BC EST #D401/99

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act, R.S.B.C. 1996, C. 113

- by -

Vancouver Cabs (1989) Ltd. and Vancouver Taxi Ltd., Associated Corporations
("Vancouver Taxi")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Paul E. Love

FILE NO.: 1999/378

DATE OF DECISION: September 14, 1999

DECISION

OVERVIEW

This is an appeal by Vancouver Cabs (1989) Ltd. and Vancouver Taxi Ltd. of a Determination dated June 10, 1999, where the Director's delegate found that the sum of $4,415.42 was due and owing to Marvin E. Lewis for overtime, statutory holidays, minimum daily pay and 30 minute breaks, which were not paid for by the employer. The Director's delegate also assessed a zero penalty determination for the contravention of sections 16, 40(1), 40(2), 45 and 58 of the *Act*. The employer took exception to the finding that the sum of $4,415.52 was due and owing, but did not appeal the penalty determination. The Determination was confirmed as the employer did not identify any errors affecting the calculation of amounts found to be due and owing by the Director's delegate.

ISSUES TO BE DECIDED

Did the Director's delegate err in his assessment of the amounts due and owing?

FACTS

The Director's delegate found that the two employers, Vancouver Cabs (1989) Ltd. and Vancouver Taxi Ltd., ("employer") were associated employers within the meaning of s. 96 of the *Act*. The employee, Mr. Lewis (the "employee") worked for the associated employers from March 13, 1993 to December 12, 1995. The employee alleges that he was paid less than the minimum wage, that the statutory deductions made by the employer were excessive, that he was not paid for statutory holidays or annual vacation pay. The Director's delegate dismissed the claim for excessive deductions, and the employee has not appealed the Determination.

Mr. Lewis's employment with the employer came to an end when he made a decision not to enter into a cab leasing arrangement with the employer and after he was available to return to work following an injury. He made no claim for compensation for length of service. He was paid $828.00 by the employer on April 26, 1998, and the Director's delegate deducted this from the amount owing to Mr. Lewis. The employee received records of employment from different employers, which I take it relate to the ownership of the taxi cabs that he drove from time to time while in the employment of the associated employers.

In response to a Demand for Employer Records, the employer provided trip sheets, records of amounts paid per day, records of employment, and holiday pay cheques in the amount of $352.36 and $320.37. The employer was unable to provide records for the period of December 12, 1993 to January 2, 1994.

Employer's Submission to the Director's Delegate:

The employer stated that the employee was on a daily commission of 46.5 % of the gross daily take. The employer stated that the employee worked 12 hour shifts and that the employer had no control on actual hours worked and said that he can take breaks whenever he wanted, and he can book off the air". The employer argued it is likely that Lewis had a 30 minute break at least once during his shift. The Director's delegate accepted the rate of pay of 46.5 % as stated by the employer, and determined that there was nothing to substantiate the employee's allegation that the rate of pay was 50 % of the gross.

Employee's Submission to the Director's Delegate:

Mr. Lewis informed the Director's delegate that the only time when he was able to eat, was when there was no business. He would dash into a restaurant to obtain food, which he ate in his car. There were no scheduled breaks. Mr. Lewis also informed the Director's delegate that he worked 40 to 70 hours per week. He said that he was not provided wage statements by the employer.

Findings by the Director's Delegate:

The records filed with the employer did not demonstrate that Mr. Lewis was paid for his meal breaks, or that meal breaks were scheduled by his removal from dispatch for calls. The Director's delegate therefore found that the employee had not received a scheduled break during his shifts with the employer.

The Director's delegate found that the payroll evidence showed gross wages of $8,995.10 in 1993 and $7,597.28 form January to September of 1994. The holiday pay was calculated at $471.20 . The employer received a vacation pay credit of $185.05 in the Director's delegate 's calculations.

The Director's delegate prepared a calculation and determined that the amount paid to the employee did not meet the required minimum wage of $6.00 per hour for the period from January 3, 1994 to February 28, 1994, $6.50 per hour for the period from March 1, 1994 to September 30, 1994 and $7.00 per hour for the period from October 1, 1994 to December 12, 1995.

The overtime calculation made by the Director's delegate covers the period from January 3, 1994 to December 12, 1995, which predates the exemption from the Act for the taxi industry made on February 29, 1996.

In total, the calculations of the Director's delegate showed that the sum of $4,415.42 was due and owing to Marvin E. Lewis**.** The Director's delegate set out the calculations as follows:

Total wages earned including overtime, minimum daily pay, statutory holidays	$22,236.43
Adjustment to correct calculation of statutory holidays $25.71	$22,262.14
Annual vacation pay $22,262.14 x .04 = 890.49	$23,152.63
Less wages paid pro-rated to period for which daily hours are available	$18,181.16
Less annual vacation pay pro-rated to period for which daily hours are available $505.42	$4,466.05
Less gross paid on April 26, 1999 -$828.00	$3,638.05
Plus interest of $777.37	4,415.42

The Director's delegate assessed a zero penalty determination in this case. The employer filed no argument related to the penalty determination.

ANALYSIS

In an appeal before the Tribunal the burden rests with the appellant to demonstrate that an error was made such that I should vary, or cancel the Determination.

The full text of the employer's argument is set out below:

I think this Determination is unfair in that the drivers sheets are accepted as being the veritable document that is used to make the decision.

> Our company keeps records of all the dispatch trips and we would like to see if they match the driver's record. Furthermore, it is difficult to rely on the driver's sheet for information because quite often flag trips are not written on the driver's sheet.
>
> It is a known fact that all cab drivers during the course of their shift take a lunch break and several coffee breaks. I think it is fair to say that this should be reflected in the calculations done by the Employment Standards Branch.

> In a previous hearing of North Shore Taxi it resulted in the calculations of the driver's on duty time as being from the first trip to the last trip shown on the driver's sheet. In our case, I think that this will dramatically change the amount that we owe to the driver.

I note that this is an identical submission to that filed by the employer in an appeal concerning Nasir Ahmed, Vancouver Cabs (1989) Ltd. and Vancouver Taxi Ltd, BCEST #D402/99. The submission does not identify any arithmetical errors related to the calculations. The submissions made are very unhelpful to me in carrying out my task, which is to review if the Director's delegate erred in the Determination. If these submissions are meant to identify errors, I cannot see the effect of the error on the Determination.

The employer has a duty to keep records. This duty is set out in s. 28 of the *Act*. The trip records do not show that meal breaks were taken or that coffee breaks are taken. It is the employer's responsibility to determine that the records conform with the *Act*. I am not satisfied that the employer has demonstrated any error.

Hours of Work:

The employer has argued that the hours of work should be calculated commencing from the time of the first trip, and ending the time of the last trip. The records provided, however, demonstrate that some of the days were commenced by the employee before the time of the first recorded trip. The employee may have started his day before the first trip commenced to do such things as safety checks, refueling, and ended his day after the last trip by returning the vehicle for the next driver.

I have reviewed North Shore (1996) Ltd., 1998 BCEST #D 467/98, and four other cases involving that company heard the same date, and decided similar in principle. In that case the Adjudicator found that the employer had met with the employees prior to the introduction of the new *Act*, and had directed the employees that they could work only 8 hours, and that the employees were required to take breaks. There is no such evidence in this case. North Shore also dealt with a complaint which arose and covered a period of time after the taxi industry received an exemption from the *Act*. I find that the North Shore case is not authority for the proposition that in all taxi cases, the Adjudicator must accept that the employee's work day commences with the first recorded trip, and ends with the last recorded trip, as set out in the employer's records.

In my view the Director's delegate had the opportunity to review the documents provided. I accept that the Director's written submission that there is nothing set out in the employer's reasons for the appeal, which ought to change the calculation of the amounts owing. The employer has not demonstrated any error made by the Director's delegate, and therefore the Director's delegate 's findings are confirmed.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination in this matter, dated June 10, 1999 be confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal