

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-

North Shore Taxi (1996) Ltd.

(“North Shore Taxi” or the “employer”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 98/399

DATE OF HEARING: September 15th, 1998

DATE OF DECISION: November 23rd, 1998

DECISION

APPEARANCES

Israel Chafetz	for North Shore Taxi (1966) Ltd.
Payam Azad	on his own behalf
Wendy L. Jones	for the Director of Employment Standards

OVERVIEW

This is an appeal brought by North Shore Taxi (1966) Ltd. (“North Shore Taxi” or the “employer”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on May 28th, 1998 under file number 002343 (the “Determination”).

The Director determined that North Shore Taxi owed its former employee, Payam Azad (“Azad”), the sum of \$9,020.32 on account of unpaid wages and interest. Further, by way of the Determination, a \$0 penalty was issued pursuant to sections 98 and 29(2)(a) of the *Act* and *Employment Standards Regulation*, respectively.

ISSUE ON APPEAL

The employer says that the delegate erred in rejecting the employer’s “daily trip sheets” which show, in Azad’s own hand, that he worked 8 hours or less each day, regardless of the duration of his shift. The time beyond 8 hours was recorded by Azad as “break” time and thus the employer says that Azad should not be compensated for these latter hours as he was not working. Azad, for his part, alleged (and this was accepted by the delegate) that the daily trip sheets do not accurately reflect his total working hours and that, in fact, he was working throughout his entire shift each and every day.

FACTS

North Shore Taxi is a licensed taxicab company whose operations, consisting of some 78 taxicabs in the North Shore Taxi livery, span from Deep Cove to Lions’ Bay on the “north shore” of greater Vancouver. The company schedules its drivers for one of two basic shifts, the day shift from 4:00 A.M. to 4 P.M. and the night shift from 4:00 P.M. to 4:00 A.M. However, there is a certain amount of variance regarding these shift times--some drivers start late and finish earlier; an individual cab is available to a driver within a designated 12-hour shift period but the actual hours

worked are, to some degree, within the driver's own discretion. During the time period in question, North Shore Taxi drivers were paid a percentage (typically, I understand, 45% although 42% in Azad's case) of the fares that they generated while on shift .

As noted above, the principal issue in this appeal, and in four other appeals that were heard at the same time involving four other former North Shore Taxi drivers, is whether the Director's delegate was entitled to disregard the complainant employees' "Daily Trip Sheets"--which, in all cases showed that the employees worked no more than 8 hours per day regardless of their "start" and "end" times--in favour of the employees' assertions that they were typically "on duty" for more than 8 hours but only recorded 8 hours "working time" as directed by their employer.

While a number of "Daily Trip Sheets" were placed into evidence, Azad's December 6th, 1996 trip sheet is typical (this document was appended to the Determination). It shows a start time of 5:15 A.M. and a finish time of 16:00 (4:00 P.M.)--for a total "shift duration" of 10 hours and 45 minutes. Azad recorded 8.0 hours as "Hours Worked" and 2 hours and 45 minutes as "Total Breaks"--the actual breaks themselves are not separately listed, only a global "total breaks" is recorded at the top of the trip sheet along with the shift start and end times and the total "hours worked". The delegate accepted Azad's position that he was in fact working throughout his entire shift and thus was entitled to be paid at the statutory minimum wage for all hours worked, not just the 8 hours (or less) he recorded as having worked on the individual daily trip sheets.

The relevant portion of the Determination, at p. 5, reads as follows:

"N.S. Taxi suggests that it would be impossible to work an 11 or 12 hour shift without taking a break. In a work environment which is commission based, it is plausible that an employee who is not scheduled for a break free from work would continue to work throughout their shift, and likely eat in the cab, and never leave the cab for more than a few minutes at a time. The taxi drivers who filed complaints unanimously claim that they could only leave their cab for a couple of minutes here and there, otherwise they would miss a trip and lose that commission.

On the balance of probabilities, Azad worked all hours during which he was scheduled to drive a cab, or had the cab in his possession, as set out on each trip sheet. The calculation report reflects these hours."

