



An appeal

- by -

Frank (Joe) House, operating as Harbour City Taxi

- 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:** James Wolfgang

**FILE No.:** 2001/57

**DATE OF HEARING:** March 22, 2001

**DATE OF DECISION:** May 1, 2001

## DECISION

### APPEARANCES:

Frank House	Harbour City Taxi
Terry Jordens	Himself

### OVERVIEW

This is an appeal by Frank House (“House”) operating Harbour City Taxi (“HCT”) under Section 112 of the *Employment Standards Act* (the “Act”) from a Determination dated November 30, 2000 issued by the Director of the Employment Standards Branch.

The Determination deals extensively with Darlene Quigley (“Quigley”), who was the owner operator of the taxi leased to HCT, but is limited on dealing directly with Terry Jordens (“Jordens”) and to the question as to who was his employer.

Harbour City claim Jordens was an employee of Quigley and not of HCT.

The Determination found Quigley to be an employee of HCT and, as the employer; they owed Jordens \$852.60 for violations of Sections 16 and 57 of the *Act*.

Jordens was employed as a taxi driver from October 26, 1999 until November 26, 1999 when he was terminated. He filed a complaint with the Employment Standards Branch claiming he did not receive minimum wage, overtime and vacation pay. The Determination found Jordens was not entitled to overtime, as a taxi driver, he had not worked in excess of 120 hours in a pay period.

Darlene Quigley did not attend the hearing.

The parties rejected an offer to mediate the dispute.

### ISSUE

Was Jordens an employee of HCT and, if so, is the amount of wages and vacation pay as established by the Determination correct?

### THE FACTS AND ARGUMENT

Quigley had driven taxi for HCT and sought minimum wage for hours worked. When it was ruled that Quigley was entitled to minimum wage, HCT sold their taxis to the drivers, including

Quigley, making them owner operators. Quigley leased her taxi back to HCT for a fixed fee per week. The lease was conditional on the taxi being available 24 hours per day, 5 days a week.

HCT had each driver and owner operator sign that they would comply with their Rules and Regulations. They insist, as the company holding the business license and being responsible for the safety of the fleet, they must ensure a consistent system of rules. That does not mean they are the employers of the owner operators and their drivers.

HCT takes the position they provide a dispatch service only to the taxis leased to them. They arrange the licensing and insurance, which is charged back to the owner operator. They do not normally receive copies of the driver's trip sheets and do not receive reports on the amount of money earned by each taxi.

HCT has no payroll for the owner operator's drivers and makes no deductions for EI, CPP or Income Tax. The owner operators hire their own drivers, set the amount they are paid and the hours they work.

There was no submission from Quigley to the Tribunal. The Determination indicates Quigley admits she bought the car to "buy herself a job" and because she needed a vehicle for personal use.

As Quigley had leased the taxi to HCT on a 24-hour basis, by law, she required a driver for the other 12-hour shift. She knew Jordens and asked him to drive her taxi. She took Jordens to HCT, who checked out his credentials and, according to Quigley, they hired him.

Quigley normally drove the day shift from 07:00 until 19:00. Jordens drove the night shift from 19:00 until the shift ended, usually at 07:00. He was paid at the rate of 50% commission plus he paid ½ the gas for his shift.

HCT claim Quigley told them she only wanted Jordens to drive her taxi and they deny hiring Jordens. HCT had a dispatch board on the wall that indicated who was driving each taxi. The taxi owned by Quigley was listed as Car #5. The drivers were listed as Quigley and Jordens. In addition to the regular owner operators and drivers HCT kept a list of qualified drivers who came into the office looking for work. If an owner operator needed a driver they could select one from the list.

Jordens indicated it was never clear Quigley was the employer. He said "the taxi employer could not override the taxi company". Jordens claims he signed an employment form with HCT letterhead and he was terminated by HCT. He claims he signed the Harbour City Rules and Regulations. He claims there were more than one set of Rules and Regulations that he was asked to sign. (Note) The set that was included in the Determination was incomplete and contained portions of HCT Rules and Regulations and a portion of the National Safety Code Rules and Regulations.

He claims he did dispatching for HCT, as did other drivers, at night after the dispatcher left. He would carry the cell phone and dispatch from the taxi or go to the office and dispatch from there. HCT had a policy, for security reasons; there would be a minimum of two taxis on the road at all times.

Jordens indicates Quigley left a message on his answering machine telling him not to come to work. He believes that was November 16, 2000. He then came in and worked November 17, and 18, 2000. Jordens claims his name was removed from the dispatch board and another driver replaced him. When he put his name back on the board he was told by House to never touch the dispatch board. Jordens returned to work November 25 and 26, 2000. House later left a message on Jordan's answering machine indicating he was terminated.

HCT admit telling Jordens he was terminated. They claim Quigley asked them to terminate Jordens because they were good friends and she did not want to do it. They also claim the drivers took turns taking the cell phone to dispatch after the regular dispatcher went home, usually at 3:00 a.m.

The trip sheets for Jordens were supplied by the Branch to indicate start and stop times for Jordens. Jordens turned those sheets over to Quigley at the end of each shift and they included the amount of fares collected and the cost of gas purchased. We have no indication of the number of hours used by the delegate however, according to HCT; using the dispatcher's book, indicating when the drivers booked on and when they booked off, Jordens worked 167.5 hours in the month he was employed.

In a written submission to the Tribunal dated February 23, 2001 HCT claimed they had problems with Jordens from the first week "when Darlene hired him". They claim he had no respect for the rules and they had telephone calls from the RCMP and local towing companies complaining about him.

Jordens claims there is no evidence of complaints about his driving from the RCMP nor was there any evidence of complaints from towing companies. He also indicates there was no evidence he had "phantom passengers" in his car. These are people who flag a taxi and the driver does not report to the dispatcher that he has a fare, thereby keeping his name on the board for the next call.

Jordens claimed one of the other taxi companies telephoned HCT to complain he had sexually harassed a young female passenger. Jordens indicated he had a gas receipt to show he was not in the area at the time. Jordens went to the RCMP and found no record of a complaint. HCT investigated the complaint when it came in and established it was a prank by one of the other taxi company dispatchers. Jordens was not satisfied and hired a lawyer to clear his name. HCT claim there was no suggestion Jordens had done anything wrong and it formed no part of the decision to terminate Jordens.

Jordens said he never met directly with House in regard to complaints but discussed them with Quigley. Jordens taped the telephone calls he received from House and Quigley and hand written copies of those were presented. The actual tape was not presented and Jordens could not identify precisely when each call had been received. They deal primarily with the last one or two days before he was terminated.

Jordens claims he was required to take passengers for free when HCT gave passes, either for promotions or following complaints. HCT claims they had a promotion of giving discounts or free taxi trips after so many times a customer used the taxi. When it was free the taxi owner put in a charge slip and HCT paid for the trip. HCT claim Quigley was paid for those trips, however Jordens claims he did not receive any money.

Quigley claimed, “HCT exercised an inordinate amount of control over her, her vehicle, and the driver, Terry Jordens, who she specifically asked to drive her vehicle” (emphasis added). The Determination found that HCT exercised considerable control over the drivers and therefore Jordens was an employee of HCT and not of Quigley.

## ANALYSIS

The Determination found Jordens was entitled to be paid minimum wage and vacation pay for the number of hours he worked less any amount received from his share of the fares. The Determination does not deal with the question of Jordens paying ½ the cost of gasoline during his shift which, in my mind, is part of the cost of doing business and, if so, is a violation of Section 21 (2) of the *Act*.

The Determination has tested Quigley to determine if she was an employee or an independent contractor. It applied the test of Control, Integration, Economic Reality, Chance of Profit or Loss and Ownership of tools. The Determination found Quigley was an employee because HCT exercised “control and direction over Darlene Quigley (owner operator) as follows:

- the cab fare is set unilaterally by HCT
- owner operators have vehicles registered under HCT’s name for insurance benefit
- owner operators are required to have their vehicle inspected and maintained to a standards (sic) set by HCT
- HCT keeps all records on owner operator’s cab.
- Owner operators are required to display HCT signage

- Owner operators are required to be available within certain specified hours (24 hours a day) Although Quigley purchased her vehicle for personal use as well as for work, the dispatch company did not allow her to keep it for her personal use, except for two days a week.
- Owner operators had to dispatch (carry the company cell phone) for the company
- HCT hires and fires drivers who specifically operate owner operator's vehicles
- HCT had the business license

I believe HCT did exercise a considerable amount of control over Quigley. The Determination extended that control to Jordens making him an employee of HCT. There is no doubt that Jordens is an employee however the question the Tribunal must answer is who was Jordens' employer? The Determination deals at length with the relationship between HCT and Quigley but only deals with the issue of Jordens' status in passing. We are, in effect, told because Quigley is an employee, by the delegate's findings, it should also apply that Jordens is an employee of HCT.

According to the evidence, HCT did not receive copies of the trip sheets of either Quigley or Jordens. They had no payroll for Jordens and did not know his earnings.

