

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C. 38

- by -

Victoria Taxi (1987) Ltd.,
Glenn Klopp and Richard Odd
("Victoria Taxi")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

PANEL: Richard Longpre
Norma Edelman
John Orr

FILE NO.: 96/534

DATE OF DECISION: December 12, 1996

DATE OF HEARING: November 28, 1996

DECISION

APPEARANCES

Adam Albright for Victoria Taxi
Adele Adamic for the Director of Employment Standards
Ronald Pistell on his own behalf

OVERVIEW

This decision addresses an appeal by Victoria Taxi pursuant to Section 112 of the *Employment Standards Act* (the “Act”). Victoria Taxi seeks a review of Determination No. CDET 003835 issued by the Director of the Employment Standards (the “Director”).

The Director determined that Ronald Pistell and all lease operators, the drivers of the taxis, were employees under the *Act*. She also concluded that Victoria Taxi, the owner-operators, and limited companies of Victoria Taxi were associated companies pursuant to Section 95 of the *Act*.

The Director was unable to determine whether wages were owing but directed that vacation pay of \$308.68 be paid to Ronald Pistell by Victoria Taxi.

Ronald Pistell ceased working on March 8, 1996.

ISSUE TO BE DECIDED

Victoria Taxi raised two grounds of appeal of the Determination. First, it argued the Determination erred in concluding Ronald Pistell, and all lease operators (the “drivers”) were employees under the *Act*. Second, if drivers were employees under the *Act*, it argued that their employers were the owner-operators of the taxis they leased. In Ronald Pistell’s case, the owner-operators were Glenn Klopp and Richard Odd.

Section 2(a) of the *Act* “ensures that employees...receive at least basic standards of compensation and conditions of employment.” As counsel for the Director noted, the *Act* must be interpreted in a fair and liberal manner. The *Act* provides a basic standard of employment: parties are not free to ignore or to contract out of these standards. We start then with a Determination that the *Act* applies to the drivers of Victoria Taxi. Victoria Taxi has the onus to demonstrate that the drivers are not employees and that the associated companies are not the employer of all drivers.

FACTS

The Determination sets out the evidence and the findings of fact reached by the Director in her investigation of Ronald Pistell's complaint. The Director then applied those findings to the following tests: the control test, the integration test, the economic reality test and the specific result test. From this analysis the Director determined that all Victoria Taxi drivers were employees.

This appeal addressed the findings and the conclusions reached by the Director. The Panel was prepared to hear evidence and argument from Victoria Taxi, Ronald Pistell and the Director: evidence that was relevant to this appeal. At the outset of the hearing, the Panel asked the parties if there was an agreement on all or certain facts. Counsel for Victoria Taxi and the Director discussed and reached an agreed upon statement of facts. The agreed statement of facts reads:

- 1) - Taxicabs are leased by drivers for a fixed fee.
 - The usual lease is daily or weekly.
 - The lease fee is payable in cash in advance to the owner-operator.
 - The lease fee can range from \$50.00 - \$80.00 per shift which is 12 hours.
- 2) - The individual owner-operators hold the motor carrier license.
- 3) - The lease fee (for a 12 hour shift) allows the driver the use of the taxicab and the dispatch system [Victoria Taxi - Radio Dispatch].
 - The driver retains all cash fares, all charges are turned into the Dispatcher, and are credited towards future lease costs with that owner-operator. Drivers are to seek pre-approval of charges from dispatch.
- 4) - Fuel costs are paid by the driver for his shift.
- 5) - Taxi customers may come through the dispatch system or they may pick up customers from the street, these are called "flags."
 - Drivers may also acquire trips from requests via cell phones or pagers.
 - Certain action or inaction by drivers may result in their removal from the dispatch system.
 - In some circumstances the lease agreement can be terminated.
 - Drivers are to advise dispatch when they are taking breaks.
 - Drivers do not personally advertise their services. A customer would call Victoria Taxi for taxicab services.
 - Lease establishes when the taxi becomes available to the driver and when it must be returned.

The statement of facts was reviewed and explained to Ronald Pistell. He agreed to proceed with the appeal on these specific facts.

ANALYSIS

The Panel agreed to restrict its analysis to the agreed statement of facts. We have not considered all of the findings of fact in the Determination. Certain documents, such as the driver's manual and the driver's contract, were not before us. The Tribunal might well refuse to restrict a hearing in this way in the future. Section 108 of the *Act* gives broad jurisdiction to the Tribunal. We accepted the parties request in this case, however, as it permitted an analysis of employment relationships in the taxi industry on a specific set of facts. Future decisions, based on a broader scope of evidence, can build on this decision.

Briefly, these are the facts before us. An owner-operator is licensed by the Motor Carrier Commission to operate a taxi within Victoria. Owner-operators own one or more of the taxis operating within Victoria. The owner-operators pay a flat fee to Victoria Taxi for dispatch and administrative services. The taxi is driven by the owner or by a driver. All drivers must have a chauffeur's permit as defined by the *Motor Vehicle Act*.

Victoria Taxi has an approved list of drivers. Owner-operators choose a driver from that list. The driver leases the taxi for a day or a week. The lease has a fixed fee for each twelve hour period. The lease between the driver and the owner-operator sets out the start and finish time of the shift. The driver retains all revenue and pays for all fuel consumed. The owner-operator maintains the car.

The dispatch system is owned and operated by Victoria Taxi. The drivers are not obliged to work during a shift, however, they must notify the dispatcher when they are unavailable or on a break. Some fares are generated by a driver's own cell phone and pager or persons flagging them on the street. The vast number of fares are generated by the dispatch system. The revenue generated by the drivers depend on the time of day, the time of year, the season and other such factors.

At the outset, Victoria Taxi argued that the purpose of the *Act*, as set out in Section 2, can not be looked at until the definition of "employee" is met. We disagree. The purpose of the *Act* influences all aspects of the *Act*, including the definition of terms used in the *Act*. We are also satisfied that if the drivers are found to be employees, Victoria Taxi would be their employer. Section 1 defines "employer" as:

"employer" includes a person

(a) who has or had control or direction of an employee, or

(b) who is or was responsible, directly or indirectly, for the employment of an employee.

Victoria Taxi raised no doubt in the Director's Determination that Victoria Taxi, the owner-operators and the limited companies are associated companies as defined in Section 95 of the *Act*. If the drivers are employees under the *Act*, we are satisfied that Victoria Taxi is the employer of these drivers.

We start with the test articulated in *Castlegar Taxi (1988) Ltd. v. British Columbia (Director of Employment Standards)*, (1991) 38 C.C.E.L. which focused on the distinction between a contract of service and a contract for service.

The issue of whether a relationship is one of a contract of service (i.e., employment) or a contract for services (i.e., independent contractor) has traditionally turned on the degree of control that the party for whom the work is being done has over the activities of the party conducting the actual work. The courts have weighed four factors in assessing the nature and degree of control inherent in the relationship: the master's power of selection of the servant, the payment of wages, control over the method of work, and the master's right of suspension or dismissal.

...

Although none can be termed either prerequisites or conclusive hallmarks, factors which favour a finding of an individual being an independent contractor are where the individual does work for more than one person, where he has the power to subdelegate tasks to those whom he employs... or where he stands to share in profits or losses and/or he has control over how and when the work will be done.

There are elements in a driver's work that indicate an employment relationship with Victoria Taxi. There are elements of control, integration and economic dependence between Victoria Taxi and the drivers. The key components of the evidence before us, however, support the opposite conclusion.

The Director agreed there was a risk of loss. The Director argued, however, that there was no chance of profit. Victoria Taxi argued there was no evidence to support that conclusion. We agree. There was no evidence before us that drivers do not make a profit. The weather, the season, and a multitude of other variables affect a driver's daily earnings. However, the risk of loss and the possibility of profit both exist.

Victoria Taxi, the owner-operators, the driver, and the dispatcher work together. The fleet of taxis is one colour. It presents itself to the public as a single operation, day to day integration exists. These facts are significant. However, integration means more than simply working together. The operation of the business has a clear dividing line between Victoria Taxi and the drivers. A driver leases the taxi for specific period of time. The service of the dispatcher is included in that cost. The dispatcher receives calls and turns them over to the drivers. A driver decides whether to take the call. The driver tells the dispatcher when he/she is taking a break. The driver does not ask for permission. The

dispatcher and Victoria Taxi receive no gain or loss if there are only a few calls or there are many calls from customers. While they may work together, their working together does not enhance the profit (or minimize the loss) of each other. The Director argued that a driver depends upon the dispatcher for work. We have no evidence about the dispatcher having such control or direction. The control and direction by Victoria Taxi may become clear in examination and evidence of the driver's manual and contract and the role of the dispatcher. However, that evidence was not before us.

Hiring is a significant factor in an employment relationship. The only sense of hiring was putting the driver on the list of approved drivers at Victoria Taxi. Victoria Taxi argued this notified owner operators of acceptable drivers. The list assisted the owner operators, it did not ensure work for the drivers. The lease places a driver under specific directions and obligations. These directions and obligations arise, however, only if the driver decides to lease a taxi for a day or a week. 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.

Victoria Taxi's discipline of drivers would be a significant factor in establishing an employment relationship. An owner-operator may suspend a driver's ability to lease a taxi for a period of time, perhaps permanently. Victoria Taxi and other owners may or may not follow that decision. Ronald Pistell pointed to an incident when he was told by Victoria Taxi's dispatcher to stop driving for two hours. Victoria Taxi argued that such "discipline" results from drivers not following the terms of the contract they have with their owners. Pistell's "discipline" was because of a dispute he had with another driver in the operation of their taxis. The dispatcher was protecting the owners' interests. The Director argued discipline was often the result of a breach of the driver's manual. The terms of the manual and the terms of the contract may suggest different relationships. These documents and perhaps oral evidence on their applicability to the work environment would be necessary to reach a meaningful conclusion on their probative values. However, the parties agreed to put neither document before us.

In summary, we do not have evidence that suggests an integration of the driver into Victoria Taxi. Victoria Taxi has taken certain steps to protect the owner-operators' and its own interests. The drivers purchase the right to drive a taxi and the services of the dispatcher. In leasing a vehicle the driver takes on the risk of loss and the possibility of profit. The driver is not paid the equivalent of wages. There was insufficient evidence to establish either hiring or the discipline of drivers. The drivers have a contract for service with Victoria on the facts before this Panel.

ORDER

On the evidence before the Panel, Ronald Pistell and all lease operators are not employees under the *Act*. We order, under Section 115 of the *Act*, that Determination No. CDET 003835 be canceled.

Richard Longpre

Norma Edelman

John Orr