

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 -

Totem Taxi (1977) Ltd.
("Totem")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Ian Lawson

FILE NO.: 98/389

DATE OF HEARING: September 9, 1998

DATE OF DECISION: November 24, 1998

DECISION

APPEARANCES

For the Appellant:	Richard Wozney, Barrister & Solicitor
The Respondent:	Judy Lloyd, in person
For the Director of Employment Standards	Kevin Molnar

OVERVIEW

This is an appeal by Totem Taxi (1977) Ltd. (“Totem”) pursuant to s.112 of the *Employment Standards Act* (the “Act”). The appeal is from a Determination issued by Kevin Molnar as a delegate of the Director of Employment Standards on May 29, 1998. The Determination required Totem to pay wages and overtime pay to Judy Lloyd (“Lloyd”) in the total amount of \$10,465.33. Totem filed an appeal on June 19, 1998. An oral hearing was held at Kitimat, BC on September 9, 1998.

FACTS

Totem operates a taxi service in Kitimat. In June, 1995 Totem entered into an agreement with the District of Kitimat and British Columbia Transit to provide a subsidized transit service for people with disabilities in the Kitimat area. The service involves a vehicle called a “TaxiDart”, which provides door-to-door transportation service for people with disabilities. The TaxiDart has a specially-designed body mounted on a large van frame, with tandem rear wheels. The vehicle has a hoist platform to lift wheelchairs, and can seat 12 passengers.

The TaxiDart operates from 7:00 AM to 7:30 PM each day and usually makes trips that are “predated” by passengers who call in advance to arrange transportation. The TaxiDart can also make trips for passengers who have not pre-dated their travel, provided the vehicle is not already in use, as a normal metered taxi or for charter trips.

Lloyd was employed by Totem as a TaxiDart driver, and also as a regular taxi driver, between March 18, 1996 and February 7, 1997. There is a dispute as to the actual hours worked by Lloyd as a TaxiDart driver. Totem alleges she was paid on a per-trip basis and worked on average between 4 and 6 hours each day. Lloyd alleges she was required to work 12,5 hours each day, and sometimes made trips with the TaxiDart beyond its normal operating hours.

In his Determination, the Director’s delegate accepted the hours of work claimed Ms. Lloyd save for a one-hour reduction for meal breaks each day. A demand for employer records was issued to Totem regarding Lloyd’s hours of work, which was not

complied with, allegedly on account of Totem's misunderstanding as to the type of records required to be produced.

ISSUES TO BE DECIDED

Counsel for Totem raised two issues for decision on this appeal: First, whether the TaxiDart should be considered a taxi or a bus under relevant legislation ; second, if the TaxiDart is a taxi, whether the overtime exemption for taxi drivers under the *Act* then applies to Lloyd. A third issue relates to whether the calculation of Lloyd's hours of work made in the Determination is correct.

ANALYSIS

Section 37.1 of the *Employment Standards Act* exempts "taxicab driver" from the hours of work and overtime provisions of the *Act*. Neither the *Act* nor the *Regulation* defines the phrase "taxicab driver". If Lloyd is a "taxicab driver", a large part of her claim to wages and overtime would fail and the Determination under appeal should be cancelled or varied. The inquiry into whether the TaxiDart is a taxi or a bus has turned out to be an interesting exercise in conflicting legislative and regulatory policy. It appears the Legislature has pronounced various pieces of legislation and subordinate legislation which render the TaxiDart a bus for some purposes and possibly a taxi for other purposes. The challenge on this appeal is to decide the nature of this vehicle, and therefore the nature of the work performed by its driver, for the purposes of the *Employment Standards Act*. Both counsel for Totem and Mr. Molnar for the Director advise that this issue has not previously found its way before the Tribunal or any court.

Totem's TaxiDart must be licenced under the *Motor Carrier Act*. On September 13, 1995, TaxiDart was licenced as a "limited passenger vehicle", with a restriction that a maximum of 11 passengers be carried at any one time. Limited passenger vehicle is defined in Section 1 of that *Act* as follows:

"limited passenger vehicle" means a motor vehicle, other than a public vehicle, whether available or not for use by the public, that is operated at any time on a highway by, for or on behalf of any person who charges or collects compensation for the transportation of passengers in or on the motor vehicle, but does not include a taxi operating exclusively in one municipality.

It seems clear that the legislature intended to exclude taxis from the definition of limited passenger vehicle, and there is no dispute that Totem's TaxiDart is licenced as such a vehicle under the *Motor Carrier Act*. For greater certainty, that *Act* defines "public passenger vehicle" and "taxi" as follows:

“public passenger vehicle” means a motor vehicle that is available for use by the public and is operated at any time on a highway over a regular route or between fixed terminating points and on a regular time schedule by, for or on behalf of any person who charges or collects compensation for the transportation of passengers in or on the motor vehicle;

“taxi” means a motor vehicle that is designed to carry not more than 10 persons and that, with its driver, is operated for hire, and includes a limousine.

For the purpose of the *Motor Carrier Act*, therefore, it appears that Totem’s TaxiDart cannot be defined as a taxi. Not only are taxis expressly excluded from the definition of “limited passenger vehicle”, but “taxi” is defined as a vehicle designed to carry no more than 10 persons (the TaxiDart carries 12). While the *Motor Carrier Act* does not define the word “bus”, it seems clear to me that the definition of “public passenger vehicle” encompasses all elements of the vehicle we would describe as a bus. However, I am not satisfied that the TaxiDart falls under the definition of public passenger vehicle in the *Motor Carrier Act* and so could be described as a bus. The chief reason for this is that a public passenger vehicle is defined as following a regular route between fixed terminating points on a regular time schedule. The TaxiDart does not follow any regular route, fixed terminating points or regular time schedule. The result of this review of the *Motor Carrier Act* is therefore that Totem’s TaxiDart is neither a taxi nor a bus (public passenger vehicle) as defined in that *Act*.

We must now look to the *Motor Vehicle Act*, which contains the following definitions of “bus” and “taxi”:

“bus” means a motor vehicle designed to carry more than 10 persons;

“taxi” means a motor vehicle designed to carry not more than 10 persons that, with its driver, is operated for hire.

The *Motor Vehicle Act Regulation* contains the following definitions:

“bus” means a motor vehicle having a seating capacity of more than 10 persons, including the driver, that is operated for hire or for public transportation (section 30.01);

“taxi” means a motor vehicle that

- a) is a passenger vehicle,
- b) is operated as a limited passenger vehicle under the authority of a licence or permit issued by either the Motor Carrier Commission or a municipality, and
- c) is designed to carry not more than 10 persons including its driver (section 11.01).

The combined effect of the *Motor Vehicle Act* and *Regulation* definitions is to underscore the hapless regulatory scheme for vehicles such as Totem's TaxiDart. Under the *Motor Vehicle Act*, the TaxiDart cannot be defined as a taxi because the TaxiDart carries more than 10 persons and would therefore appear to be defined as a bus. The *Motor Vehicle Regulation* muddies these waters by making specific reference to a "limited passenger vehicle" licenced under the *Motor Carrier Act* and includes such a vehicle in the definition of "taxi". That same definition, however, then excludes Totem's TaxiDart because the TaxiDart is designed to carry more than 10 persons. The result of this inquiry into the *Motor Carrier Act* and *Regulation* is therefore that the TaxiDart must be considered to be a bus for the purposes of that legislation.

Counsel for Totem acknowledged at the appeal, as did Mr. Chinna in giving evidence for the appellant, that for the purpose of insurance by the Insurance Corporation of British Columbia, the TaxiDart was considered to be a bus and not a taxi. Totem filed a letter from Mr. Glen Wright, an Inspector with the Motor Carrier Department of the Insurance Corporation of British Columbia, which suggested the TaxiDart should now be insured as a taxi, although it was pointed out that the regulatory regime governing such vehicles is confusing.

I now turn to section 1 of the *Employment Standards Regulation* which contains the following:

- "bus operator"** means a person who operates a motor vehicle that
- a) seats more than 7 passengers,
 - b) is available for use by the public, and
 - c) is operated for or on behalf of a person who charges or collects compensation for transporting passengers in that motor vehicle.

The *Regulation* does not contain a definition of "taxi" or "taxicab", although it makes specific reference to "taxicab" drivers in section 37.1. The *Employment Standards Act* does not define any of these terms. In the absence of any definition of taxicab driver, the term "bus operator" would include Lloyd when driving Totem's TaxiDart. The result of this review of the *Employment Standards Act* and *Regulation* is that the TaxiDart seems to fall more into the category of bus than taxi.

A false dichotomy has arisen, however, in the attempt to categorize Totem's TaxiDart as either a taxi or a bus. For the purpose of this appeal, all that needs to be decided is whether Lloyd is a "taxicab driver". If she is not a taxicab driver, then it does not matter what label is put on the TaxiDart, because the wage and overtime exemption would not apply. The above review of other legislation was necessary because of the absence of any definition of "taxi" or "taxicab driver" in the *Employment Standards Act* or *Regulation*. While none of the various pieces of legislation answers satisfactorily the question as to what regulatory label is to be attached to Totem's TaxiDart I am satisfied that the TaxiDart is not a "taxi" under any legislative scheme. Only the *Motor Vehicle Act Regulation* came close to putting the TaxiDart into the "taxi" category, but that same regulation then

restricted taxis to vehicles carrying not more than 10 persons. The *Motor Carrier Act* excludes the TaxiDart from the definition of taxi, and I have concluded that the TaxiDart is a bus for the purpose of the *Motor Vehicle Act*. All of this points to the conclusion that operators of Totem's TaxiDart are not "taxicab drivers" under the *Employment Standards Regulation* and so the exemption under section 37.1 does not apply to Lloyd.

Regarding Lloyd's hours of work, I heard evidence from Mr. Chinna, dispatcher Nadine Garrett, and from TaxiDart driver Vito Gibaldi. Mr. Chinna testified that Lloyd was hired on an "on-call" basis, and was paid for one-half hour of time for each trip that was made with the TaxiDart. He alleges she would be called in to work only when there was a trip booked for the TaxiDart. Having said that, however, he then acknowledged that Lloyd was paid approximately \$800.00 per month initially, which was then raised to approximately \$900.00 per month. Pay stubs presented by Lloyd indicated what appears to be a regular salary, as opposed to pay-per-trip. Mr. Molnar for the Director emphasized that Totem could produce no records to support its claim that Lloyd worked between 4 to 6 hours per day on average. Apparently, Totem produced only those records relating to trips made by the TaxiDart for people with disabilities; it is agreed that the TaxiDart also made regular metered trips and charter trips each day.

Evidence from Ms. Garrett and Mr. Gibaldi confirmed that the TaxiDart made metered and charter trips, as well as for people with disabilities. These witnesses also confirmed that Lloyd was the primary TaxiDart driver during the time she was employed by Totem. Lloyd gave evidence that she was paid \$7.00 per hour and was not paid on a per trip basis. She was paid this wage even when she drove the TaxiDart as a metered taxi or charter vehicle, and was not paid on commission when using the vehicle for the latter purposes.

Lloyd's record of employment indicated she was paid a wage of \$7.00 per hour. Item 27 on the record indicates Lloyd's hours of work were from 8:00 AM to 7:30 PM. Although Mr. Chinna alleged this form was prepared in error, it casts some doubt on the appellant's already weak position regarding Lloyd's hours of work. When questioned by Mr. Molnar, Mr. Chinna admitted that the record of employment was prepared by Mrs. Dhaliwal, who was the company's long-term bookkeeper and who was responsible for day-to-day record keeping.

I am not satisfied that Totem has met the burden upon it to cast doubt on the Determination regarding Lloyd's hours of work. Totem did not provide records to the Director regarding the metered and charter trips made by the TaxiDart when Lloyd was driver, and appeared to base its argument mainly on the trips made for people with disabilities. From all the evidence I heard, metered and charter trips appear to have been made several times each day and Totem overlooks these in attacking the calculation of Lloyd's hours of work in the Determination. Mr. Molnar counted a total of 17 days worked by Lloyd exclusively as metered or charter taxi driver; while these hours are exempt from the overtime provisions, they were taken into consideration in Mr. Molnar's calculation of the total hours worked by Lloyd each day. Where there is a conflict in the evidence concerning Lloyd's hours of work, I find her version of events more credible than Totem's assertions that she worked on average between 4 and 6 hours each day.

ORDER

After carefully considering the evidence and argument, I find the Determination made by Mr. Molnar is correct and the appeal should be dismissed. Pursuant to section 115 of the *Act*, I order that the Determination dated May 29, 1998 be confirmed, with interest pursuant to section 88 of the *Act*.

Ian Lawson
Adjudicator
Employment Standards Tribunal

IL/bls