North Shore Taxi's sole witness was its general manager, Mr. Subag Singh. The firm uses a computerized dispatch system--customers call into a central number for a taxi and the call is dispatched to the first in line in the "queue" in the relevant zone (the company's service area is divided into a number of geographic zones); this driver responds by pressing an "accept button" in which case further details are then displayed on the in-car screen. If a driver does not quickly respond to a request to "accept" a particular fare, that driver is dropped from the queue and will then have to re-book into that zone or some other zone.

A driver is not supposed to log into a particular zone until actually in the zone and once in the zone, the onboard computer screen lets the driver know where he or she stands in the queue for that zone. Drivers are allowed to temporarily "book-out" for up to 7 minutes without losing their

position in the queue; otherwise, the driver will have to re-book into the zone and then fall to the end of the queue. In addition to the computerized dispatch system, there is a two-way radio on board but the radio is only used as a back-up system.

In October 1995, and with a new *Act* pending, the employer redesigned its “daily trip sheet” and implemented other new policies including having its drivers sign the following form:

“In view of the recent revisions to the Employment Standards Act, North Shore Taxi has implemented a new **‘Drivers Hours of Work Policy’**, which will be rigorously enforced.

1. Under NO circumstances is any driver allowed to work in excess of eight (8) hours per day; or forty (40) hours per week, without written authorization from the Company.

2. Drivers will clearly show their TOTAL HOURS WORKED, and all other hours in the areas provided on the trip sheets. THE NUMBER OF HOURS WORKED (no more than 8) WILL BE CLEARLY WRITTEN ON THE ENVELOPE BEFORE CASHING OUT. Drivers who fail to record the NUMBER OF HOURS WORKED IN THE SPACE PROVIDED ON THE TRIP SHEET AND ENVELOPE, WILL FIND THEMSELVES BEING INCONVENIENCED DURING THEIR SHIFT TO COME INTO THE OFFICE AND CORRECT THE OVERSIGHT.

3. In signing this letter the driver is stating that she/he understands the above and agrees to comply FULLY with the new regulations.”

(**boldface** in original)

In addition to having its drivers sign the above form, North Shore Taxi also stressed the matter of hours of work in its various “newsletters” sent out to its drivers. For example, the October 4th, 1995 newsletter stated that drivers were to “write down all the breaks that you take during your shift and write down the actual hours worked on the sheet and the envelope (not the number of hours you had the cab in your possession)” and that “drivers are only authorized to work for eight (8) hours” after which time “drivers must code 2” (*i.e.*, book off the shift).

Mr. Singh’s evidence is that drivers are able to schedule their breaks in a variety of ways: the driver may book into a slow zone, leave the car and, in effect, “take his chances” that a call will not come in while on a break; alternatively, the driver can simply not “book in” to any zone while on break. According to Mr. Singh, “we (*i.e.*, North Shore Taxi) don’t control when a driver takes a break” and that the company “cannot supervise or enforce breaks with 78 vehicles on the road”, that it cannot “physically check drivers” and that it “relies on drivers to take breaks”. Mr. Singh also testified that if a driver asked to work over 8 hours per day that request would likely be refused. Indeed, in cross-examination Mr. Singh stated that the company policy was for drivers to work no more than 8 hours per day and that if a driver exceeded 8 working hours in a day that

driver would have to explain the situation to the company. If a driver recorded more than 8 hours in a shift “he would be called in and dealt with”--the driver would be warned and if he persisted in recording more than 8 hours worked, he would be fired. Mr. Singh testified that although the taxi would be made available to a driver for a 12-hour shift, the onus was on the driver to only work for 8 hours during the shift. Mr. Singh also testified that only drivers who were “booked in” to a particular zone were eligible--in accordance with their position in the queue--to be dispatched and that drivers who continually were not booked into any zone would be warned and then, if the behaviour persisted, terminated.

Azad’s evidence was that although he did take some breaks while on shift, he did not take breaks nearly as often as is suggested by his trip sheets. For example, Azad’s trip sheets for January 1997 show that, on average, he took about 3 to 4 hours in “breaks” each shift. Azad says that the employer tightly controlled its drivers through its dispatch system and that drivers were told to record no more than 8 hours as “Hours Worked” each shift and that the balance of the shift was to be recorded on the trip sheet under the heading “Total Breaks”. According to Azad, he was also instructed to record less than 8 hours worked when his percentage of the revenues earned during a shift would not produce an hourly rate equivalent to the minimum wage. It should be noted that on some trip sheets, Azad’s total hours worked, though recorded to be less than 8 hours, produced an hourly wage equivalent of more than \$7 per hour. When asked about this point in cross-examination, Azad’s reply was that he only did a “rough adjustment in his head” and reduced the “Hours Worked” recorded on the trip sheet so as to ensure he earned at least the minimum wage; he was not particularly concerned about the actual number of hours recorded so long as they were less than 8 because he was not paid by the hour but rather was paid by commission. I find this explanation to be entirely credible.

Thus, according to Azad, the company’s direction to its drivers was that they record no more than 8 hours worked on the daily trip sheet, regardless of the duration of the shift, and to record less than 8 hours when the income earned during an 8-hour shift would not equal at least the minimum wage--in the latter case, the drivers were instructed to record such hours worked as would produce earnings of at least \$7 per hour.

Azad testified that he was told to follow the above guidelines regarding the recording information on the trip sheets by his supervisor, Parmjit Saroya, sometime in 1995 and again by the employer’s manager, Don Muir, sometime in July or August of 1995. Azad says that if a driver attempted to record more than 8 hours worked, that driver would be “called into the office” and reprimanded. The employer did not call either Mr. Saroya or Mr. Muir to rebut Azad’s testimony.

Azad stated that since drivers were paid solely on a commission basis, it was in their interest to remain, as much as possible, in the car between fares so as not to miss a dispatch call and thereby lose their place in the queue. The system did not permit a driver to take a break any longer than 7 minutes or else, again, the driver would lose their queue position. Thus, he rarely booked off for a break and, for the most part, ate his meals in the car. While there was a good deal of “waiting time” these interludes could not be characterized as true “breaks” because he was in his car awaiting a call and would be reluctant to leave the car for fear of losing a call and, in turn, his place in the dispatch queue. Azad claims that with some few minor exceptions, he was on-duty

throughout his shift and therefore is entitled to be paid for all of his working hours (*i.e.*, the entire shift each day) which is precisely what the Director's delegate ordered in the Determination.

ANALYSIS

At the outset it should be noted that during the time period material to this appeal, section 37.1 of the *Regulation* exempted taxicab drivers from certain provisions of the *Act* including the meal break and overtime provisions. However, taxicab drivers have never been exempted from sections 16 and 17 of the *Act* and thus are entitled to be paid at least the minimum wage for all hours worked. "Work means the labour or services an employee performs for an employer whether in the employer's residence or elsewhere" and "an employee is deemed to be at work while on call at a location designated by the employer" (other than the employee's residence)--see subsections 1(1) and (2) of the *Act*.

The employer's position is quite straight-forward and, superficially at least, somewhat compelling. In late 1995, with the pending introduction of a new *Employment Standards Act*, the employer took steps to ensure that it would not be liable for paying its drivers for anything more than 8 working hours per day. To that end, it directed its drivers that they could no longer work more than 8 hours per day. Although a cab would be made available to each driver for a 12-hour shift, the onus would be on the driver to work only 8 hours within that 12-hour shift period. The drivers were told to take as many breaks as they wished but not to work any more than 8 hours per day. Further, at the end of each shift their total working hours as well as their "break times" were to be recorded on the daily trip sheet.

In Azad's case, so far as the employer was aware, and based on his own signed daily record (the trip sheets), he never worked more than 8 hours in a day and on some days worked less than 8 hours. The employer clearly set out its rule prohibiting drivers from working beyond 8 hours in a day; it vigorously enforced that rule; Azad seemingly accepted the rule--as evidenced by his signature on the trip sheets attesting to his not having worked more than 8 hours on any given day--and thus he cannot now come forward and purport to deny his own document. In effect, the employer submits that it should not face an unpaid wage liability because Azad failed to honestly record his working hours.

As attractive as that argument may appear to be, I cannot accede to it. This is not a situation where, say through the strict application of the parol evidence rule, I can simply ignore the surrounding circumstances with respect to the completion of the daily trip sheets. Certainly, if the trip sheets are taken at face value, Azad does not have an unpaid wage claim. However, I accept Azad's testimony that the trip sheets were not an accurate record of his actual working hours and I further accept his submission that the employer either knew, or was wilfully blind, about that matter. When a document clearly does not express the parties' mutual intentions, the document cannot be relied on and resort may be had to extrinsic evidence (see Waddams, *The Law of Contracts*, 3rd ed., pp. 215 et seq.).

I must query why, for example, the employer would allow a driver to report for a 10- to 12-hour shift and then demand that the driver only work for 8 hours during that shift. To suggest that Azad routinely worked 8 or fewer hours, while at the same time clocking anywhere from 2 to 5 hours in “breaks” on that same shift unreasonably stretches credulity, particularly when Azad could not earn any income while on a “break”. For example in January 1997, the trip sheets show that Azad worked 20 shifts, ranging from 9 to 13 hours in length; his “hours worked”, however, typically ranged from 4 to 8 hours each day--the balance was recorded as noncompensable “break” time. It may well be that during a good portion of any given shift Azad was simply sitting in his car awaiting a call, but I do not consider that this sort of inactivity can be properly characterized as noncompensable “break time”.

There were institutional barriers, created by the employer, that discouraged drivers from taking breaks of any extended duration. I have already alluded to the computerized dispatch system and the fact that unless a driver was “booked in” to a particular zone he or she was not even eligible to be dispatched. It should be remembered that a driver could only “book out” for 7 minutes before losing his or her place in the zone queue and thus possibly forfeiting a fare. The drivers were paid on a pure commission basis and, accordingly, being booked into the dispatch system was critical to their ability to be dispatched and in turn earn any sort of income.

Further, Mr. Singh’s own testimony was that the company expected drivers to be booked into some zone while they were on shift--if drivers were booked out entirely for extended periods they would be disciplined. That particular policy is fully understandable inasmuch as the company can only generate revenues when its drivers are on the road and available to service customers. How then, can this latter policy be reconciled with, for example, Azad’s January 1997 daily trip sheets which show that he was supposedly on “breaks” nearly as much (on some days even more often) as he was on duty? Azad was never disciplined in any way regarding his failure in January 1997, or at any other time, to be available for dispatch.

I am satisfied, a balance of probabilities, that Azad was directed by company officials to record no more than 8 “hours worked” on his daily trip sheets regardless of the duration of the shift, or the total number of hours actually worked while on shift. The employer says that by allowing Azad to contradict his own record, the employer is being penalized. I do not agree--in my view, if Azad was bound by the daily trip sheets, which I believe the employer knew to be an inaccurate record of Azad’s working time, it would be Azad, and not the employer, who would be penalized.

The present appeal is to be distinguished from *Munday* (BCEST Decision No. D326/96), cited by the employer in its final argument, where I had no credible evidence before me that the employer’s payroll records were inaccurate; I cannot reach the same conclusion here. Unlike the situation in *Health Ventures Ltd.* (BCEST Decision No. 078/97) also cited by the employer’s legal counsel, the employer’s time records, that is, the daily trip sheets, most definitely do not constitute the “best evidence” of Azad’s actual working hours.

Nor can I accept the employer’s assertion that the daily trip sheets give rise to the equitable doctrine of promissory estoppel (see *Central London Property Trust Ltd. v. High Trees House Ltd.* [1947] 1 K.B. 130). For one thing, a necessary element of this latter doctrine is an uncoerced representation by the promisor--in the present case, the daily trip sheets were completed pursuant

to the instructions of the *employer* and, therefore, cannot reasonably be said to constitute a representation by Azad. Further, I am not satisfied that the necessary element of good faith reliance is present here; at all times, the employer either knew, or was wilfully blind to the fact that the daily trip sheets were concocted records and did not accurately reflect the drivers' actual working activities during their shifts.

I am not persuaded by the employer's submission that taxi drivers are independent and autonomous employees whose working hours cannot be easily monitored. For one thing, the employer is free to schedule its drivers for shorter shifts which would ensure that no driver could exceed 8 working hours in a day. If the employer's operational requirements are such that drivers must be on the road for a shift in excess of 8 hours, the employer can seek, under section 37 of the *Act*, to implement one of the five "flexible work schedules" set out in Appendix 1 of the *Employment Standards Regulation* (the options range from 10 to 12 hours shifts). Secondly, the employer could ensure that the employees actually took breaks--and it should be noted that during the times material to this appeal, taxicab drivers did not have a statutory entitlement to any breaks by reason of section 37.1 of the *Regulation*--by simply dropping them off the system during mandated break times. Of course, to a large degree, the drivers themselves might rebel at such a system because it would limit their earnings and that, perhaps more than any other reason, would appear to be the explanation why drivers were prepared to go along with the employer's subterfuge--they needed to be on duty for more than 8 hours in order to generate even modest earnings.

In effect, what the employer implemented in this case was a record-keeping system that purported to limit the drivers' right to claim compensation for any working time beyond 8 hours in a single shift. However, if a driver did work beyond 8 hours, and by so doing generated additional revenue, the employer benefited inasmuch as it demanded the larger percentage of cab revenues. However, the taxicab driver alone bore the risk of not earning anything if he or she worked beyond 8 hours but did not generate any additional revenue in that period. In this latter scenario, the employer would simply say that the additional hours worked, being in contravention of its "8-hour rule" with respect to working time, was (and would be recorded as) noncompensable "break time".

In my view, and based on the evidence before me, I am satisfied that Azad was "working" throughout most, if not all, of his shifts because he was "on-call" in his cab during his shifts [see section 1(2) of the *Act*]. It is incumbent on the employer to show that for some or all of Azad's daily shifts he was, in fact, not on-call and therefore not working. Azad did admit, in cross-examination, that he did, from time to time, take a break but he also testified that these breaks were of limited duration. I am not satisfied, on a balance of probabilities, that Azad was working each and every minute of each and every shift during the period spanned by the Determination, namely, August 5th, 1995 to June 30th, 1997.

The delegate held, relying on the start and finish times set out in the daily trip sheets, that the entire shift was compensable time. The delegate was of the view, based on section 32 of the *Act*, that only a break of 30 or more consecutive and uninterrupted minutes could be considered to be noncompensable time. In my view, the delegate's approach to this issue was misconceived. Section 37.1 of the *Regulation* states that, *inter alia*, section 32 of the *Act* (the 30 minute meal

break provision) “do[es] not apply to a person employed as a taxicab driver”. Accordingly, I believe that the delegate erred in relying on section 32 in defining a noncompensable break to be one of at least 30 minutes’ duration. The only relevant determination to be made is whether or not Azad was “working” (*i.e.*, providing labour or services to his employer or on call) during all of his shifts. Azad admits that he was *not* working every minute of every shift but, rather, did take breaks from time to time. Undoubtedly, the frequency and duration of these breaks varied considerably during the course of his employment.

The daily trip sheets that were placed into evidence by the employer clearly, and routinely, show lengthy “gaps” between fares. For example, during the month of February 1997, Azad typically came on shift somewhere between 5:00 and 5:30 A.M. each day, however, the first fare of the day is not recorded until, again typically, more than 1 to 2 hours later. While it is certainly possible that Azad was sitting in his cab, waiting for a fare, I think it substantially more probable that he was away from his cab on a break, perhaps having breakfast, during the slack time in the early hours before the morning “rush hour” commences. Because the early morning hours are typically slow, Azad would not have necessarily “booked out” of the computer dispatch system as he knew from experience that he could wait in line in the queue for an extended period before reaching the front of the queue to be dispatched as and when a fare came in.

Faced with the conflicting evidence before me--the employer taking the position that anything over 8 hours was “break time” and Azad asserting that he was on-duty for virtually the entire shift each day--I can only render a judgment based on what I believe, based on the evidence before me, to be the most probable scenario. It goes without saying that I do not find either the employer’s or Azad’s position vis-à-vis “working hours” to be credible. Based on the evidence before me, and recognizing that there would be some variance from day to day, on the balance of probabilities and on average, I find that Azad was off-duty, on noncompensable break times (*e.g.*, to have a meal), for one hour of each and every shift during the material period.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be varied by reducing Azad’s compensable hours by one hour for each and every shift worked during the period August 5th, 1995 to June 30th, 1997 save for August 5th and 8th, 1995 when Azad was being trained. This matter is referred back to the Director solely for the purpose of calculating Azad’s unpaid wage entitlement, including any necessary adjustments with respect to statutory holiday pay, vacation pay and interest.

I have found that the employer contravened the *Act* by failing to pay Azad all of the wages to which he was entitled. Accordingly, the \$0 penalty set out in the Determination is confirmed.

Kenneth Wm. Thornicroft, Adjudicator