



Manitoba Labour Board

Suite 500, 5th Floor - 175 Hargrave Street, Winnipeg, Manitoba, Canada R3C 3R8
T 204 945-2089 F 204 945-1296
www.manitoba.ca/labour/labbrd
MLBRegistrar@gov.mb.ca

Case No. 56/24/ESC

File No. 138272

IN THE MATTER OF: *THE EMPLOYMENT STANDARDS CODE*

BETWEEN:

A.D.,

Appellant,

- and -

F.K.,

Respondent.

BEFORE: H. Krahn, Vice-Chairperson

A. Diza, Board Member

M. Bereziak, Board Member

This Decision/Order has been edited to protect the personal information of individuals by removing personal identifiers.

SUBSTANTIVE ORDER

Introduction

1. On January 6, 2023, the Appellant filed a claim with the Employment Standards Branch (the “ESB”) for wages, vacation wages, general holiday pay, and wages in lieu of notice.
2. On February 28, 2024, the ESB issued Dismissal Order 57/24/DE, dismissing the claim of the Appellant pursuant to section 96 of *The Employment Standards Code* (the “Code”).
3. The ESB investigated the claim of the Appellant and found that he is an independent contractor and therefore, pursuant to section 2(3) of the *Code*, the *Code* does not apply to him.

4. On March 14, 2024, the Appellant filed a timely appeal of the Dismissal Order and asked the matter to be referred to the Manitoba Labour Board (the “Board”).
5. On March 21, 2024, the Board received the referral of this matter from the ESB.
6. The matter proceeded to a hearing in Winnipeg, Manitoba on August 7, 2024. Both parties were self-represented. The Appellant testified on his own behalf and the Respondent’s brother O.O. testified in addition to another witness.
7. For the reasons that follow, the Appeal is dismissed, and the Dismissal Order issued by the ESB is confirmed.

Background Facts

8. The Appellant testified that he began working for the Respondent in April 2021 driving the Respondent’s taxi in the City of Winnipeg.
9. The working arrangement was subject to a verbal agreement whereby he paid the Respondent \$65.00/day to drive the taxi in 12-hour shifts starting at 4:30pm until 4:30am. He claimed that any repairs or maintenance costs were the sole responsibility of the Respondent.
10. The Appellant said the \$65.00 fee was similar to a lease or a rental and said he was responsible to pay that amount on the days he drove the taxi. If he was unavailable to drive, such as sick days or days he took off to be with his newborn baby, he contacted an alternate driver to drive the taxi. While he did not have to drive on the 7th day, if he did, he paid a \$50.00 fee for use of the taxi. He disputed that the verbal agreement required him to pay the \$65.00 fee if he did not drive in the 6 day period.
11. He said he had the option to accept or not accept a trip from the dispatcher and said he could take a break at any time. He paid for the gas for the taxi.
12. He provided “charges” which were handwritten vouchers labeled “Duffy’s Taxi (1996 LTD.) Trip Sheet, and indicated payments received through debit, vouchers and a deduction for the \$65 rental fee multiplied by the number of days he drove in that two week period. The Appellant would drop these to the day driver Y.C., or to the Respondent’s house.
13. The Appellant received payment periodically, by way of e-transfer, which the Appellant said were irregular and often late or not for the full amount he claimed.
14. From May 16, 2022, to May 31, 2022 he did not drive the taxi as a headlight was burnt out and he did not want to receive a traffic violation for driving without proper

headlights. He said it was the responsibility of the Respondent to repair the headlight. The Appellant said he drove for someone else while he did not have access to the Respondent's taxi.

15. He said the taxi was involved in a car accident on July 20, 2022, and it was written off. The Respondent did not arrange for another car for him to drive so from July 21, 2022, to September 10, 2022 he did not drive for the Respondent.
16. On December 16, 2022, he was pepper sprayed by a customer who then stole the debit machine from the taxi. The Respondent in turn charged him for the loss of the debit machine. With respect to this incident, he said the owner needed to make the claim to his insurer.
17. The Respondent also deducted from his wages the cost of a damaged tire which the Appellant said was the responsibility of the owner of the taxi.
18. Page 1 of Exhibit 2 of the Respondent's documents showed that his income from 2022 was \$45,279.00 with \$715.32 deducted for Employment Insurance and \$2,114.82 for GST. That document also showed no income tax had been deducted. It was the Appellant's position that the Respondent ought to have deducted CPP as well.
19. Although there was a text to the Appellant on December 16, 2022, from the Respondent providing two weeks' notice, he was not provided with another taxi to drive for that two week period. The text reads,

"Hey A.D., I am sorry to say but I have to provide you with a 2 weeks' notice starting today. 30th Dec will be last day of your self employment with us. If you wish to start new job or start driving a new cab before the notice period You can just inform us and start doing it prior to the notice period as well Thanks"
20. There was little more evidence provided as to the nature of the employment relationship between the Appellant and the Respondent. The focus of the majority of the Appellant's evidence focused on various expenses that the Respondent had deducted from his pay which the Appellant said were improper.
21. O.O., brother of F.K., testified the nature of the relationship between the parties was in the nature of self-employment, not employer/employee. There was a verbal agreement between the Appellant and the Respondent whereby the parties negotiated that the Appellant was obligated to pay the Respondent \$65.00, 6 days a week, whether or not he drove the taxi. This ensured that the Respondent was not responsible to find alternate drivers. If the Appellant elected to drive the 7th day, the rental charge was \$50.00.

22. The Appellant otherwise had the option to take time off if he so chose.
23. He said pursuant to Canada Revenue Agency (the "CRA") rules for taxi drivers who own less than 50% of the taxi, CPP and income tax are not deducted from pay, but employment insurance is. Employment insurance is calculated at the end of the year since the vouchers handed in by the Appellant do not include cash fares. That information must come from Duffy's Taxi at year end as they have the meter information which would indicate the fares not otherwise accounted for by the vouchers.
24. Every fare has GST included in it, so GST must be deducted from the Appellant's pay as well. Tips are included in the annual income and is reported to CRA.
25. The day driver Y.C. testified for the Respondent. He drove the same taxi as the Appellant but from 4:30am to 4:30pm. His arrangement was to pay the Respondent \$80.00/day, 6 days/week whether he drove the taxi or not. If he drove on the 7th day, he paid \$50.00 for use of the taxi. He said he only pays employment insurance and GST but not CPP.

Legislation

26. The ESC is a legislative framework and provides minimum standards as between employers and employees. However, the ESC also provides:

No application to independent contractor

2(3) For greater certainty, this Code does not apply to an independent contractor.

27. In other words, if someone is found to be an independent contractor, the standards stipulated in terms of wages, overtime, and payment of wages in lieu of notice do not apply to such a person.

Analysis and Decision

28. The onus of establishing a valid claim under the ESC is on the Appellant to prove on a balance of probabilities that firstly, he was in an employee/employer relationship, and if so, that he was owed compensation. Unfortunately, very little evidence was provided to the Board with respect to the first aspect of this claim.
29. What the Board does know from both parties is that the Appellant paid the Respondent for the use of the taxi to earn income, that is, a daily amount of \$65.00. The Board also knows that the Appellant was entitled to elect whether or not he chose to drive 6 days/week. There was a dispute as to whether the Appellant was obligated

to pay the “rental” fee if he chose to take a day off (apart from the 7th day), but nonetheless, he paid to use the Respondent’s equipment, that is, the taxi.

30. While the Appellant drove the taxi 4:30pm to 4:30am, he agreed in cross-examination that he could turn down a fare and take breaks whenever he so chose.
31. In addition, the Appellant paid for the gas to operate the taxi.
32. The Board finds the relationship more consistent with a subcontractor type of arrangement than an employee/employer relationship for the following reasons:
 - a) Employees do not pay their employers to use the employer’s tools and equipment to earn income. In this case, the Appellant paid the Respondent a rental fee of \$65.00/day to use the taxi;
 - b) The Appellant paid for the gas to operate the taxi;
 - c) The Appellant could choose whether to work on any given day, or not; and,
 - d) The Appellant could decline a fare provided by the dispatcher.
33. While the Appellant may have a valid claim as against the Respondent, given the above-noted finding, this is not the correct venue to pursue compensation given the fact that the Board has found the Appellant to be an independent contractor.
34. Based on the evidence presented, the Appellant has not satisfied the Board that he was an employee of the Respondent.

T H E R E F O R E

The Manitoba Labour Board **HEREBY DISMISSES** the claim of A.D.

DATED at **WINNIPEG**, Manitoba, this 15th day of August, 2024, and signed on behalf of the Manitoba Labour Board by:

“Original signed by”

H. Krahn, Vice-Chairperson

“Original signed by”

A. Diza, Board Member

“Original signed by”

M. Bereziak, Board Member

HK/ms/acr/fs-s