Employment Standards TRIBUNAL

An appeal

- by -

Yellow Cabs (Kamloops) Ltd.
("Yellow Cabs")

- 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: David B. Stevenson

FILE No.: 2001/102

DATE OF HEARING: June 21, 2001

DATE OF DECISION: July 10, 2001

DECISION

APPEARANCES:

on behalf of the individual	In person
on behalf of the Director	Shelley Burchnall

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Yellow Cabs (Kamloops) Ltd. ("Yellow Cabs") of a Determination that was issued on January 12, 2001 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded the Society had contravened Part 1, Section 4, Part 3, Sections 16, 27 and 28, Part 5, Section 44 and Part 7, Section 58 of the *Act* and Part 4, Section 15 of the *Employment Standards Regulation* (the *"Regulation"*) in respect of the employment of Emanuel Torres ("Torres") and ordered the Yellow Cabs to cease contravening and to comply with the *Act* and to pay an amount of $3,227.04.

Yellow Cabs says the Determination is wrong. Its appeal states as follows:

> Yellow Cabs (Kamloops) Ltd. seeks to appeal this determination in its entirety. There are several areas where there has been misinterpretation of information supplied and also in the interpretation of the law. The basic problem is that a blanket assumption has been made that Mr. Torres worked "a full shift" no matter what. That is wrong and grossly unfair.
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> The other area of dispute is the fact that the holiday pay and statutory pay is included in the commission pay structure. This was apparently resolved during and after Section 37.1 (Taxicab Drivers) Regulations were put in place.
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> More detailed presentation of our appeal will follow.

The appeal was filed with the Tribunal on February 5, 2001. On April 7, 2001, Yellow Cabs corresponded with the Tribunal. In that correspondence, Yellow Cabs indicated they were in the process of pulling all of Torres' trip slips and compiling data on his daily starting time and finishing time. On May 29, 2001, Yellow Cabs delivered a submission to the Tribunal, which stated in part:

> These are the additional data of start times and finish times that we have pulled out of Mr. Torres trip slips. In this fax there are 19 pages of start and finish times. The originals will be brought in at the oral hearing for sighting.

The Director responded on June 5, 2001, putting the Tribunal and Yellow Cabs on notice of an issue about whether Yellow Cabs should be allowed to provide this information at the appeal stage. That objection was addressed as a preliminary issue at the appeal hearing.

ISSUE

There are, in effect, three possible issues raised in this appeal. The first is a preliminary issue about whether Yellow Cabs should be allowed to introduce new evidence that was not produced to the Director during the investigation. The second issue is whether, if the new evidence is received, Yellow Cabs has shown the conclusion in the Determination concerning Torres' hours of work from January, 2000 to May, 2000 was wrong. The third issue is whether the Director erred in not accepting that annual vacation pay and statutory holiday pay were included in Torres' commission pay structure.

THE PRELIMINARY ISSUE

The Tribunal has established that a party cannot fail or refuse to participate in the investigation of a complaint, then later challenge findings of fact with which they disagree. To allow such a process would be inconsistent with the role of the Tribunal as an appeal body and with the statutory purpose and objective of expedience and efficiency in dealing with disputes arising under the *Act*. The following comment, from *Re Tri-West Tractors Ltd.*, BC EST #D268/96, is relevant:

> 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, then later filing appeals of the Determination when they disagree with it. An appeal under section 112 of the *Act* is not a complete re-examination of the complaint. It is an appeal of a decision already made for the purpose of determining whether that decision was correct in the context of the facts and the statutory provisions and policies. 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.

See also: *Re Kaiser Stables Ltd.*, BC EST #D058/97.

The above principle is procedural, not substantive. As noted above, an appellant will not always be foreclosed from bringing forward evidence that was not provided to the Director during the investigation. It is a matter of discretion. It is significant to how that discretion is exercised where the appellant is attempting to use the appeal procedure to make a case that could have and should have been made during the investigative process. It is also relevant to know if there are good reasons for the failure to provide the evidence during the investigation. I heard some evidence and listened to argument from Yellow Cabs the Director addressing whether I should allow the evidence to be introduced in the appeal hearing.

