

An appeal

- by -

Jafic Holdings Ltd.
("Jafic")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: C. L. Roberts

FILE No.: 2000/750

DATE OF DECISION: February 7, 2001

DECISION

This is a decision based on written submissions by Michael Arnold, Crease Harman & Company, Barristers and Solicitors, on behalf of Jafic Holdings Ltd., Shelley Timmins, and Ian MacNeill for the Director of Employment Standards.

OVERVIEW

This is an appeal by Jafic Holdings Ltd. operating as Marlin Travel and Thomas Cook Travel ("Jafic"), pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued October 6, 2000. The Director found that Jafic had contravened sections 45 and 58(3) of the Act in failing to pay Shelly Timmins ("Timmins") statutory holiday pay, annual holiday pay and interest, and Ordered that Jafic pay \$3,811.19 to the Director on Timmins' behalf.

ISSUE TO BE DECIDED

There are two issues on appeal. The first is whether the Director erred in determining that Jafic could not include statutory holiday pay in the commission without violating the Act unless there was a variance in place.

The second issue to be decided is whether the delegate erred in calculating Timmins' regular daily wage. Jafic contends that the delegates calculations are inappropriate, resulting in an amount owing that is wholly inconsistent with her actual earnings and contrary to the provisions of the Act.

FACTS

Jafic operates a chain of travel agencies at various locations in B.C. As a result of a complaint from a Jafic employee regarding statutory holiday pay, the Director conducted an audit of Jafic's payroll. Four employees, including Timmins, were selected for the audit.

Timmins worked for Jafic as a travel agent in Nanaimo from November 7, 1994 to August 8, 2000.

She did not work on any of the statutory holidays identified in the Act. Timmins worked 37.5 hours per week, or 162.5 hours per month.

Timmins was paid straight commission on travel packages sold each month. The commission structure was 42% of the first \$5000 of commission sales, and 50% of any sales in excess of \$5000.

Sales for each specific month were calculated at month end and Timmins was paid for those sales on the 15th day of the succeeding month. At the end of each month, Timmins was paid an advance of \$500 against commissions earned, less RRSP and EI deductions. Jafic submitted that statutory holiday pay was included as part of an employee's commissions, and that, since it was explained to all employees when they were hired, it formed a condition of their employment. In her appeal submission, Timmins denied that she agreed that this commission structure was intended to include statutory holiday pay. In reply to this submission, Jafic submitted a document outlining the terms of the employment, initialled by Timmins. That document contains the following paragraph:

STATUTORY HOLIDAYS

Pay for stats is part of the 42% commission. Therefore there are actually three months every year that agents are paid for a stat when there is none.

Jafic acknowledged that it had no variance to permit it to include statutory holiday pay as part of the commissions, but contended it was standard in the industry.

The delegate found that the payment for statutory holiday pay for which Timmins qualified was included in her commission, and that constituted a breach of section 4 of the *Act* in the absence of any evidence that a variance had been granted under Part 9.

The delegate also found that Jafic's wage calculation method did not comply with the *Act* in that it operates on a thirty day pay period rather than a 16 day pay period.

In the absence of any legislative formula for determining statutory holiday pay for commission employees, the delegate applied the Director's policy of determining the regular daily wage as envisaged by Section 45 of the *Act*." That policy is to:

divide the wages earned in the pay period in which the statutory holiday occurs by the number of hours worked in that pay period to reach an hourly rate of pay. The hourly rate is then multiplied by the number of hours worked on a regular day to arrive at the amount owed for that statutory holiday.

The delegate contends that this policy is formulated from the definition of "regular wage" contained in the *Act*, and found to be correct in *Pacific Shores Nature Resort Ltd.* (BCEST #D309/00) The delegate applied this policy in calculating Timmins' entitlement.

ARGUMENT

Jafic contends that the 42/50 % commission rates were intended to compensate employees for statutory holidays, and satisfies the requirements of section 45(a) of the *Act*.

Timmins denies that this was a part of her agreement with Jafic. She further states that she has worked for 4 different agencies and that "there is no travel industry 'standard'".

Jafic also argues that Timmins received a benefit in the form of a higher rate of commission that compensated her for the statutory holidays on which she did not work, and, as a result of the Determination, is being ordered to pay her again based on daily wage calculations that are inconsistent with her actual earnings.

The delegate argues that Jafic's appeal on the grounds that the Director erred in law by determining the employer could not include statutory holiday pay in the commission without violating the Act without a variance should be dismissed, as that issue has been dealt with by the Tribunal on a number of occasions (*W.M. Schultz Trucking Ltd.* BCEST #D 127/97 and *Monday Publications Ltd.* BCEST #D 296/98).

Jafic argues that, in the event the Tribunal finds that statutory holiday pay is found owing to Timmins, that the delegate erred in calculating her regular hourly and daily wages. It argues that the amount must be recalculated "in a manner consistent with the *Act* and fair to both parties."

Jafic relies on *Fabrisol Holdings Ltd. (c.o.b. Ragfinder) (Re)* BCEST #D376/96 in which the Tribunal found that the payment of commission wages semi-monthly, provided that the wages represent at least minimum wage for all hours worked in the pay period and it is a term of the employment contract to allow deferral of earned commission to a subsequent pay period, to be a sensible and acceptable practise in the context of commission employees.

The delegate argues that, without an employment contract signed by Timmins, the *Fabriso* decision does not apply to Jafic.