HCT had no opportunity for profit or loss in the operation of Quigley's taxi. They were paid a fixed weekly amount without regard to the amount the taxi earned. Insurance and licenses were billed on a monthly basis, again without regard to the amount earned.

In Tribunal decision [*Victoria Taxi (1987) Ltd., Glenn Klopp and Richard Odd v. the Director of Employment Standards* (the "Pistell" decision) BC EST D364/96] it was found:

We heard no evidence that the taxi owner operator was obliged to hire a specific driver nor did we hear evidence that a driver was contractually bound to undertake specific shifts for an owner operator. Absent such evidence, we can not conclude that drivers are hired by Victoria Taxi.

That is significant in this case. HCT gave no instructions to Quigley, as the taxi owner operator, as to the driver she must hire nor did they specify which shift Jordens would work. That was an arrangement solely between Quigley and Jordens.

In Tribunal decision [*Victoria Taxi (1987) Ltd et. al. v. Director of Employment Standards* (the "Gaw decision") BC EST D601/97] the adjudicator found:

The Director applied four common law tests of determining employment status. After an analysis of the facts in light of the Control Test, the Integration Test, the Economic Reality Test and the Specific Result test, the Director concluded, on balance, that the lease operators were employees.

I find that the lease operators perform work normally performed by an employee. They are, in most respects, no different than any other taxi driver in Victoria, most of whom are employees. In fact, William Bill's drivers have the option of being employees or lease operators. While his treatment of their payment may differ, the type of work they perform does not.

The above decision establishes the lease operators are employees. The Determination found:

Terry Jordens drove Darlene Quigley's cab for HCT. He was not a lease operator, as he did not have a lease agreement with either Darlene Quigley, or Harbour City Taxi.

This decision has elements that are different than the HCT case. In Victoria Taxi the company is made up of owner operators as shareholders in the business. In that case the owner operators are the company. The owner operator may drive their own vehicles, lease them out or drive and lease them.

The step of lease operator is not present in this case. Quigley, as an owner operator, leases her taxi to HCT for a 24-hour period. As she cannot drive the taxi for 24 hours she must hire another driver to ensure she can meet her lease obligation. This varies from the lease operator in the decisions cited as their leases are for a 12-hour period. They are not concerned with who will be driving the taxi during the other 12-hour period.

The Determination, under the section dealing with **“Darlene Quigley's (owner operator) Position** states:

Ms. Quigley asserts that as an owner operator, she was required to pay a lease amount per month to HCT, was responsible for all fuel costs, repairs to her vehicle, and to pay her drivers.(emphasis added)

Ms. Quigley claims that Harbour City Taxi had all control over who she hired.(emphasis added) Initially she suggested that Harbour City Taxi hire Terry Jordens. She claims that Harbour City interviewed Mr. Jordens, scrutinized his application (issued by the company) and agreed to hire him.

Ms. Quigley claims that HCT fired Terri Jordens, when they knew that he was the only driver that she trusted to drive her vehicle.(emphasis added)

The Determination, under the section dealing with “**Frank (Joe) House operating as Harbour City Taxi’s position**” states:

Frank (Joe) House operating as Harbour City Taxi contends that Darlene Quigley was an owner operator, owned her own taxi, paid his dispatch company a lease amount per month, and hired Mr. Jordens, and paid wages to her drivers.(emphasis added)

It is clearly established Jordens is an employee. While the amount of control exercised by HCT over all owner operators and drivers indirectly impacts on Jordens I do not believe the key elements of an employer/employee relationship existed between HCT and Jordens. HCT had no payroll account for Jordens and had no record of the hours he worked or the amount of commission he earned. Jordens only drove the taxi owned by Quigley. The hours of work and the rate of commission were set between Quigley and Jordens. Jordens only worked the night shifts following the day shifts Quigley worked. In the original agreement, Jordens was to pay 100% of the gasoline used on his shift. When Jordens realized this would not be profitable he went to Quigley, not HCT, to negotiate a different percentage. Quigley and Jordens agreed on 50%.

I am inclined to believe that Quigley hired Jordens and then took him to HCT to have the necessary paper work completed. All of the discussions regarding employment matters were between Quigley and Jordens. HCT claim they were dissatisfied with Jordens but took no disciplinary action, which they may have if he had been an employee of theirs.

For the reason outlined above, I find Jordens to be an employee of Quigley, as the owner operator and not of HCT.

## **ORDER**

In accordance with Section 115 of the *Act* I order the Determination by the Director dated December 18, 2000 be cancelled.

***JAMES WOLFGANG***

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**James Wolfgang**  
**Adjudicator**  
**Employment Standards Tribunal**