

An appeal

- by -

Swiftsure Taxi Co Ltd
(“Swiftsure”)

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: James Wolfgang

FILE No.: 2001/370

DATE OF HEARING: August 21, 2001

DATE OF DECISION: September 10, 2001

DECISION

APPEARANCES:

Bob Godfrey	representing himself
P. Wahlla	Swiftsure Taxi
A. Kang	Swiftsure Taxi
Ian MacNeill	Director of Employment Standards

OVERVIEW

This is an appeal by Swiftsure Taxi Co. Ltd. (“Swiftsure” or the “Employer”) pursuant to Section 112 of the *Employment Standards Act (the “Act”)* of a Determination issued by the Director of Employment Standards (the “Director”) dated May 02, 2001. The Determination found Swiftsure owed Robert Godfrey (“Godfrey”) \$2,824.39 for violations of Section 37.1 (4), Section 16, Section 18 (2), Section 21 (2), Section 47 and 58 (3) of the *Act*. A copy of the original complaint form was not included in the material supplied to the Tribunal.

The Determination found Godfrey had not been paid minimum wage and that he had paid the fuel for the taxi he was driving. During the investigation the delegate found Godfrey had not been paid statutory holiday pay or vacation pay while employed by Swiftsure.

There appears to be a small mathematical error in the calculation of the amount owed. The revised calculation for the amount is \$2,823.09 rather than \$2,824.39.

The appeal was heard by way of an oral hearing on August 21, 2001. The witnesses who testified were:

- Cynthia Cantelon, former employee of the Employer
- Sandra Evans, former employee of the Employer
- K. Hudson, employee of the Employer

Evidence was taken from all parties under oath.

ISSUE

Does Swiftsure owe Godfrey for fuel purchased by him while employed? Also, does Swiftsure owe Godfrey wages, annual vacation pay and statutory holiday pay?

THE FACTS AND ARGUMENT

Swiftsure employed Godfrey as a taxi driver from June 14, 2000 until August 19, 2000. Godfrey indicated Joginder Wahlla who was part owner of Swiftsure Taxi at the time and the owner of Duncan Taxi referred him to Swiftsure Taxi. According to Swiftsure, Godfrey was hired by Laurie Aho (“Aho”) who was a dispatcher at the time Godfrey was employed and was responsible for the day-to-day dealings with the employees. There was no written employment contract in effect. According to Godfrey, he worked a 12-hour shift and was paid a commission of 50% of the gross earnings of the taxi on a daily basis. The Determination found Godfrey had paid the full cost of fuel from his commission of 50 % of the gross revenue for the taxi he was driving.

At some time after Godfrey quit Swiftsure there was a change in policy. The drivers went from paying 100% of the fuel from their share to paying 50% of the fuel. This was done by taking the cost of fuel off the gross revenue from the taxi before dividing the net 50/50. The witnesses for Godfrey indicated this change took place between September and early December in 2000.

Swiftsure claims they have not changed the way they employed drivers. It is their contention Swiftsure has always paid 50% of the fuel with the driver paying the other 50%. The witness for Swiftsure supported this. He had been a dispatcher during the time Godfrey was a driver. He started driving taxi part time in late August 2000 and began driving full time in September 2000.

Swiftsure presented written statements from two employees. One claimed he was dispatching when Godfrey worked for Swiftsure and the practice then was for the driver to pay for the fuel from out of the total income for the day and then divide the remainder 50/50.

Swiftsure had a change in operators in July 2000. P. Wahlla and A. Kang (“Kang”) assumed the operation of Swiftsure on that date.

When the drivers arrive at the dispatch office at the beginning of their shift the dispatcher has them sign out the keys for the vehicle they are driving that day, recording the time the keys are picked up. The dispatcher then gives the drivers their trip sheets for the day. The driver records each trip or fare on the trip sheet showing the time of the pick up, the location and the destination of the trip. They also record the amount of the fare and whether it is paid by cash, credit card or company charge account. At the end of their shift the drivers return the keys to the dispatcher and the time is recorded. The dispatcher then takes the trip sheet and the money from the driver and puts the company’s share in the safe. The driver keeps his share. The dispatcher may check the trip sheet to ensure the driver has properly reported all money. The information from the trip sheet is transferred to a report sheet, which records the driver’s name, the time on, and off shift, distance driven in the shift, the hours worked and the amount of charges and money brought in. If the money does not balance it is recorded on the report sheet showing a shortage or surplus and a running total is kept. The dispatcher then signs the entries.

In addition to the trip sheets and report sheets the dispatcher maintains a logbook. This is a running total of all activity during the shift. The dispatcher records the time and location of each incoming call, the driver dispatched to pick up the passenger and notes when the driver is again available for dispatch. They also record other information, such as when a driver leaves the taxi for meals or breaks and when they are available again. Information on vehicle breakdowns etc. is also recorded. The dispatcher has a dispatch board where the drivers are marked by location. In the case of Swiftsure, the territory is divided into zones and the dispatcher notes which driver is “number 1 in zone 2” for example.

According to one of the witnesses, Swiftsure had changed the way the drivers were reported on the record sheet. Instead of showing the start time and end time as the time the driver picked up or dropped off the keys for the taxi the dispatchers were told to report the time of starting as the time the driver received their first dispatch and to indicated the end of the shift as the time the driver received their last dispatch.

Swiftsure admit that Godfrey’s trip sheets are missing; in fact the trip sheets for all of the drivers are missing. They claim the former manager may have taken them or destroyed them before she left on short notice. Godfrey kept a separate record in a book of the information from his trip sheets, which the delegate used, in his calculations.

Swiftsure stated they do not owe Godfrey minimum wage for the hours claimed, as Godfrey was not always available to answer radio calls therefore he had booked off and was not working. They claim Godfrey would take a couple of calls at the beginning of his shift and then disappear. They contend Godfrey deliberately set them up to make a claim for wages at a later date. On December 04, 2000 Swiftsure sent a letter to the delegate outlining the hours they claim Godfrey worked from June 14 to August 09, 2000. The daily hours range from 2.5 to 10.5. Swiftsure claim these were developed using the log sheet records. While a shift was of 12 hours duration, they claim many drivers would not work the full shift, taking time off to do personal business.

There was no evidence of any reprimand of Godfrey on his file or any verbal warnings. When questioned why Swiftsure had not disciplined Godfrey for not being available, they indicated it was better to have a driver bringing in some money rather than no money.

Swiftsure claim they do not pay statutory holiday pay or vacation pay as the drivers keep all of their tips and this is equal to the statutory and holiday pay.

ANALYSIS

Statutory holidays are provided for under Section 44 of the *Act*.

Swiftsure are in violation of the *Act* by not paying statutory holiday pay and vacation pay. The *Act* is quite specific that gratuities are not wages and therefore cannot be used to offset statutory and holiday pay.

Definitions in Part 1 of the *Act* states:

“wages” includes (a), (b) (c) (d) (e)

but does not include

(f) gratuities

Vacation pay is paid at the rate of 4% of the employee’s wages. Gratuities are not wages and cannot be used to meet the employer’s obligation to pay vacation pay.

There are provisions in the regulations to apply for a variance to include vacation pay and statutory holiday pay in the commission rates paid to an employee. There is no record a variance has been issued to Swiftsure and therefore both vacation pay and statutory holiday pay is owed to Godfrey.

Swiftsure argued there is no proof Godfrey actually worked the hours in the Determination. I will agree there is no evidence to prove Godfrey was in his taxi at all times however we have no evidence he was not. Swiftsure had a system of codes to allow the driver to communicate with the dispatcher on a number of circumstances, for example a “Code 3” was an indication to the dispatcher that the driver would be leaving the taxi for some time. The dispatcher would not assign any calls to them until they called in to inform they were available. The dispatchers indicated Godfrey was no more difficult to contact than the other drivers and I will accept the hours established by the delegate as the best evidence available.

The number of hours that Swiftsure reported to the delegate on December 04, 2000 as having been worked by Godfrey were supposedly created from the log sheets, which they claim, are an accurate record of the hours worked by a driver. It is one tool that can be used but by itself is not totally reliable. The logs and the trip sheets would present a better indication but also cannot be solely relied upon. Both the log sheets and the trip sheets only report activity. They do not report the time a driver is sitting in the taxi waiting for a dispatch. The lack of activity does not mean the driver is not working. This is a commission-based position and like their counterparts in sales is subject to periods of inactivity while still being at work. I believe the better measure is when the driver takes control of the taxi and when he returns it. I agree this is not perfect as drivers may take personal time off; however there is strong motivation as trips mean money for the driver therefore he must be available. I find it difficult to accept Godfrey would simply sit in his taxi and refuse to answer dispatches when it meant less money for him personally as well as Swiftsure.

If Swiftsure were concerned Godfrey was taking “personal time” they could have rectified this situation. As indicated above, there are a number of ways taxi drivers are monitored during their shift. The management reviewed the log sheets on a daily basis matching the log sheet activity to the trip sheets and the deposits. The dispatchers monitored the drivers to ensure they were available and took them “off the board” if they were not. There was no evidence of any warnings

or letters of discipline on Godfrey's personnel file to indicate Swiftsure were not satisfied with his performance. Swiftsure admit they did not discipline Godfrey.

It should be noted the drivers were scheduled for a 12-hour shift. Section 32 (1) (a) and (b) of the *Act* provides for two breaks of 30 minutes in each 12-hour period. The delegate noted this and reduced Godfrey's working shift to 11 hours per day. I accept the delegate's calculation of the hours worked by Godfrey and confirm Swiftsure were also in violation of Section 37.1 (4) of the *Act* in that they did not pay minimum wage.

There is conflicting evidence in this case in respect to who paid the cost of the fuel. A key piece of evidence is missing. The daily trip sheets for Godfrey cannot be located. In fact all of the trip sheets for the period of Godfrey's employment are missing. The trip sheets would have clearly indicated whether Godfrey was paying all of his fuel, as he claims, or 50% of the fuel as Swiftsure claims.

Swiftsure contend the evidence presented by the two witnesses for Godfrey should be discounted as one had left the company under bad terms and the other has an Employment Standards claim against them. They claim the two written statements from Mr. Nelson and Mr. Hudson are legal documents and should be given more weight.

This is not correct as the documents are simply written statements given to Swiftsure and are not sworn affidavits. It should be noted the evidence given by Mr. Nelson to the delegate is different from his written statement. Swiftsure claim Mr. Nelson misunderstood the questions of the delegate when he was interviewed.

In reply to that allegation, the delegate stated in a letter to the Tribunal dated June 5, 2001 that:

It was very clear to me when I spoke to Mr. Nelson what he said. He confirmed that he worked very little with Mr. Godfrey as they worked opposite shifts. The drivers all worked 12 hour shifts and that when it came to cash out at the end of the shift, the cost of the fuel that went into the taxi came from the drivers (sic) portion of the 50/50 split. Mr. Nelson's comments were included as they supported Mr. Godfrey's allegations and were consistent with the information received from the other witnesses. Are (sic) the other witnesses are not wrong nor were things done differently on Mr. Nelson's shift. I would also not like to think that his re-employment with this employer has affected his ability to recall the facts of the situation or the accuracy of the statements he has made.

Mr. Nelson did not attend the hearing.

Swiftsure complained the delegate did not use the written evidence of Laurie Aho ("Aho"). The letter written by Aho dealt primarily with her difficulty in contacting Godfrey and that Godfrey was seeking to sue Swiftsure. It did not change her evidence to the delegate, which was the

drivers paid the full cost of fuel. Both Swiftsure and the delegate invited Aho to attend the hearing. She had informed the delegate she would attend but did not appear.

The two witnesses for Godfrey strongly supported his claim that, during his employment, all drivers paid for 100% of the fuel. One of the witnesses was a former dispatcher and the other was a former part time dispatcher/part time driver. Both had been employed for some time with Swiftsure before leaving. Both stated the practice had changed from the driver paying all of the fuel to 50/50 after Godfrey left Swiftsure.

I found their testimony to be credible and, on the basis of probabilities, prefer their evidence to the written statements presented by Swiftsure. The drivers should not be required to pay for any fuel out of their commission. Therefore the past practice of the drivers paying 100% of the fuel costs was a violation of Section 21 (2) and the current policy of sharing the fuel cost 50/50 with the drivers is still a violation of the *Act*.

Section 21 (2) of the *Act* states:

An employer must not require an employee to pay any of the employer's business costs except those permitted by the regulations.

There is an obligation on the appellant to prove the Determination erred in fact or in law. Swiftsure has failed to do so therefore the Determination is confirmed except for the mathematical correction.

ORDER

In accordance with Section 115 of the *Act* I confirm the Determination by the Director dated May 02, 2001. Additional interest is to be calculated in accordance with Section 88 of the *Act*.

James Wolfgang
Adjudicator
Employment Standards Tribunal