

*Case Name:*  
**Gamble v. TCL Transport Co.**

**IN THE MATTER OF a Wage Recovery Appeal under Division  
XVI - Part III of the Canada Labour Code  
Between  
Don Gamble, appellant, and  
TCL Transport Company Ltd., Winnipeg, Manitoba,  
respondent  
Human Resources Development File No. YM2727-1557**

[2002] C.L.A.D. No. 420

Canada  
Labour Arbitration

**B.P. Schwartz, Referee**

Heard: Winnipeg, Manitoba, July 17, 2002.  
Decision: August 30, 2002.

(16 paras.)

**Appearances:**

Don Gamble, the appellant, on his own behalf.

Linda MacDonald and Edwin Mah, for the respondent, TCL Transport Co. Ltd.

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AWARD

Introduction

**1** Mr. Don Gamble ("Mr. Gamble") was employed as a truck driver for TCL Transport Company Ltd. ("TCL"). Mr. Gamble claims that TLC promised to pay him for the full eight-hour days on his out of town trips.

**2** TCL denies Mr. Gamble's claim. It states that the deal was that for out of town trips, Mr. Gamble would be paid only on the basis of how many miles he drove.

The Facts

**3** When Mr. Gamble was hired, TCL did not ask him to sign a written agreement. Mr. Gamble was not provided with a sheet setting out any standard conditions of employment. There was no sign posted, or website or any other reference point.

**4** Mr. Gamble testified as follows. TCL's representative who hired him was Mr. Dave Berry. Mr. Berry expressly assured Mr. Gamble that he would be paid for his time on out of town trips. According to Mr. Gamble, he would have been "nuts" to agree to work on the basis of the modest per-mile rate TCL offered on out of town trips. There were often long delays while a truck was being loaded or while international customs officials did their work.

**5** Mr. Gamble testified under oath at the hearing. He appeared to me to be a credible witness. He appeared to have a good recollection for detail. But he was candid about acknowledging those points on which he did not have a clear recall, and avoided speculating about them. He presented his case calmly and factually. There was no display of anger or resentment that might have suggested that his account was distorted by emotions. Rather than making any effort to stretch the size of the claim, he confined it to its core and made no attempt to press a number of minor respects in which he felt the TCL had not compensated him fully. I observed Mr. Gamble's demeanour throughout the hearing and nothing about his speech patterns, gestures or expressions suggested to me a lack of candour.

**6** TCL challenged Mr. Gamble's account on several bases. I found all of TCL's witnesses to be honest and fair-minded, but their testimony did not in the end overcome Mr. Gamble's own evidence and arguments.

**7** TCL contended that standard practice was to pay a driver only for mileage on an out of town trip. The employee received several cents more per mile on such trips and that extra compensation made up for the fact that the employee might spend a fair amount of time waiting around. But whatever the "standard arrangement" was, it is clear that it was not communicated to Mr. Gamble by way of a written contract or form.

**8** Mr. Gamble had a right to rely on the contractual terms that were specifically communicated to him. As noted earlier, I accept his testimony about what he was told by Mr. Dave Berry.

**9** Mr. Gamble testified that he was in a distinct position at TCL. As I understand from Mr. Gamble's testimony, TCL usually hired contractors to do its driving, rather than using an employee. Mr. Gamble was the only employee at the time. It might be the case that there was no "standard practice" to which Mr. Gamble's situation could be compared.

**10** One of TCL's witnesses, Mr. Edwin Mah, argued that the per-mile rate produced a reasonable rate of remuneration for Mr. Gamble. But Mr. Gamble testified that the rate was not at all at the high end by industry standards. It was only pennies-per-mile more than the in-town mileage rate. This small increment did not compensate a driver, in Mr. Gamble's view, for the very large amount of time that was liable to be spent waiting around - dealing with customs issues, among other things - on out-of-town trips. It may well be that some other drivers would consider the mileage rate to be sufficient. But given the lengthy amounts of non-driving time Mr. Gamble spent on such trips I can understand him, as a reasonable person, taking the view that the per-mileage position was too low to secure his own continuing employment.

**11** Another witness on behalf of TCL, Mr. Bakalinsky, recalls being told by Mr. Dave Berry (in the absence of Mr. Gamble) that Mr. Gamble's understanding with respect to remuneration was

mistaken. I do not doubt the sincerity of Mr. Bakalinsky's testimony. But Mr. Berry himself was not produced as a witness. He was not present to provide detail or context to the remark attributed to him. It is possible, among other things, that Mr. Berry did make the remark attributed to him - but that when Mr. Berry made it, he had forgotten about his early conversations with Mr. Gamble. The hearsay evidence offered by Mr. Bakalinsky is much less persuasive to me than Mr. Gamble's own clear recollection of what Mr. Berry told him.

**12** Mr. Gamble produced detailed logs he had made during his out of town trips that showed how much non-driving time he spent on various out of town trips. TCL was not able to provide me with any reason to doubt the accuracy of these logs. Mr. Bakalinsky noted that on one occasion, Mr. Gamble put in a claim to be paid for a hotel room when he had spent the time sleeping in a truck. Mr. Gamble explained that TCL was obliged to pay for his accommodations and the claim he put in was simply to be paid for the cost of a low-cost hotel room. As far as I can determine, Mr. Gamble was not attempting to be dishonest or deceptive in any way. He made a claim on the basis of what he believed was consistent with the terms of his employment, and was prepared at the hearing (and I think at any time) to explain the complete facts on which it was based.

#### Conclusion

**13** This case basically turns on its specific facts, not competing legal arguments. My conclusion is that through Mr. Berry, TCL entered into a specific agreement with Mr. Gamble. It must honour that agreement.

**14** My ruling would be the same even if I assumed that TCL had some "standard practice" that it applied to employees who were drivers. I am not convinced that there was such a standard practice at the time. But even if there were, TCL has to honour the specific arrangement that it made with Mr. Gamble.

**15** Mr. Gamble's claim is to be paid \$12/hour with respect to a total of 124 hours combined in August and September of 2000. That adds up to \$1,488.00, plus interest on that amount that I fix at an additional \$140.00. Costs were not requested by either side and I am not awarding any.

**16** To be clear, my decision addresses only this fact situation. TCL might wish to consider drafting up a standard contract that will be offered to employees who serve as drivers. Doing so might avoid the kind of controversy that arose in this case.

qp/d/qlklc