 until September 2000.

The employment relationship between Mr. French and Royal is unclear. Mr. French says that until approximately 1998, he drove 5 shifts per week, three in car #56, two in car #10, and took two days off. After the sale of two cars, the lease driver of car #67 became the full time driver of car #56, effectively "bumping" Mr. French from three shifts. Royal then gave Mr. French another shift on car #15, and placed Mr. French at the top of the list of "on call" drivers. Mr. French acknowledged that, at that time, his status changed, and that he should have complained then, but that the arrangement worked out for him.

In mid September, Royal issued Mr. French a Record of Employment, indicating a lack of work. Mr. French contended he was entitled to compensation for length of service.

The delegate found that Mr. French, as an "on call" driver, fell within the exceptions to the length of service entitlement set out in section 65 of the *Act*, and was therefore not entitled to length of service compensation.

ARGUMENT

Mr. French contends that the delegate erred in determining that he was not owed wages, and argues that the entire determination ought to be set aside.

Mr. French stated that the delegate misunderstood the nature of his job, and that he is entitled to the protection of the *Act*. He argued, as I understood it, that while he was able to accept or reject shifts, he would have to pay for the car for the shift he refused, if Royal was unable to find someone else to cover the shift.

Royal stated that Mr. French did not have a permanent shift assigned to him, and that he was the first driver called for each shift. Royal contended that, since Mr. French had, in fact, refused shifts regularly, he was indeed an "on call" driver, and that the Determination should be upheld.

The delegate sought to have the Determination upheld, as she concluded that Mr. French was not entitled to the protection of the *Act* since he could, and did, refuse to work shifts. The delegate further noted that she had provided Mr. French with a list of dates on which he had refused shifts, and that he had not replied, or disputed that.

ANALYSIS

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I find that burden has been met.

Section 63 of the *Act* sets out an employer's liability for compensation for length of service on termination.

Section 65 (1) provides that section 63 does not apply to an employee

- (a) employed under an arrangement by which
 - (i) the employer may request the employee to come to work at any time for a temporary period, and
 - (ii) the employee has the option of accepting or rejecting one or more of the temporary periods.

As noted in *Covert Farms Ltd. v. Director of Employment Standards* (BCEST #D077/99), section 65 establishes exceptions to length of service compensation, and, like other provisions of the *Act* that limit or remove minimum statutory rights and benefits, its application will be construed narrowly. *Covert Farms* set out four conditions that had to be satisfied before section 65 could be applied:

First, there has to be an "arrangement" between the employer and the employee; second, the "arrangement" must allow the employer to call the employee to work "at any time" for temporary periods, third, the employee may accept or reject any temporary period of work; and fourth, that the employee may reject the temporary period without risk to his or her continued employment.

The evidence does not support the conclusion that Mr. French falls within the exception set out in section 65. There is no evidence that there was an "arrangement" between Royal and Mr. French. Mr. French says that he had three regularly scheduled shifts for many years, and had the expectation that this arrangement would continue. Mr. French did not own his own taxi, so he paid Royal a leasing fee for each scheduled shift. That fee would be paid whether or not Mr. French drove the taxi. The employment relationship was more of a permanent nature than a temporary one, and Mr. French always had secure shifts. I find that the delegate's analysis insufficient to conclude that section 65 applied to Mr. French's employment situation, and refer it back for further analysis.

I allow the appeal.

ORDER

I Order, pursuant to Section 115 of the *Act*, that the Determination dated November 3, 2000 be set aside. The Determination is referred back to the delegate for a further and better analysis of the employment relationship between the parties, with a view to determining whether Mr. French is entitled to the benefit of section 63 of the *Act*.

C. L. ROBERTS

C. L. Roberts
Adjudicator
Employment Standards Tribunal