BC EST #D402/99

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.: 1999/379

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 $4,093.29 was due and owing to Nasir Ahmed. The amount relates to overtime, statutory holidays, minimum daily pay, adjustment for 32 hours free from work, annual vacation pay, and compensation for length of service, and interest. The employer did not demonstrate any error in principle, or in calculation of the amounts owing, and the Determination was confirmed.

ISSUES TO BE DECIDED

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

FACTS

The employee, Mr. Lewis worked for the associated employers from September 12, 1994 to December 11, 1995. On or about the last day of work, he was asked to sign a lease agreement for a cab, which he refused to do so. He was advised that there was no car available for him. There was no longer any work available for him, and the employer issued a record of employment. Since he drove a number of taxicabs owned by different persons, he was given two records of employment, one relating to each owner for whom he drove.

The Director's delegate found that the pay to Mr. Ahmed did not meet the minimum pay requirements of the Act for the periods January 2, 1994 to February 28, 1994 ($6.00 per hour), March 1, 1994 to September 30, 1994 ($6.50 per hour), and October 1 1995 to December 12, 1995 ($7.00 per hour).

The Director's delegate found that the sum of $4,093.29 was due and owing to Mr. Ahmed. The amount relates to overtime, statutory holidays, minimum daily pay, adjustment for 32 hours free from work, annual vacation pay, and compensation for length of service, and interest.

The Director's delegate made the following findings concerning the amounts due and owing to the employee, for various breaches of the *Act*:

Total wages earned including overtime, adjustment for 32 hours free from work, minimum daily pay, statutory holidays and annual vacation pay		$20,505.66
Adjustment for correction of statutory holiday calculations - $74.04		$20,579.70
Compensation for length of service: Total wages earned in last 8 weeks, less overtime: 350.5 hrs x $7.00/hr= $306.69/wk x 2 weeks = $613.37		$21,193.07
Annual vacation pay: #21,193.07 x .04 = $847.72		$22,040.79
Less wages paid:	$17,614.59	
Less annual vacation paid	380.35	$4,045.85
	$17,994.94	
Less amount paid April 26, 1999: $672.00		$3,373.85
Plus interest: $719.44		$4,093.29

The Director's delegate assessed a zero dollar penalty pursuant to s. 98 of the *Act*, and s. 29 of the *Regulation*. This penalty was not appealed by the employer

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 employer on this appeal has not filed any submission which allows me to review in any substantial way, the determination. The employer did not point to any error made by the Director's delegate in the calculation of amounts found to be due and owing to the employee.

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 Marvin Lewis, Vancouver Cabs (1989) Ltd. and Vancouver Taxi Ltd, BCEST #D401/99. 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 Director's delegate points out that trip tickets and the daily trip record are documents in the control of the employer, who could analyze if it chose to do so. The first submission therefore does not assist me in identifying errors.

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.

Termination Pay:

The employer has not filed any argument alleging that it was not required to pay termination for length of service. In my view, the employee was terminated when the employer failed to assign any work to the employee, after the employee refused to sign a lease agreement for the use of a taxi cab. Such an agreement was a fundamental alteration of the terms and conditions of employment. The employer is liable for compensation for length of service in accordance with the *Act.* The employer has not filed any submission which relates to liability for termination pay, although this appears to have been an issue before the Delegate.

Deduction for Prayer Breaks:

In the submissions made to the Director's delegate, the employer suggested that there should be a deduction from wages due and owing to Mr. Ahmed because he attended for prayers every Friday and for special prayers, twice per year in Surrey. There was no written documentation relating to this in the employment records produced. The Delegate did not discount the amount owing, for prayer attendance, as he was not satisfied this was proven by the employer. The employer has not appealed on this point. I therefore will not consider whether the Delegate erred in failing to make this deduction.

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. Mr. Ahmed says that the trip sheet is the most important document, and the one on which the employer pays the driver, and settles complaints made by customers against drivers. He indicated that there was substantial waiting time between trips, that he never took coffee breaks as he is "not habitual of coffee", and he ate his bag lunch while waiting for the next trip.

I have reviewed North Shore (1996) Ltd., 1998 BCEST #D 467/98, and four other cases involving that company heard he 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 changes the calculation of the amounts owing. The employer has not demonstrated any error made by the Delegate, and therefore the 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