

**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.:** 98/401

**DATE OF HEARING:** September 15, 1998

**DATE OF DECISION:** November 23, 1998

**DECISION**

**APPEARANCES**

Israel Chafetz	for North Shore Taxi (1966) Ltd.
No appearance	for Bagher Shahram Mojtahedzadeh
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, Bagher Shahram Mojtahedzadeh (“Mojtahedzadeh”), the sum of \$5,210.32 on account of unpaid minimum wages, statutory holiday pay, vacation pay 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.

Although served with notice of the appeal hearing, Mojtahedzadeh failed to attend the hearing or to otherwise advise the Tribunal as to the reason for his absence. Further, despite being asked to provide a written submission with respect to the employer’s appeal, Mojtahedzadeh did not do so. I was advised at the hearing that Mojtahedzadeh had left Canada and was now living in eastern Europe.

**ISSUE ON APPEAL**

North Shore Taxi asserts that the delegate erred in rejecting the employer’s “daily trip sheets” which show, in Mojtahedzadeh 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 Mojtahedzadeh as “break” time and thus the employer says that Mojtahedzadeh should not be compensated for these latter hours as he was not working. Mojtahedzadeh, for his part, alleged during the investigation of his complaint (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 AND ANALYSIS

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 45%) of the fares that they generated while on shift. Mojtahedzadeh was employed as a taxicab driver with North Shore Taxi from March 2nd, 1995 to June 30th, 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 Mojtahedzadeh's "Daily Trip Sheets" were placed into evidence, his May 17th, 1996 trip sheet is typical (this document was appended to the Determination). It shows a start time of 16:30 (4:30 P.M.) and a finish time of 2:30 A.M. for a total "shift duration" of 10 hours; Mojtahedzadeh recorded 8 hours as "hours worked" and 2 hours as "total breaks". The delegate accepted Mojtahedzadeh'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 employer's position is quite straight-forward. 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.

The employer placed into evidence Mojtahedzadeh's daily trip sheets for December 1996 and January to February 1997. These trip sheets indicated, as does the delegate's "calculation report" appended to the Determination, that Mojtahedzadeh worked irregularly, typically only about 10 shifts per month. During the period December 1996 to February 1997, Mojtahedzadeh usually drove the day shift coming on shift somewhere between 6:30 and 7:00 A.M. Although there is some variance, he usually drove a 9 hour shift, recording 1 hour as "break time".

Very frequently, the trip sheets show a “gap” of an hour or more from when Mojtabehzadeh came on shift to his first fare of the day. The employer surmises that he may have been on a breakfast break prior to his first fare and that is not an unreasonable assumption. There is evidence before me of a common practice among some North Shore Taxi drivers to book on the day shift and then, shortly thereafter, take a breakfast break at one of a few local restaurants.

Thus, Mojtabehzadeh’s time records are consistent with his having taken the breaks that he recorded as having taken; Mojtabehzadeh did not give any contrary *viva voce* evidence (not having attended the appeal hearing); nor has Mojtabehzadeh provided any written submission challenging the veracity of his own records. The Director did not submit any evidence--and, frankly, was not in a position to submit any evidence, other than hearsay evidence--with respect to Mojtabehzadeh’s actual working hours.

Based on the evidence before me, I can only conclude that Mojtabehzadeh was “working” or on-call only during the times he recorded as working time on his daily trip sheets. It follows that the Determination must be varied inasmuch as the delegate proceeded on the assumption that Mojtabehzadeh was working throughout his entire shift each day.

## **ORDER**

Pursuant to section 115 of the *Act*, I order that the Determination be varied so that Mojtabehzadeh’s wage entitlement is calculated on the basis that the “break time” recorded in his daily trip sheets is considered to be noncompensable nonworking time. This matter is referred back to the Director solely for the purpose of calculating Mojtabehzadeh’s unpaid wage entitlement, including any necessary adjustments with respect to statutory holiday pay, vacation pay and interest in accordance with these reasons.

It may well be, after the appropriate calculations have undertaken, that Mojtabehzadeh is not entitled to any further monies on account of unpaid wages. In that event, the \$0 penalty set out in the Determination is cancelled; on the other hand, if, following the appropriate calculations, the employer is remains liable to Mojtabehzadeh on account of unpaid wages, the \$0 penalty is confirmed.

**Kenneth Wm. Thornicroft, *Adjudicator***  
**Employment Standards Tribunal**