

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.: 98/400

DATE OF HEARING: September 15, 1998

DATE OF DECISION: November 23, 1998

DECISION

APPEARANCES

Israel Chafetz for North Shore Taxi (1966) Ltd.
Reza Vaziri 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 June 1st, 1998 under file number 002343 (the “Determination”).

The Director determined that North Shore Taxi owed its former employee, Reza Vaziri (“Vaziri”), the sum of \$9,837.59 on account of two weeks’ wages as compensation for length of service, 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.

This appeal was heard at the same time as four other employer appeals involving four other former North Shore Taxi drivers. The employer’s evidence was common to all five appeals.

ISSUE ON APPEAL

The employer does not challenge the Determination with respect to the finding that Vaziri was entitled to two weeks’ wages as compensation for length of service (see section 63 of the *Act*). However, the employer asserts that the delegate erred in rejecting the employer’s “daily trip sheets” which show, in Vaziri’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 Vaziri as “break” time and thus the employer says that Vaziri should not be compensated for these latter hours as he was not working. Vaziri, 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 (in Vaziri's case, 42%) of the fares that they generated while on shift. Vaziri was employed as a taxicab driver from October 29th, 1995 until he was terminated, purportedly for cause, in early May 1997; his last working day was May 6th, 1997.

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 Vaziri's "Daily Trip Sheets" were placed into evidence, his June 14th, 1996 trip sheet is typical (this document was appended to the Determination). It shows a start time of 4:00 P.M. and a finish time of 5:00 A.M. for a total "shift duration" of 13 hours; Vaziri recorded 8 hours as "hours worked" and 5 hours as "total breaks". The delegate accepted Vaziri'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.

Vaziri testified that if he drove a 12-hour shift, he was, in fact, working that entire time. His evidence is that he and all other drivers were instructed to record no more than 8 hours of working time on a shift regardless of the actual time on-duty. The balance of the shift beyond 8 hours was to be recorded as "break time". Further, Vaziri stated that he was instructed to record less than 8 "hours worked" if his earnings, on a per hour basis, fell below the \$7 per hour minimum wage set out in the *Employment Standards Regulation* (see section 15); in that event, he was to record whatever figure lesser figure that would produce an hourly rate of not less than \$7 per hour.

Vaziri's evidence is that he does not drink coffee or smoke and thus he had no need to take a "coffee break" and that he ate his all of his meals in the cab. While he acknowledged that he did, from time to time, take some breaks these occasions were infrequent and the breaks were not very long--*e.g.*, no more than a few minutes to use a washroom.

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 *North Shore Taxi and Azad* (EST Decision No. 465/98), an appeal involving one of the other four employees referred to above, I rejected the employer’s contention that the “daily trip sheets” accurately set out the actual working hours of the respondent employee in that appeal. The employer’s evidence in this appeal is essentially identical to that given in the *Azad* appeal. For the reasons given in the *Azad* appeal, I do not find the “daily trip sheets” to be a credible and reliable record of Vaziri’s working hours.

The employer placed into evidence Vaziri’s trip sheets for March 1997. These trip sheets show that Vaziri’s shifts ranged from 10 to slightly more than 13 hours in length but the “hours worked” during each shift only ranged from 6 to 8 hours--the balance of the shift was recorded as noncompensable “break” time. Throughout March 1997 Vaziri was driving the “day shift” and typically came on shift between 4:45 and 5:00 A.M. and usually ended his day around 3:30 P.M. 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. Unless a driver was “booked in” on the computerized dispatch system to a particular geographic “zone” he or she was not even eligible to be dispatched. A driver could only “book out” of the system 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. Therefore, I do not think it credible that Vaziri would spend 3 to 5 hours each day on “breaks” during which time he was wholly unable to generate any income.

Mr. Subag Singh, the employer’s general manager and sole witness testified 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, Vaziri's March 1997 daily trip sheets which show that he was supposedly on "breaks" for between 4 and 6 hours each shift during that month? Vaziri was never disciplined in any way regarding his failure in March 1997, or at any other time, to be available for dispatch.

Based on the evidence before me, I am satisfied that Vaziri 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 Vaziri's daily shifts he was, in fact, not on-call and therefore not working.

Vaziri did admit, in cross-examination, that he did take infrequent breaks but only of limited duration. However, I am not persuaded, on a balance of probabilities, that Vaziri's evidence is credible on this latter point. Vaziri's daily trip sheets for March 1997 clearly show lengthy "gaps" between fares (both the pick-up and drop-off times are recorded as well as the pick-up address). Vaziri testified that the daily trip sheets were entirely accurate at least insofar as the record of fares is concerned. As noted above, according to the trip sheets, Vaziri came on shift typically between 4:45 and 5:00 A.M. each day. However, throughout the better part of March 1997 the first fare of the day is not recorded until after 6:30 A.M. (often after 7:00 A.M.). While it is certainly possible that Vaziri 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, Vaziri 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 Vaziri 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 Vaziri's position vis-à-vis "working hours" to be credible. On balance, and recognizing that there would be some variance from day to day, I find that Vaziri 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 Vaziri's compensable hours by one hour for each and every shift worked during the period October 29th, 1995 to May 6th, 1997. This matter is referred back to the Director solely for the purpose of calculating Vaziri'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 as is the

finding with respect to Vaziri's entitlement to two weeks' wages as compensation for length of service.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal