

An appeal

- by -

Duncan Taxi Ltd.
("Duncan Taxi")

- 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.: 2001/443

DATE OF HEARING: August 22, 2001

DATE OF DECISION: September 10, 2001

DECISION

APPEARANCES:

Bob Godfrey	representing himself
Joginder Wahlla	Duncan Taxi
Ian MacNeill	the Director of Employment Standards

OVERVIEW

This is an appeal by Duncan Taxi Ltd. (“Duncan Taxi” 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 22, 2001. The Determination found Duncan Taxi owed Robert Godfrey (“Godfrey”) \$4,842.46 for vacation pay, statutory holiday pay and reimbursement for fuel. The Determination found violations of Section 21 (2), 45 and 58 (1) of the *Act*.

A penalty of \$0.00 was assessed.

Duncan Taxi had sought an adjournment to allow them to be represented by counsel. There were requests from two different law firms seeking an adjournment, as they were unavailable on the hearing date. The Tribunal denied both applications and the case proceeded. Duncan Taxi indicated they were objecting to this action and were proceeding under protest.

In a letter to the Tribunal dated June 12, 2001 the delegate stated:

Shortly after leaving Duncan Taxi, Mr. Godfrey went to work for S & S Taxi in Nanaimo. The owner of Duncan Taxi Ltd, Mr. Wahlla is a principal in that company. Mr. Godfrey filed a complaint against S & S Taxi, which is also being appealed.

The issues in both complaints are similar. Since we have the same complainant, and the same principals in both cases, I would suggest that if there is to be hearings that they be held at the same time, with the same adjudicator.

It should be noted the company Godfrey worked for in Nanaimo was Swiftsure Taxi, not S & S Taxi. It should also be noted Mr. Wahlla sold his interest in Swiftsure Taxi in July 2000. The hearing in respect to the appeal by Swiftsure Taxi was held August 21, 2001 in Nanaimo (see #D469/01).

Finally, while the complainant was the same in both cases there were new principals in Swiftsure Taxi and the evidence and argument in each case was quite different.

The appeal was heard by way of an oral hearing on August 22, 2001.

The witnesses who testified were:

- Harold Dookherin employee of Duncan Taxi
- Doug MacLean employee of Duncan Taxi

An offer to mediate was rejected by the parties.

Evidence was taken from all parties under oath.

ISSUE

Does Duncan Taxi owe Godfrey for vacation pay, statutory holiday pay, and re-imburement for fuel he purchased?

THE FACTS AND ARGUMENT

Godfrey had worked for Duncan Taxi from 1986 until 1992. Prior to May 1992 the drivers were receiving 44% and the company was taking 56% and paying all the expenses including fuel. In May 1992 the company was in financial difficulty and the drivers agreed to go to a 40% driver share and the company would keep 60% and pay all expenses. The Company supplied a copy of a memo dated April 4, 1992 addressed "TO ALL DRIVERS" confirming the change effective April 19, 1992.

This prompted Godfrey to quit and sue the Company on a number of issues including the driver share agreement referred to above. He was unsuccessful in his court action. Other drivers took the company to small claims court and were also unsuccessful in their action regarding the share agreement.

In 1995 the drivers requested more freedom in the use of the taxis and agreed to a 50/50 split with drivers paying the cost of fuel. When the Company was paying the fuel costs the drivers were cautioned about driving around "sight seeing" and creating "dead kilometers". These are non-revenue kilometers that increase the fuel cost. The drivers claim they wanted the freedom to cruise for flags and to move from one area to another to increase the chances of more fares, even if this meant using more fuel.

According to Duncan Taxi, the cost of fuel at that time was about 7 to 8% of the gross. In a memo "TO ALL DRIVERS" dated November 28, 1994 the company stated:

Effective Jan. 1, 1995 the company will give an extra 10% commission to the drivers to cover fuel costs.

This will also make the commission calculation easier being 50 % to the driver and 50 % to the company.

Godfrey returned to Duncan Taxi in 1999. According to the owner of Duncan Taxi, he interviewed Godfrey before re-hiring him and gave him two options. The first was an offer for a 60% company share and 40% driver share with the company paying the fuel. The second was for a 50/50 split with Godfrey paying the fuel. The second option was, according to Duncan Taxi, Godfrey's proposal, as he wanted more freedom in driving. Godfrey admits they discussed both proposals and he accepted the 50/50 split over the 60/40 split before he went back to work.

According to the Determination, the Employer stated:

He advised that the driver keeps a record of the fuel purchases and then can claim the cost of the fuel and the GST on his income tax and get it back, so there is no real loss to the driver.

In an undated letter received by the Tribunal on June 19, 2001, Godfrey indicated he had all his fuel receipts.

Duncan Taxi had two witnesses that supported their position that when the driver commissions were 40% the company paid the fuel costs and when the driver commission was 50% the driver paid the fuel costs. The Company had letters from three employees, one of who was also a witness, which supported the company position on the payment of fuel costs.

Duncan Taxi re-employed Godfrey as a taxi driver from August 13, 1999 until April 15, 2000 when he quit to take a job as a manager of a pizza outlet. He was terminated two weeks later and went back to Duncan Taxi in an attempt to get his job back. The owner of Duncan Taxi had hired another driver and had no openings for Godfrey however he referred him to another taxi company in which he was a part owner.

There was no written employment contract in effect, however both parties agree there was a verbal agreement with Godfrey receiving 50% of the gross and paying the cost of the fuel.

According to Godfrey, he worked a 12-hour shift and paid for all the fuel and kept his receipts. It should be noted that the Employment Standards Complaint & Information Form completed by Godfrey indicates he worked 10 hours per day, 50 hours per week. The evidence from Duncan Taxi indicates Godfrey worked 4 or 5 days per week.

In respect to the issue of statutory holiday pay and vacation pay, Duncan Taxi raised the issue of whether Godfrey was an employee or a sub-contractor. At the time Godfrey was employed the

drivers paid their own EI at the rate \$3.00 per \$100.00. They took the EI premiums out of their share and Duncan Taxi forwarded the money to EI.

The Determination found Godfrey to be an employee as Duncan Taxi owned the taxi, did the dispatching and issued a T-4 slip at the end of the year. When Godfrey quit he was given a Record of Employment.

Duncan Taxi then claimed 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 holiday and vacation pay.

ANALYSIS

First, there is no doubt Godfrey was an employee of Duncan Taxi. As an employee Godfrey is entitled to statutory holiday pay and vacation pay in accordance with the *Act*.

The *Act* is quite specific that gratuities are not wages and therefore cannot be used to offset statutory holiday pay and vacation pay.

Definitions in Part 1 of the *Act* states:

“wages” includes (a), (b) (c) (d) (e)

but does not include

(f) gratuities

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 granted to Duncan Taxi and therefore both vacation pay and statutory holiday pay are owed to Godfrey.

Fuel costs have risen dramatically in recent months and are now 12 to 13% of the gross revenue of the taxi. Duncan Taxi commission rates currently reflect that fact with the drivers receiving 35% and the company 65%. The Company pays the total cost of the fuel, oil and fluids plus they now pay the EI. They use this example to illustrate they have always provided a formula where the Company pays for the fuel, either directly or indirectly.

There is no dispute that Godfrey paid for the fuel out of his 50% share. Duncan Taxi take the position Godfrey had a choice of which commission plan he wished to be on and he chose the 50/50 plan as it gave him more freedom to drive when and where he wanted to go.

Duncan Taxi take the position Godfrey was “given” a 10% additional share to purchase fuel. They have indicated the fuel cost at the time of Godfrey’s employment was approximately 7 to

8% and Godfrey was making money on the arrangement. This was evident in the memo from Duncan Taxi to the drivers dated November 28, 1994.

If Duncan Taxi were paying the cost of fuel by way of the 10% subsidy it would seem logical they would require the drivers to provide the Company with the fuel receipts as they would be a business expense and could be used by them for income tax purposes.

According to the Determination, this was not the case with the Company indicating the driver could use the fuel receipts for the driver's income tax.

However Section 21 (2) of the Act states:

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

The key issue is whether all of the commission received by Godfrey was wages or whether part of it was a "fuel subsidy". If it was a fuel subsidy it should not appear as wages on Godfrey's T-4 slip. If the total commissions earned by Godfrey were included as Employment Income it becomes wages. The income tax rules may allow for the deduction of certain expenses however the *Employment Standards Act* is very specific in respect to employees wages being used for business costs.

This may not have been in the minds of the parties when they arrived at the 50/50 agreement and is to the detriment of Duncan Taxi however the Tribunal must rule on provisions of the *Act* and the *Regulation*. It must be remembered the provisions of the *Act* are minimums and the parties cannot enter into agreements that violate the terms of the *Act*. The 1999 and 2000 T-4 slips for Godfrey were not presented before the Tribunal as evidence. The question of whether the \$14,389.09 shown in the Determination is the sum of the 50% commission earned by Godfrey in 1999 and 2000 is referred back to the Director for investigation.

In the event the \$14,389.09 is the total commission earnings of Godfrey for the period and is the same as the total Employment Income reported on the 1999 and 2000 T-4 slips would indicate Godfrey paid for the fuel out of his wages and the Determination is confirmed.

In the event the 10% fuel subsidy was deducted from the total earnings for the period and the amount on the T-4 is less the 10% for fuel I would find Duncan Taxi establishing that they paid the fuel costs by way of the subsidy and have succeeded in their appeal. If that is the case we must address whether the 10% established for fuel was sufficient.

The fuel cost for Godfrey, according to the Determination, was \$3,391.08. This translates into a fuel cost of 12% of the gross revenue. This would mean Godfrey was paying in excess of the 10% he had agreed was included in the 50/50 split for fuel. Godfrey would then be entitled to the difference between the 10% in the agreement he made with Duncan Taxi and the actual cost of the fuel. By my calculation, the gross revenue for the taxi Godfrey drove was \$28,778.18. 10%

of that amount is \$2,877.82 and is the maximum Godfrey should pay for fuel. The actual fuel cost was \$3,391.08; therefore Godfrey would be entitled to be paid the difference, which is \$513.26.

The \$28,778.18 calculation is based on the assumption the \$14,389.09 was the total commission earnings for Godfrey. If it were the net of the total commissions less the 10% fuel subsidy the gross revenue of the taxi would require being adjusted upwards to establish the total revenue for the taxi.

ORDER

In accordance with Section 115 of the *Act* I am referring the Determination dated May 22, 2001 back to the Director in respect to the total wages earned by Godfrey. If, as indicated above, the Gross Wages reported in the Determination is the same amount as reported on the T-4 slips and includes the fuel costs the Determination is confirmed. In the event the 10% fuel subsidy has been deducted from the gross revenue the amount owed to Godfrey is to be adjusted as outlined above. The remainder of the Determination in respect to the statutory holiday pay and vacation pay is confirmed. Additional interest is to be calculated in accordance with Section 88 of the *Act*.

James Wolfgang
Adjudicator
Employment Standards Tribunal