

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 -

New Shuttle Inc.
("New Shuttle")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE N_{O.}: 1999/456

DATE OF **D**ECISION: September 22, 1999

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) by New Shuttle Inc. (“New Shuttle”) of a Determination which was issued on June 25, 1999 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that New Shuttle had contravened Sections 18 and 40 of the *Act* in respect of the employment of Michael Muelleder (“Muelleder”) and ordered New Shuttle to cease contravening the *Act*, to comply with its requirements and to pay an amount of \$6504.45. Pursuant to Section 98 of the *Act* and Section 29 of the *Employment Standards Regulation* (the “*Regulations*”), the Determination also imposed a zero dollar (\$0.00) penalty.

New Shuttle says the Determination is wrong, primarily because the Director failed to correctly apply Section 44 of the *Regulations*. The appeal also claims that Muelleder was employed by New Shuttle and the Determination incorrectly names Phillip Morgan as the “employer”.

ISSUES TO BE DECIDED

The issue is whether New Shuttle has shown that the Director incorrectly applied Section 44 of the *Regulations* to the circumstances of this case.

FACTS

Muelleder was employed as a driver for New Shuttle from June 21, 1998 until December 15, 1998. New Shuttle operated a shuttlebus service, comprising two full size passenger vans, transporting passengers between the BC Ferries’ Departure Bay Terminal and Parksville/Qualicum throughout the day. Muelleder was employed to drive one of two shuttlebuses. It is agreed that for the purposes of the *Act*, he was a “bus operator” as that term is defined in the *Regulations*. It is also agreed that New Shuttle failed to pay Muelleder all wages owing when his employment terminated.

The arrival of the shuttlebus at the ferry terminal was timed to meet seven ferries each day. Occasionally, a ferry was late arriving and the shuttlebus driver would wait.

ANALYSIS

I see nothing in the Determination that names Phillip Morgan as the employer. The Determination names New Shuttle in its conclusions and order. It is addressed to Mr. Morgan, perhaps because he is a director or officer of New Shuttle, but at this point is not named as a person liable to pay the wages found to be owing. It is conceivable that all or some of New Shuttle's liability may be extended to Mr. Morgan under Section 96 of the *Act*, but that does not appear to have happened yet. There is no basis for an appeal on the question of the employer's identity.

The relevant part of Section 44 of the *Regulations* reads:

44. Sections 40 and 41 of the Act do not apply to any of the following:
- (a) a bus operator
 - (i) while waiting during the course of a charter trip or excursion,
 - (ii) for lay-over time, or
 - (iii) for any time that the bus operator is not operating a bus, if the cause is completely beyond the employer's control.

New Shuttle says the time that Muelleder spent waiting for late ferries was time "beyond the employer's control". It should be noted that the appeal is limited to circumstances when the ferry was late. In its reply submission, New Shuttle states:

There were countless occasions, even on a daily basis, when a late ferry arrival created the need for Mr. Muelleder to wait, thereby triggering this condition because our drivers have to wait for the ferries to arrive before they can leave Departure Bay. As most people are aware, BC Ferries' are frequently late.

New Shuttle does not indicate in their appeal which days or hours of the overtime hours worked by Muelleder ought to be considered as being completely beyond their control and therefore exempted from Sections 40 and 41 of the *Act*

The submission of the Director on the appeal correctly notes that the time could not be considered as being either "time waiting during the course of a charter trip or excursion" or "lay-over time".

In his brief reply, Muelleder says the possibility that ferries could be late was contemplated by New Shuttle and he was instructed to promote New Shuttle to the general public during these waits and he did that. He also notes that the daily operating schedule included a 30 minute wait in Qualicum Beach between runs and he had the same instructions during those waits. Muelleder notes that from October his shift started at 7:15 am and ended in Parksville at 4:00 pm, a total of 8.75 hours.

I do not agree with New Shuttle that the exemption found in Section 44(a)(iii) of the *Regulations* applies to the circumstances of this case. The exemption only applies if a bus operator is "not operating a bus". New Shuttle has not addressed what might be included in the phrase "operating a bus". While I do not intend to engage in a complete analysis of every possible circumstance that might be included in that phrase, it

would, at least, include all of the duties Muellerder was required to perform relating to his job as a bus operator. It is certainly not limited to the act of simply driving a bus. If it were, it would have been a simple thing for the legislature to have used the term "driving" instead of the term "*operating*" when drafting the exemption. One of the difficulties I have with the submission of New Shuttle is that, while the implication of their argument is that Muellerder was not "*operating*" the shuttlebus when the ferry was late, they have not told me when he ceased "*operating*" it.

In my opinion, the term "*operating*" must be given its meaning in the context of the complete set of duties that New Shuttle expected Muellerder to perform. That conclusion is supported by the opening words of the definition of "*bus operator*" in the *Regulations*, which says:

"bus operator" means a person who operates a motor vehicle that . . .

In this case, it was clearly contemplated that a normal part of operating the shuttlebus would include waiting at the ferry terminal and in Qualicum and that during those periods Muellerder was required to promote the service provided by New Shuttle to the public.

The appeal is dismissed.

I will make two other comments, although neither relate to the conclusion I have already reached. First, in their reply submission, New Shuttle suggested that the exemption in subsection 44(a) relieves an employer from paying straight time wages if any of the circumstances listed in that subsection. That is wrong. Where the exemption applies, it applies only to the statutory obligation outlined in Sections 40 and 41 of the *Act* to pay overtime wages. The exemption does not, as suggested by New Shuttle, apply to the general statutory obligation to pay wages for work performed.

Second, even if the exemption had applied, it is apparent that not all Muellerder's overtime hours could have been attributed to waiting for late ferries. Simply because Muellerder was required to wait for a ferry which was late does not mean that the time waiting would have been caught by Section 44(a)(iii) of the *Regulations*. It is obvious that a large portion of the overtime accumulated by Muellerder related simply to his work schedule. For example, on many days Muellerder worked from 7:15 am to 4:00 pm, a total of 8.75 hours. He would have been entitled to .75 hour overtime, regardless of whether he had to wait for a late ferry on that day. In those circumstances it was not the late ferry, a matter "*completely beyond the employer's control*", that caused the overtime, but his work schedule, which is a matter completely within the employer's control. It would have been up to New Shuttle to show that any overtime hours claimed to be exempted related directly to the ferry being late on that day and were not simply attributable Muellerder's work schedule on that day.

ORDER

Pursuant to Section 115 of the *Act*, the Determination dated June 25, 1999 is confirmed in the amount of \$6504.45, plus interest on that amount pursuant to Section 88 of the *Act*

David Stevenson
Adjudicator
Employment Standards Tribunal