

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-

Victoria Taxi (1987) Ltd. and Ashok Dhaul and Harpal Kang operating D.K.
Transport; William Bill; Mike Mann; Joe Cloutier and Merv Wilson; Robert White;
Jack Heywood; Keithcam Holdings Ltd.; David Ostrum; Sheldon Lessingham; Glen
Klopp; Adrian Nicholas; Jack Chow; Harj Dhillon; Edward Hill operating Ted &
Di's Taxi and Tracey Richstone
(" Victoria Taxi ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

AJUDICATOR:	C. L. Roberts
FILE No.:	97/530
DATE OF HEARING:	November 20 and 21, 1997
DATE OF DECISION:	January 6, 1998

DECISION

APPEARANCES

S. Johnson,
S. Williams,
Horne Coupar for Victoria Taxi

Witnesses for Victoria Taxi:

Steve Bzdera, owner operator and President
Daniel Mucci, owner operator
Dennis Reardon, lease operator
Glenn Klopp, Shareholder and Past President
Matthew Watson, lease operator
Dennis Grant, lease operator
William Bill, owner operator

A. Adamic
Mary O'Byrne for the Director

D. Gaw representing himself

OVERVIEW

This is an appeal by Victoria Taxi and a number of individuals and limited companies ("Victoria Taxi"), pursuant to Section 112 of the *Employment Standards Act* (the "Act"), against a Determination of the Director of Employment Standards ("the Director") issued June 20, 1997 . The Director found that Victoria Taxi Ltd, the owner operators, and limited companies were associated corporations for the purposes of Section 95 of the *Act*, and that the lease operators were employees of the associated corporations. The Director found that Victoria Taxi had contravened Sections 17(1), 21(2), 44, 46, 58(1) and 58(3) of the *Act*, and directed that Victoria Taxi and the associated corporations establish the lease operators as employees, and accord to them the entitlements in accordance with the *Act*. The Director further ordered that Victoria Taxi and the associated corporations pay \$4,188.33 to David Gaw ("Gaw") for regular wages (including fuel costs), statutory holiday pay and vacation pay.

The grounds of appeal are as follows:

1). Victoria Taxi claims that the issue of whether the taxi drivers are employees or contractors has been previously determined, and as such, is *res judicata*. It further alleges that the Determination is an abuse of the Director's powers in light of a previous Tribunal decision [*Victoria Taxi (1987) Ltd., Glenn Klopp, Richard Klopp, Richard Odd v. Director of Employment Standards* (the "Pistell" decision) BC EST 96/534].

At the conclusion of the hearing, I advised the parties that I was not inclined to make a finding in the Appellant's favor on this ground. The Tribunal in the Pistell case made its decision based on an agreed statement of facts. Those facts did not include any reference to the Lease Operators Manual ("LOM") or the Lease Operators Contract ("LOC"). The Tribunal noted that "...future decisions, based on a broader scope of the evidence, can build on this decision". The Tribunal left the door open to a different result on further evidence. While none of the factual background in the Pistell decision differed from the evidence before me, a significant amount of additional evidence was put before me, including the LOC and the LOC. In addition, I heard evidence from owner operators, lease operators, and the President of Victoria Taxi regarding their interpretation of those documents as well as the nature of the relationship between the owner operators and the lease operators. Consequently, I do not find that the matter is *res judicata*.

2) Victoria Taxi argued that the Director's delegate erred in the findings of facts dealing with the interpretation and application of documents which were before her, leading to incorrect conclusions in determining whether Gaw was an employee of the company or an independent contractor. Victoria Taxi argued that, after a review of the whole of the evidence, the preponderance of the evidence led to the conclusion that lease operators, while meeting some of the tests of what constituted an employee, could not be considered employees.

3) Victoria Taxi also contended that the amount of fuel costs ordered to be recoverable by Gaw was excessive, and that the amount of the Determination ought to be reduced.

4) The fourth ground of appeal, that of whether Victoria Taxi, the owner operators and the limited companies were associated companies as defined by Section 95 of the *Act*, was conceded by Victoria Taxi, and no arguments were advanced on this issue.

The Director and Gaw argued that the Determination ought to be upheld.

ISSUES TO BE DECIDED

Whether the Director correctly determined

- (a) that the lease operators were employees of Victoria Taxi or the associated corporations; and if so
- (b) whether the fuel charges ordered to be paid to Gaw were correctly determined.

FACTS

David Gaw worked as a taxi driver for Victoria Taxi between January 31, 1996 and August 31, 1996. During that time, Gaw drove taxis owned by sixteen different owner operators. He was removed from the approved driver's list when he failed to show up for two scheduled shifts. On August 31, 1996, he was taken off the dispatch board for two hours for cheating on other drivers. When he did not reappear for a scheduled shift, an assumption was made that he had quit. The Director found that Gaw resigned following a discussion with the general manager, and this was not disputed in the hearing.

In order to determine whether Gaw was eligible for wages, statutory holiday pay and vacation pay, the Director's delegate had to determine whether Gaw was an employee or an independent contractor. Following a review of the documentation provided to the Director by Victoria Taxi, including licences from the Motor Carrier Commission, City of Victoria chauffeur licences, Motor Vehicle Act permits, Lease Operator Contracts (LOC's), and the Lease Operators Manual (LOM), the Director determined that Gaw, and all other lease operators were employees of Victoria Taxi.

The Director applied four common law tests of determining employment status. After an analysis of the facts in light of the Control Test, the Integration Test, the Economic Reality Test and the Specific Result test, the Director concluded, on balance, that the lease operators were employees.

Over the two days of hearing, I heard further evidence on the history of, and rationale for, the LOM and the LOC, and Victoria Taxi's interpretation of these documents. This evidence, which is summarized below, supplements the background recited in the Director's Determination, and the agreed statement of facts outlined in the Pistell decision, in which the operations of Victoria Taxi were reviewed.

There are currently 25 shareholders of Victoria Taxi. Each share entitles the holder to own a vehicle of a prescribed style, age, condition and colour, which can be operated as a taxi. Each vehicle must have a Motor Carrier Licence and be insured. The licence is held by the owner of the vehicle.

Operated like a cooperative, Victoria Taxi is structured so that it does not make profits. In the years that it does, excess money is paid back to the shareholders.

Directors are elected from the shareholders. There are no lease operators on the Board of Directors. Victoria Taxi has also established a number of committees to carry out certain functions. Virtually all the committees are comprised only of shareholders. One of those is the safety committee, which reviews driving infractions and will require drivers, whether they are lease operators or owner operators, to take defensive driving courses.

Victoria Taxi has been issued a licence by the Department of Transport to operate a radio for dispatch purposes. Some of the 'on air' rules prescribed by DOT have been incorporated into the LOM.

Victoria Taxi owns some office furniture and radio equipment, and employs individuals to provide dispatch and other administrative services (including accounting, maintaining a central record for the various licencing authorities, and coordinate the services). The shareholders pay a flat fee for these services.

Owner operators drive their own vehicles, lease them out, or drive and lease them. Drivers are selected from an "approved drivers list" which is generated by Victoria Taxi. To be placed on this list, lease operators must satisfy the licencing requirements established by various regulatory agencies (a chauffeur's licence from the City, a Class 4 Drivers Licence from the Province), have an acceptable safety record, and some knowledge of the City.

Although a standard form LOC was introduced into evidence, the evidence of a number of the witnesses was that many of the terms could be, and were, varied between the parties. The standard terms specified that lease payments were payable in advance, cars were to be booked in advance and any shifts changes were to be made one week in advance. There was no evidence that Clause 5, which specified that "All Rules and Regulations are to be followed as per Victoria Taxi's Lease Manual", could be varied or waived.

Some owner operators lease only to specific lease operators, some lease to any approved lease operator. Generally, shifts are for a 12 hour period, the maximum allowed by the licencing authorities. Some lease operators never see the owner, and leave the lease payments at the Victoria Taxi office. The lease payment includes the driver's share of Employment Insurance (EI), the GST on the lease payment, and the lease payment itself. The cost of refuelling the vehicle is the responsibility of the driver, but all other money is retained by the operator.

Drivers may use their own cell phones to obtain calls from customers. The LOM requires that the numbers are registered with the dispatch office.

"Personals" or customers wishing the services of a particular driver are permitted, and are usually arranged between the driver and the customer. The driver is required to notify the dispatch when they expect one.

Bzdera's evidence was that the LOM incorporates the City of Victoria taxi bylaws, which in turn repeat the Motor Carrier Act requirements. The City regulates driver department, conducts a criminal record check prior to issuing a chauffeur licence, and conducts meter inspections.

The zone system outlined in the LOM divides the City up into areas. The evidence is that the zones were developed over time, with input from both day time and night time lease operators, dispatchers and managers. Bzdera's evidence was that the zone system was to make the dispatch system more efficient, and that it was developed in response to complaints from drivers to ensure a fairer allocation of trips, not as a control mechanism.

ANALYSIS

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I am unable to find that burden has been met.

I shall first address the issue of whether Gaw, and all other lease operators are employees or independent contractors. All references to Victoria Taxi include the owner operators and the associated companies.

Section 1 of the *Act* defines employee as including

- (a) a person....receiving or entitled to wages for work performed for another, and*
- (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee....*

An employer is defined as including a person

- (a) who has or had control or direction of an employee, or*
- (b) who is or was responsible , directly or indirectly, for the employment of an employee.*

Work is defined as meaning *"the labour or services an employee performs for an employer whether in the employee's residence or elsewhere"*.

Several common law tests have evolved to determine whether a person is an employee or an independent contractor. I have considered several of those tests, which include the control test, the integration test and the economic realities test, along with the definitions noted above, and find that the lease operators are employees. I am unable to agree that the Director's interpretation of the LOM and LOC in light of those tests, was incorrect. I am also unable to conclude that the Director was incorrect in her determination, based on an examination of the whole of the evidence, that the lease operators were employees.

The common law Control Test has been subsumed within the 'Four fold' test. That test involves an examination of the degree of control, the ownership of tools, the chance of profit and the risk of loss.

Each owner, or shareholder of Victoria Taxi, provides the car, or equipment, to the lease operator. That car is also licenced and maintained by the owner. Without this equipment, the lease operator could not perform any work. Victoria Taxi provides the dispatch service, which is essential to the profitability of the operation. The driver is not expected to provide any additional tools to perform the work for which money is received.

Once lease operators are on the "approved drivers list", there is no guarantee of work. Individual owner operators are free to select one or none of those operators. A lease operator may be removed from the list for violating the LOC or the LOM, (ie. if the Safety Committee feels the lease operator is a danger to public due to accidents or reckless driving), or failure to pay the lease fee.

I find that the lease operators do not assume a chance of profit and risk of loss. "Profit" denotes an amount of money remaining after expenses have been deducted from gross earnings. The only expense a lease operator incurs after making the lease payment is the refuelling costs. All other costs of operating the vehicle, including the licence fee, the maintenance, and the fee for dispatch and administrative services, are the responsibility of the owner. The risk that charged fares may be dishonoured is borne by the owner. Drivers have no investment in the equipment, either the car or the radio, which are key to the operation of the business. This relationship does not exhibit, as the Director phrased it, "a strong entrepreneurial flavour". What lease operators have is an opportunity to earn money. The amount of money they make is dependent on a number of factors, including the amount of the lease payment and the skill and experience of the driver. The evidence is that lease payments range anywhere from \$32.00 to \$72.00 per shift, depending on the

relationship between the lease operator and the owner, the season, the particular shift, and the particular owner's costs.

There was evidence that the most lucrative shifts (Friday and Saturday nights) were most desirable. As there does not appear to be any system of allocating those shifts on either a random or impartial basis, there is the possibility of owners exercising control over drivers. A driver's opportunity to earn a greater or lesser amount of money may be affected by a particular owner based on any number of things including the relationship between the parties and the ability of the parties to negotiate higher or lower lease rates. Consequently, the owner has some ability to determine how much money can be made by any particular driver.

I find, in balance, that the business is that of the owner operator, not the lease operator.

The drivers do not play a part in the management of Victoria Taxi. While there are some committees in which drivers have representatives, by in large those are not the "guiding hands" of Victoria Taxi.

I find that the LOM, which was explained by Victoria Taxi as merely a guide to behaviour, 'rules of the game' and a codification and consolidation of existing regulatory requirements, goes beyond that. Although some of the rules are designed to promote the orderly distribution of calls and trips, and assist in the orderly flow of business, it also establishes performance standards for the lease operators. It regulates such things as appropriate standards of clothing which go beyond that prescribed by the City in its bylaws, (for example the bylaw sets out a dress code which requires the driver to be clean, neatly dressed and groomed, but does not specify that ties must be worn, or prohibits the wearing of white shoes or blue jeans, as the LOM does) on air behaviour, vehicle care, charges and radio protocol. Drivers can be disciplined for violations of the LOM. Although Victoria Taxi argued that these 'sanctions' did not constitute control, they do show that the drivers are not completely autonomous in how they carry out their work. Furthermore, the sanctions are for matters which go beyond the standards established by the various licencing agencies in several respects. I find that the LOM does function as a measure of control over the lease operators.

Additionally, the LOM and LOC operate as a form of protection of the owner operators' property rights, which include the Motor Carrier Licence, the vehicle itself, as well as the goodwill of Victoria Taxi. In order to protect those rights effectively, the owners must have a measure of control over the driver. That is exercised through the LOC and LOM.

As such, I unable to conclude that the Director was in error in finding that the relationship between the drivers and the owners met the definition of employee under this common law test.

The Integration, or Organization, Test

This test, which has been applied in the Supreme Court of Canada in *Cooperators Insurance Association v. Kearney* [1965] SCR 106, involves a balancing of all of the factors.

I find, in balance, that the lease operators meet the definition of employee when this test is applied.

Clearly, the driving of a taxi is an integral part of the business of Victoria Taxi, not merely an accessory to it. The lease operator is, for all intents and purposes, part of the company. The drivers operate under the general direction of Victoria Taxi through the operation of the LOM. Victoria Taxi provides the car, the necessary paperwork, and the dispatch system, (the tools and equipment used in performing the work). Victoria Taxi selects the drivers. All drivers carry Victoria Taxi business cards which also function as receipts. All charges must be approved by

Victoria Taxi. I find that a customer, not knowing the structure of the company, would reasonably assume that the driver was integrally connected to Victoria Taxi.

However, even if I am wrong in finding that the taxi drivers/lease operators are employees under these common law tests, I must also consider whether they fall within the definition of employee under the *Act*.

As this Tribunal has stated in a previous decision, the common law tests of employment statutory definition of employee is subordinated to the definition contained in the legislation (*Christopher Sin* BCDEST#D015/96). Unlike the definition of employee in Alberta considered in *Yellow Cab Ltd. v. Board of Industrial Relations et. al.* (1980) 2 S.C.R. 761, the statutory definition of employee under the *Act* is inclusive, not exhaustive. Consequently, I find that case, as well as the other Income Tax cases cited by Victoria Taxi to be of little relevance to my determination.

Thus, the overriding test is whether the lease operators "perform work normally performed by an employee". While Victoria Taxi argued that the statutory definitions should be narrowly interpreted, the Tribunal has held otherwise (*On Line Film Services Ltd v Director of Employment Standards* BC EST #D319/97).

I find that the lease operators perform work normally performed by an employee. They are, in most respects, no different than any other taxi driver in Victoria, most of whom are employees. In fact, William Bill's drivers have the option of being employees or lease operators. While his treatment of their payment may differ, the type of work they perform does not.

All of the drivers, regardless of whether they own the car, drive it on a lease basis, or drive it on a commission basis, are expected to perform the same duties, and adhere to the same standards. The lease operators are not identified as being separate and apart, nor do they perform tasks no other taxi driver is incapable of performing.

Although Victoria Taxi argued that the wishes of the parties was a factor in determining the nature of their relationship, the Tribunal has stated that while those intentions could be taken into account, they are not decisive of the issue. (*Thursday's Sports Plus Ltd. v. B.C. (Director of Employment Standards)* BCEST#146/97). While I appreciate that most drivers are presently of the opinion that they are independent contractors and prefer that arrangement over an employment relationship because of the freedom and independence it affords them, employees can have a large measure of independence and still be captured under the definition contained in the *Act*. (see also *Tenant v. Director of Employment Standards* BCEST# 302/97, where despite the intention of the parties to create an independent contractor relationship, the Tribunal found an employment relationship). The freedom to use personal cell phones, take personal trips, to negotiate lease fees directly with the owner, or to rely on flags does not make the drivers independent contractors.

I deny the appeal on this ground.

The third ground of appeal was that the fuel calculations, which were included in the award of wages, were excessive.

The evidence is that normal fuel costs were approximately 10% of the revenue per shift. Having reviewed Gaw's fuel costs, I am satisfied that although his costs were somewhat higher than the average, they were not significantly higher. The evidence is that his fuel costs ranged from 11.4% to 18.7%, with an average of 13.2% over all his shifts. I am unable to conclude, on the evidence presented, that these costs were excessive, and deny the appeal on this ground.

ORDER

I order, pursuant to Section 115 of the *Act*, that the Determination, dated June 20, 1997, be confirmed together with whatever interest might have accrued, pursuant to Section 88 of the *Act*.

Carol Roberts
Adjudicator
Employment Standards Tribunal