Mr. Abdul Rasheed, one of the owners and directors of Yellow Cabs, acknowledged that the employer had not provided any of the information during the investigation that was being sought to be introduced. He told me that the failure to provide that information was a "misunderstanding" about the scope of the complaint. Mr. Rasheed said he, and the people charged with responding to requests from the Director, understood that the complaint was only about annual vacation pay and statutory holiday pay, and did not appreciate that it was also about daily hours of work and minimum wage. There is some support for that on the face of the correspondence from the Director.

In a letter dated August 24, 2000, the Director stated:

> Mr. Torres alleges he was not paid his annual vacation pay, nor did he receive statutory holiday pay.

On November 24, 2000, the Director sent a letter to Mr. Rasheed in which she set out the amount of annual vacation pay and statutory holiday pay which she calculated was owed. There is no reference in that letter to a minimum wage calculation.

Against that position, Mrs. Burchnall, appearing on behalf of the Director, stated that in addition to letters sent August 24, 2000, September 20, 2000, October 4, 2000 and November 24, 2000 and the Demand for Employer Records, which was served on the employer on or about October 5, 2000, she had several telephone conversations, on with Mr. Rasheed, on September 24, 2000, two with the employer's bookkeeper at the time, who was only identified to me as Kathy, one on October 16, 2000 and the other on November 10, 2000, and one with Yellow Cabs' accountant, Mr. Kuldeep Singh, on December 18, 2000, in which she asked for the daily trip sheets. None were ever provided. In the letter of August 24, 2000, the Director asked for "all payroll records and documents showing Mr. Torres' daily earnings from his fares". In the Demand For Employer Records, The Director asked for, *inter alia*, "all records relating to wages, hours of work, and conditions of employment. In the discussions with Kathy, she indicated to Mrs. Burchnall that she would talk to Mr. Rasheed about getting the requested or required information and documents. It was common ground that neither Kathy nor Kuldeep Singh had direct access to any of the daily trip sheets and had to request those from Mr. Rasheed.

Neither Kathy nor Kuldeep Singh were called to confirm there was any "misunderstanding" on their part about what Mrs, Burchnall wanted. The correspondence from the Director clearly indicates that a record of daily earnings was being sought. The Demand For Employer Records was also clear, and demanded all records relating to "hours of work" to be produced and delivered. It is not the right or responsibility of a person upon whom such a Demand is served to decide what will be produced and delivered. There is a statutory obligation to comply. The evidence of the telephone discussions between Mrs. Burchnall and Kathy and Kuldeep Singh specifically addressed the production of the daily hours of work. Overall, the evidence suggests the employer was not at all cooperative with the investigation. Even in respect of the information that was provided to the Director, that information came out in dribs and drabs over a four month period. In her letter of November 24, 2000 (three months after the original request and 1½ months after the Demand), Mrs. Burchnall felt compelled to write to Mr. Rasheed:

> Despite several conversations with your bookkeeper, Kathy, to date I have only received partial payroll records for Mr. Torres.

The information which Yellow Cabs sought to introduce was available and could have been provided during the investigation. No good reason has been given for not doing so. This is a strong case for refusing to allow the evidence to be brought in support of the appeal.

In light of my decision on the preliminary issue, it is no basis for considering the second issue. I will now address the third issue in the appeal.

THE FACTS

The facts relative to the third issue are not in dispute. Torres was employed by Yellow Cabs from October 1995 to May 2000 as a taxi driver. He was paid 45% commission, taken on a daily basis out of fares collected. Yellow Cabs intended that the 45% commission would be inclusive of annual vacation pay, statutory holiday pay and sick leave.

ARGUMENT AND ANALYSIS

Yellow Cabs argued that the manner in which they were paying wages was consistent with how the industry operates and with the intent of Section 37.1 of the *Regulation*. Mr. Rasheed and Mr. Singh, who were making the arguments on behalf of Yellow Cabs, could not identify what part of that regulation allowed the payment of an all inclusive commission wage rate to be paid to taxi cab drivers. They suggested that it was part of the general intention of that provision. I must disagree with their view of that regulation. There is nothing in Section 37.1 of the *Regulation* that specifically allows for an all inclusive commission wage structure in the taxi industry. Such a wage structure would only be allowed if it does not contravene the *Act*.

On that point, the question of whether the requirements of the *Act* allowed an employer to pay its employees an "all inclusive" has been considered in *Re Foresil Enterprises Ltd.*, BCEST #D201/96 (Roberts) and *Re Wm. Schulz Trucking Ltd.*, BC EST #D127/97 (Stevenson). In the latter case, the Tribunal stated:

> In *Foresil Enterprises Ltd.*, BCEST #D201/96, Adjudicator Roberts, faced with the same argument in the context of an employer in the silviculture industry who had incorporated annual vacation pay into the calculation of the average daily rate for the tree planters employed by it, stated, at pages 3-4:
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> > The *Act* prevents the inclusion of annual vacation pay as part of a unit pay scheme, or price per tree or hectare. If it were otherwise, employees would have no method of determining what the basic hourly or per tree rate would be for conversion purposes. In addition, employees with more seniority entitled to a higher rate of

> vacation pay would actually be paid less on a per unit basis than more junior employees.

Mr. McMillan, on behalf of Schulz Trucking, argued the decision was distinguishable on its facts and, in any event, was wrongly decided. I respectfully disagree on both points.

On the first point, while the circumstances of the *Foresil Enterprises Ltd.* case arose in the silviculture industry as opposed to the trucking industry, the factual matrix within which the case was decided was identical. Both in that case and in this the employer had purported to include statutory holiday pay and annual vacation pay in a piecework or commission wage structure. The fact the Employment Standards Branch had provided guidelines to the employers in the silviculture industry to assist in ensuring compliance with the *Act* is irrelevant. The employer in that case was required to comply with the minimum requirements of the Act in respect of payment for statutory holidays and annual vacation, just as Schulz Trucking is required to do. The argument all other employers in the trucking industry include holiday pay in a piecework or commission wage structure not helpful if that method of payment contravenes the minimum requirements of the *Act*.

On the second point, in reaching her conclusions, Adjudicator Roberts relied upon a decision of Braidwood, J., *Atlas Travel Service Ltd. -and- Director of Employment Standards*, unreported, October 24, 1994, Vancouver Registry (B.C.S.C.) on appeal under subsection 14(3) of the Employment Standards Act, S.B.C., 1980, c.10. In that case four employees of a travel agent claimed entitlement to annual vacation and general [statutory] holiday pay. The director had agreed and had issued a certificate for the amounts claimed. The employer appealed, arguing each of the employees had signed a commission agent's contract with Atlas containing a clause which stated statutory and vacation pay was included in the commission. The issue was whether the clause met the requirements of the Act. The Court found it did not. There were a number of reasons given for its conclusion.

First, the Court found the statutory provisions of the *Act* establishing the entitlement to annual vacation, the method of payment to an employee for their annual vacation, the requirement to maintain a record of annual vacations and the amount of vacation pay earned by an employee to be minimum requirements. Relative to these minimum requirements, the Court confirmed subsection 2(1) [now Section 4] of the Act, gave no effect, for the purposes of the *Act*, to any agreement to waive them.

Second, the Court found the argument of the inclusion of annual vacation pay to be illogical because it would have had the absurd result of reducing an employee's

> total wage to fund an increase in a statutory benefit as their years of employment increased their entitlement to annual vacation pay.
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> Third, the Court recognized the inclusion of annual vacation and statutory holiday pay in an "all inclusive" wage structure did not comply with the statutory scheme which requires annual vacation and statutory holiday pay to be calculated on total wages and paid as something in addition to total wages. Under the employer's wage structure in that case, as in this, the employer would never pay annual vacation pay on total wages, but only on the regular wage portion of total wages. This would result in less than the required statutory benefit being paid. This result is sufficient, standing alone, to conclude the *Act* prohibits the type of wage structure imposed by Schulz Trucking.
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> The reasoning of Braidwood, J. in *Atlas Travel Service Ltd. -and- Director of Employment Standards*, *supra*, is still valid under the new *Act*. Despite the able arguments of Mr. McMillan, and while I have some sympathy for Mr. Schulz, who believed he had an understanding with at least some of his employees about their holiday pay, Schulz Trucking has been unable to demonstrate any basis for varying the conclusion of the delegate for the director that it has contravened Section 44 and subsections 58(1), 58(2) and 58(3) of the *Act*.

The same result must be reached in this case.

Mr. Rasheed asked that the matter be referred back to the Director for further investigation. Yellow Cabs has not however, shown the Determination is wrong or deficient in respect of its reasoning or result. I am not inclined to refer the matter back without a reason for doing so. The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated January 12, 2001 be confirmed in the amount of $3,227.04, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal