

Citation: *Giam v. Guspie*, 2009 YKSM 5

Date: 20090423
Docket: 08-S0060
Registry: Whitehorse

IN THE SMALL CLAIMS COURT OF YUKON

Before: His Honour Judge Michael Cozens

Ken Giam

Plaintiff

v.

Russell Guspie

Defendant

Appearances:

Ken Giam

Appearing on own behalf

Russell Guspie

Appearing on own behalf

REASONS FOR DECISION

Overview

[1] Ken Giam is an owner of Premier Cabs in Whitehorse. Russell Guspie is the owner-operator of a taxi. On May 30, 2008, Mr. Guspie joined Premier Cabs as a taxi driver. On June 17, 2008, Mr. Giam sold Mr. Guspie two vehicles for a price of \$6,360.00, inclusive of GST. The Bill of Sale signed by both parties, indicates that these vehicles were sold to Mr. Guspie for an amount approximately \$5,000.00 less than market value.

[2] In exchange for purchasing these vehicles at lower than market value, Mr. Guspie was required to affiliate himself exclusively with Premier Cabs for a period of six months. In the event that Mr. Guspie breached this condition of exclusive affiliation, he was to pay Mr. Giam the \$5,000.00 difference between the market value of the vehicles and the actual purchase price.

[3] On August 9, 2008, Mr. Giam terminated Mr. Guspie's relationship with Premier Cabs, citing repeated violations by Mr. Guspie of the policies and rules of Premier Cabs. Mr. Giam is now claiming payment of the \$5,000.00 difference on the vehicles.

[4] Mr. Guspie denies that he violated any such rules and policies. He claims that his ability to fulfill his contractual obligation to Premier Cabs was frustrated by Mr. Giam's firing of him.

Issues

[5] The fundamental issue in this case is whether Mr. Guspie's actions amounted to a breach of contract, such that Mr. Giam was justified in terminating Mr. Guspie's relationship with Premier Cabs.

[6] If Mr. Giam's actions were justified, then what portion of the \$5,000.00 is Mr. Guspie required to repay him?

[7] If Mr. Giam's actions were not justified, there nonetheless remains the issue of whether Mr. Guspie is required to reimburse him any of the \$5,000.00, and if so, what that amount would be.

Evidence

Plaintiff's Evidence

[8] Mr. Giam called several witnesses.

Victor Solar

[9] Mr. Solar is also an owner-operator of Premier Cabs. Prior to working at Premier Cabs, he worked for Yellow Cabs. He testified that Premier Cabs has very high expectations of its drivers and that customer service is very important. These expectations were explained to Mr. Solar when he started working for Premier Cabs.

[10] Mr. Solar expressed his opinion that Mr. Guspie was a good driver, although sometimes "he did things that he shouldn't do". He did not provide much, however, in the way of specific detail, and questioned only one left hand turn by Mr. Guspie that he had observed. He also expressed some concern about the cleanliness of Mr. Guspie's car, although he was not aware of any related customer complaints. Much of his evidence as to Mr. Guspie's relationship with Premier Cabs was speculative.

[11] In cross-examination he stated that Yellow Cabs had a written form that prescribed the specific rules and regulations of Yellow Cabs, while Premier Cabs did not.

[12] Mr. Solar also agreed that Mr. Giam would perhaps lose his temper more often than he was used to experiencing when at Yellow Cabs, but that Mr. Giam usually did so for a reason.

Yousef Abdi

[13] Mr. Abdi is similarly an owner-operator for Premier Cabs. He also testified that the rules and policies of Premier Cabs were explained to him. He stated that most of these rules and policies were common sense, such as maintaining a clean cab, being polite to customers, and obeying the rules of the road. He considered these common sense requirements to be part of the agreement he signed with Premier Cabs. This agreement was similar to the Bill of Sale Mr. Guspie signed.

[14] Mr. Abdi testified that he believed he had received a written copy of the rules of Premier Cabs, but could not produce this document.

[15] Mr. Abdi had no direct knowledge of Mr. Guspie's working relationship with Premier Cabs. He was unaware of any violations by Mr. Guspie of the rules and policies of Premier Cabs.

[16] He agreed that Mr. Giam would sometimes yell at the owner-operators over the phone, even while customers were in the car, although he considered this to not amount to anything personal.

[17] He understood that providing customers a personal cell phone number was prohibited. The underlying reason for this prohibition is to prevent drivers from taking fares that should, in fairness, be assigned to other drivers.

Karin Meidinger

[18] Ms. Meidinger is another owner-operator with Premier Cabs. She considered Mr. Guspie to be a "really aggressive driver". She recalled one incident where she observed Mr. Guspie passing vehicles about four times on

Mountainview Drive, which she did not consider to be proper driving. She also observed Mr. Guspie allowing customers to smoke in his cab on 3-4 occasions, which was a violation of a City of Whitehorse bylaw and the rules and policies of Premier Cabs. She has observed Mr. Guspie handing out cards to customers four or five times, but could not say what was on these cards, and acknowledged that this could also be a good policy depending on what was written on the cards.

[19] She agreed that Mr. Giam sometimes would yell or be loud when speaking on the phone to owner-operators, in a manner that she did not consider necessary.

Noelle Marchewa

[20] Ms. Marchewa is also an owner-operator for Premier Cabs. She stated that people would sometimes call and ask for Mr. Guspie and, if she did not connect them to Mr. Guspie, they indicated that they would reach him on his cell phone. She agreed that these individuals could have been friends of Mr. Guspie.

[21] She relayed one incident where Mr. Guspie tailgated her to Walmart and tried to pass her in the parking lot in order to get to a fare first. She also related another incident where a complaint was received from an individual regarding Mr. Guspie's vehicle passing this individual and several other vehicles on Mountainview Drive.

[22] She agreed that Mr. Giam yells over the phone but considers him to be fair and only trying to make Premier Cabs a successful company.

[23] She stated that the rules and policies of Premier Cabs were discussed with her but not reduced to writing.

[24] One of the rules discussed was that personal fares were not allowed and were being phased out by Premier Cabs.

Ken Giam

[25] Mr. Giam testified that the Bill of Sale was the only written document that set out the terms of Mr. Guspie's employment with Premier Cabs. He agreed that the Bill of Sale did not set out the rules and policies of Premier Cabs, but that

it was a matter of common sense as to what these rules and policies were. It was implied within the employment agreement that Mr. Guspie was required to follow these rules and policies. He stated in cross-examination that these rules and policies could change as things went along, but that an owner-operator would not be penalized if unaware of the change.

[26] He stated that on occasion calls would come into dispatch requesting Mr. Guspie, but acknowledged that he had no direct knowledge that Mr. Guspie was encouraging customers to request him.

[27] He cited one example of an angry call he received about an incident involving Mr. Guspie yelling obscene language, at which time he told Mr. Guspie to end his shift and go home. There was nothing provided in writing to Mr. Guspie about this. Mr. Giam said, without providing specific details, that there were a few other incidents.

[28] Mr. Giam stated that he saw Mr. Guspie with someone smoking in his taxi, and was also able to smell smoke in his taxi. No additional details were provided.

[29] One basic, common sense rule of Premier Cabs was that drivers were not to "steal" trips, although exceptions could be made for customer service, with notice to the dispatcher.

[30] Mr. Giam stated that Mr. Guspie received many warnings about taking personal trips (fares) but nonetheless continued to do so.

[31] He related the specific incident on August 9 that resulted in Mr. Guspie's termination. In short, he felt that Mr. Guspie was violating the rules and policies of Premier Cabs by taking for himself a fare from the Takhini Hot Springs back to Whitehorse, despite being told directly not to do so. He also stated that, after returning to Whitehorse and dropping off the fare, Mr. Guspie was interfering with the affairs of Premier Cabs by going on the air and interfering with the dispatch calls.

[32] Mr. Giam testified that he told Mr. Guspie on August 9 that if he did not provide information about what time the fare was to be picked up at Takhini Hot Springs, he would be terminated.

[33] He stated that he tried to reach Mr. Guspie that evening by telephone 10 – 20 times regarding the Takhini Hot Springs fare, but his calls were unanswered.

[34] Mr. Giam agreed in cross-examination that after being unable to reach Mr. Guspie by telephone, he observed Mr. Guspie driving his vehicle up Hamilton Boulevard. Mr. Giam tried to get Mr. Guspie to pull his vehicle over and, when Mr. Guspie would not, Mr. Giam used his vehicle to force Mr. Guspie to do so. Mr. Giam felt that this “drastic action” was justified because Mr. Guspie would not stop. Mr. Giam agreed that he was upset.

[35] At that time Mr. Giam requested that Mr. Guspie remove the Premier Cab decals from the taxi and return any business cards etc. that associated Premier Cabs with Mr. Guspie’s vehicle.

[36] Mr. Giam agreed that he would sometimes speak loudly over the phone to owner-operators.

[37] Mr. Giam stated that his decision to terminate the relationship with Mr. Guspie caused Premier Cabs to be short of drivers.

Defendant’s Evidence

Gary Barrett

[38] Mr. Barrett testified for the defendant. He had previously been an owner-operator with Premier Cabs but had been terminated. There was clearly an outstanding issue between himself and Mr. Giam as to the existence of monies Mr. Barrett stated that Premier Cabs owed to him, over which Mr. Barrett expressed some anger. He stated that the rules and policies of Premier Cabs were “ever-changing”.

[39] Mr. Barrett agreed that he had been told by Mr. Giam that personal fares were not allowed, and that cards were not to be given out. He was adamant that he complied with these rules and policies.

[40] He stated that he was not aware that Mr. Guspie had ever stolen any trips and, had he believed that Mr. Guspie was in fact stealing trips, he would have been very upset with Mr. Guspie.

[41] He also stated that Mr. Giam would yell over the telephone at the owner-operators.

Russell Guspie

[42] Mr. Guspie stated that he was never given anything in writing by Mr. Giam regarding what constituted the rules and policies of Premier Cabs. He understood from speaking with Mr. Giam that the rules and policies were similar to those of other cab companies.

[43] He denied breaking any rules and policies of Premier Cabs.

[44] He indicated that he understood that he would be allowed to keep the personal fares that he brought to Premier Cabs, but that he could not take other personals. He stated that he was not in the practice of giving out his cell number to customers because personal calls are a hassle.

[45] He provided an explanation for the events of August 9th that differed somewhat from Mr. Giam's, although it is clear that he decided on his own to take a fare back to Whitehorse from the Takhini Hot Springs. He stated that, when he dropped these customers off at the Takhini Hot Springs they requested him to return for them at a set time.

[46] Mr. Guspie agreed to do this as he lived in the area and was able to go home and do some chores in the interim. To him it made common sense to do so as compared to having another driver come all the way out to the Hot Springs; an approximately ½ hour drive.

[47] Mr. Guspie acknowledged that he deliberately avoided answering Mr. Giam's phone calls on the way back into town as he did not want to hear Mr. Giam yelling at him. He felt that he was providing good customer service through his actions that night.

[48] He denies interfering with or disrupting the affairs of Premier Cabs later that evening by going on the air, stating it was only after he heard Mr. Giam on the radio telling other drivers that Mr. Guspie was stealing trips, that he went on the air to deny this and explain that these customers wanted him to return for them.

[49] He denies being told by Mr. Giam that night that he would be terminated if he did not give the information Mr. Giam requested.

[50] He testified as to Mr. Giam being very angry when he forced Mr. Guspie's vehicle over to the side of the road after the fare was dropped off. He stated that he had decided to end his shift for the night and had made arrangements for another individual to cover his dispatch duties as he knew Mr. Giam was angry at him. He was dropping off a friend at the time Mr. Giam encountered him.

[51] He recalls the incident of August 9 as being the only occasion where Mr. Giam was very upset with him. He stated that he otherwise had been given a few verbal admonitions, specifically recalling an incident where "Min" was in his vehicle and the incident where he swore at an individual who swore at him.

[52] Mr. Guspie provided an explanation for this swearing incident. He agrees that he swore at this individual in an apartment parking lot in the midst of a garage sale taking place there, while he was showing up to pick up a fare. She was not, however, a customer, and she had initially confronted him and swore at him, without having any justifiable reason for doing so.

[53] He stated that he was never given anything in writing by Mr. Giam expressing any concern about his compliance with the rules and policies of Premier Cabs or about his activities as a driver for Premier Cabs.

[54] He stated that Mr. Giam would routinely yell at the owner-operators over the phone. He agreed that sometimes there would be a reason for Mr. Giam's tone.

[55] He enjoyed working for Premier Cabs and believed that they gave good service to customers. He was happy to be part of the Premier Cabs group.

[56] He stated that, at the time he signed the Bill of Sale, he did not really believe that he was receiving a \$5,000.00 discount on the purchase price of the vehicle and the second parts vehicle, but felt that he had to sign the Bill of Sale as he wanted to be able to work as an owner-operator.

Analysis

[57] The onus is on the Plaintiff, Mr. Giam, to prove on a balance of probabilities that Mr. Guspie breached his contract with him and, as such, is indebted to him.

[58] I accept the evidence that there was a contractual agreement between Mr. Giam and Mr. Guspie, as set out in the Bill of Sale. I also accept that the specific terms of the contract were that Mr. Guspie would work for Premier Cabs exclusively for six months and that, in exchange, he would receive a \$5,000.00 discount on two cars. This money was to be repaid if Mr. Guspie did not work for Premier Cabs for six months. It is unclear on the evidence whether the six months period commenced on May 30 or on June 17. In the absence of any clear evidence, I find that the six month period runs from the date of the Bill of Sale, being June 17, 2008.

[59] I also accept that there it was an implied term of the contract that Mr. Guspie was required to comply with certain fundamental rules in order to continue to drive for Premier Cabs. Obviously, if Mr. Guspie was rude to customers, operated an unclean or unsafe vehicle, flagrantly violated federal, territorial and/or municipal statutes and bylaws, or unlawfully kept monies due to Premier Cabs, Mr. Giam would be in a position to terminate the working relationship between Mr. Guspie and Premier Cabs on the basis that Mr. Guspie had frustrated the contract.

[60] I do not accept, however, that isolated violations of either the rules and policies of Premier Cabs, or of federal, territorial or municipal legislation, necessarily allowed Mr. Giam to terminate the working relationship. I note that there was no evidence that Mr. Guspie had come to the attention of the federal, territorial or municipal authorities as a result of his driving while working for Premier Cabs. Any such violations would have to be reviewed in the context of the entirety of the employment relationship and communication between the parties.

[61] I find that on the evidence before me, there was nothing up to August 9, 2008 that allowed Mr. Giam to terminate Mr. Guspie's working relationship with Premier Cabs.

[62] There is no evidence of a repeated pattern of behaviour by Mr. Guspie that violated the rules and policies of Premier Cabs. I note that these rules and policies had not, at the time of trial, been reduced to writing by Premier Cabs and that there is either an informal discussion with owner-operators or reliance on a common sense understanding of the nature of the business for these rules and policies. It would seem that if Mr. Giam wishes his owner-operators to follow the rules and policies of Premier Cabs and wants to have the ability to terminate working relationships and seek remedies as a result, he should take the time to create a formal list of these rules and policies and require each owner-operator to review them and, preferably, to sign a letter of understanding and agreement to abide by them.

[63] There is also no evidence that Mr. Guspie received written formal notice of being in violation of any of the rules and policies of Premier Cabs. At most there was, on a consideration of all the evidence of the Plaintiff's witnesses, and Mr. Guspie, a somewhat informal indication of there being some problems which appear to be of a minor or speculative nature.

[64] There is also no cogent evidence that would allow me to find Mr. Guspie in breach of any federal, territorial or municipal bylaws, at least not to the extent that he has attracted the attention of any of these authorities or been charged with any offences, other than a speeding conviction dated September 4, 2007 which predates his employment with Premier Cabs.

[65] I simply cannot find that, when considered individually or cumulatively, Mr. Guspie's actions up to August 9, 2008, provided any cause for Mr. Giam to have terminated Mr. Guspie's working relationship with Premier Cabs.

[66] With respect to the August 9th incident, I agree that the events of that evening indicate a more significant breakdown in the relationship between Mr. Guspie and Mr. Giam than at any previous time. It is clear that Mr. Guspie, in taking the fare back to Whitehorse, not answering Mr. Giam's calls, and

purportedly disrupting Premier Cab's business affairs, acted contrary to what he understood his obligations to be. I cannot determine on the evidence one way or the other whether Mr. Giam told Mr. Guspie that evening that he would be terminated if he did not provide the requested information.

[67] Is this enough, however, even when considering the relationship up to that point in time, to allow Mr. Giam to treat the contract as having been breached by Mr. Guspie?

[68] I find that it is not. Firstly, there is insufficient evidence before me to find that Mr. Guspie, on a balance of probabilities, further disrupted the affairs of Premier Cabs through his actions after dropping off the fare in Whitehorse. While I find that Mr. Guspie in fact knowingly violated what he knew was a rule and/or policy of Premier Cabs in taking the fare back to Whitehorse contrary to Mr. Giam's instruction, I do not find that this violation was sufficiently egregious to amount to a breach of contract that would allow Mr. Giam to terminate the employment contract made in the Bill of Sale and seek a return of the vehicle purchase discount.

[69] I note that in Mr. Giam's evidence, he stated that even after this incident, matters between himself and Mr. Guspie could have been worked out had Mr. Guspie simply booked off the rest of that night and agreed not to violate the rules.

[70] I find that what in all likelihood happened was that Mr. Giam became angry enough on August 9 that he took somewhat precipitous action and terminated Mr. Guspie's working relationship with Premier Cabs. The numerous phone calls by Mr. Giam in his attempt to reach Mr. Guspie and the pullover of Mr. Guspie's vehicle by Mr. Giam in the culmination of that evening's events, is indicative of the heightened emotions at play. While Mr. Giam may well have come to the conclusion that Mr. Guspie and he could no longer work together, the evidence falls short of establishing that Mr. Guspie frustrated the contract by his actions.

[71] In law, where the actions of the first party have caused the event upon which the first party claims a contract has been frustrated, the first party cannot

rely on the non-performance of the condition precedent as evidence of a breach. In this case, Mr. Giam's actions caused the event, being the termination of Mr. Guspie's employment relationship, which placed Mr. Guspie in the position of being unable to perform his obligations under the contract.

[72] I say this, recognizing that Mr. Guspie's actions, while objectionable, simply were not enough to have amounted to a breach of the contract. In reality, Mr. Giam has frustrated the contract.

[73] As such I find that Mr. Guspie is not required to remit \$5,000.00 to Mr. Giam on the basis of the claim for breach of contract.

[74] That, however, is not the end of the matter. Mr. Guspie has clearly received a benefit from Mr. Giam in the discounted purchase price for the vehicles. To that end, he has received a benefit without having provided Mr. Giam the reciprocal service to which Mr. Giam was entitled under the contract. While ultimately this was the result of a choice by Mr. Giam, the fairness of this result must be considered.

[75] In Yukon law, the situation governing frustration of contracts is governed by the *Frustrated Contracts Act*, RSY 2002, c. 96 (the "Act"). Clearly, had Mr. Guspie's actions frustrated the contract, he would be indebted to Mr. Giam as per the contract. I find that this indebtedness would be reduced by the 53 days of work out of the 182 days of service required under the contract. Therefore the full amount would have been reduced by the approximate amount of \$1,430.00, leaving \$3,570.00 owing.

[76] However, as I have not found that Mr. Guspie's actions caused the contract to be frustrated, he cannot be held liable for this amount. The facts of this case do not fall within the application of the *Act*, especially given that Mr. Guspie did not bring his own claim for frustration of contract.

[77] The bottom-line reality is that Mr. Guspie was prevented from fulfilling his obligations under the contract he made with Mr. Giam and Premier Cabs. He has nonetheless received a benefit in the amount of approximately \$3,570.00 for which he was unable to perform his contractual obligations in exchange. Mr. Giam believed, mistakenly as I have ruled, that he had the right to terminate the

contract. He did not, however, in my opinion act in bad faith or for any improper purpose in terminating the working relationship between parties. It is clear on the evidence that at all times Mr. Giam has acted in what he considered to be in the best interests of Premier Cabs, in order to continue to provide the best customer service possible.

[78] In fairness, Mr. Giam should be compensated for a portion of the discount he gave to Mr. Guspie on the sale of the vehicles. I have calculated this discounted amount as being approximately \$3,570.00. This amount will be apportioned by assigning approximately 1/3 of the responsibility for the contractual breakdown to Mr. Guspie and 2/3 to Mr. Giam.

[79] Therefore I award Mr. Giam the amount of \$1,200.00. There will be no pre-judgment interest. Post judgment will be awarded in accordance with the Judicature Act. However it will not commence until June 1, 2009.

Cozens T.C.J.