Jafic submitted that the Delegate's wage calculation policy is unfair to it and results "in an exaggerated regular hourly wage calculation which offend reason and which offend [sub-sections 2(a) and (b)] of the *Act*."

Jafic suggests that Timmins' regular daily wage, for the purposes of section 45,

should be calculated with reference to the hours of work and earnings over the entire month in which the holiday falls. The appropriate way to calculate the complainant's regular daily wage is to divide monthly gross earnings by the number of hours worked in the month to generate an hourly wage. That hourly wage should then be multiplied by the regular daily hours (7.5) and the product would an accurate estimate of complainant's pay for a given statutory holiday. This approach achieves the stipulated objectives of Section 45 and 2 of the *Act*. [sic]

In the alternative, Jafic argues that

the complainant's monthly gross earnings could be divided by the number of days worked in the respective month which would also resulting a fair estimate of the regular daily wage. This formula is similar to the one prescribed in section 24(a) of the regulation that deals with statutory holiday pay for workers whose schedule is irregular. This approach would also accord with the *Act* and generate a reasonably accurate daily wage figure.

Jafic suggests that, if calculated on an annual basis, Timmins' hourly wage in 1998 was \$13.08, and \$13.64 in 1999.

The delegate submits that there is no error in law in the Director's policy of calculating statutory holiday pay for commissioned employees. He argues:

The previous legislation had a specific provision for calculating statutory holiday pay for commissioned employees. As that provision is no longer available, and the Director does not feel that sections 45 and 46 provide fair compensation to employees in this position. Calculating the wages earned in a 30 day period for an employee that is paid on an hourly basis does not present much of a challenge. Calculating the commissions earned by a sales person in the previous thirty days presents considerable challenge to the Director and the employer who has to do the calculations. ...The policy that the Director has developed provides a simpler method of calculation for the employer and employees and was done with a view of best achieving the intent of the *Act*.

The delegate continues

It is not the policy, but rather the employer's failure to follow the provisions of section 17, that has created any mischief that the employer sees in these calculations. The employer has been warned on numerous occasions that they were in contravention of the *Act* by failing to follow the provisions of section 17 and the definition of a pay period. Had they heeded these warnings and complied with the *Act*, any calculations made under this policy may have resulted in different numbers. This is a self inflicted wound.

ANALYSIS

Is Jafic required to pay statutory holiday pay?

Jafic argues that the commission wage structure includes statutory holiday pay, and that "a majority of the employees recognized and accepted the additional benefit conferred by this

approach to statutory holiday compensation." Timmins denied that she entered into any such agreement. I accept that Timmins initialled a copy of Jafic's "Commissioned Employees" document. While it is arguable that this document constitutes an employment contract, section 4 of the *Act* provides that the requirements of the *Act* or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect in any event.

Employees are entitled to statutory holidays whether or not they are paid by way of commissions unless the employer has a variance under Part 9. Jafic acknowledged that it did not. I find that Jafic is required to pay Timmins for statutory holidays.

What is the appropriate method of calculating statutory holiday pay in this instance?

It is helpful to set out here the relevant sections of the *Act* and *Regulations*.

Section 44 of the *Act* provides that after 30 calendar days of employment, an employer must either

- (a) give an employee a day off with pay on each statutory holiday, or
- (b) comply with section 46.

Since Timmins did not work on any statutory holiday, she must be paid as provided under section 44(a).

Section 45(a) provides that an employee who has a regular schedule of hours and who has worked or earned wages for at least 15 of the last 30 days before the statutory holiday, and who is given a day off on a statutory holiday or instead of a statutory holiday, must be paid the same amount as if the employee had worked regular hours on the day off.

I accept that the industry practice of paying commission wages on the 15th day following the end of the month, with an advance against commissions being paid on the first of the month, although contrary to the *Act*, falls within the practice accepted by the Director and acknowledged by the Tribunal as being "eminently sensible". (*Fabrisol*). The three requirements an employer must meet under the *Fabrisol* test, which are that an employee is paid some wages semi-monthly, the wages are at least equal to the minimum wage for the hours worked, and that it is a provision of the employment contract to allow deferral of earned income, have been met.

In the absence of any legislatively prescribed formula, the Director must develop a method of determining a fair rate of pay that complies with the spirit and intent of the *Act*. In my view, the Director has not done so in this instance. The delegate's calculations suggest that Timmins' average regular wage was \$29.79 for 1998, and \$35.11 for 1999. This is

significantly greater than the actual hourly wage, if calculated annually, of \$13.08 for 1998 and \$13.64 for 1999.

While the Director may be of the opinion that the *Act* is unfair, it must be interpreted in a fashion that is consistent with the objectives set out in section 2. Those include ensuring that employees receive at least basic standards of compensation and conditions of employment, and the promotion of fair treatment of employees and employers.

To determine an employee's wage entitlement, the *Act* requires that compensation be determined on an hourly basis. (section 1). This is the starting point for determining the statutory holiday pay entitlement for employees. To calculate an hourly wage that is over two times the actual hourly wage calculated annually defies logic and flies in the face of the purposes of the *Act*.

In the absence of a prescribed statutory formula for calculating statutory holiday wages in this instance, the method of calculating the hourly rate that best reflects the spirit and intent of the *Act* is that suggested by counsel for Jafic.

That is, the employee's total gross monthly wage must be divided by the total number of days worked in that month to arrive at an hourly rate. That rate must then be multiplied by the regular daily hours (i.e the same amount as if the employee had worked regular hours that day) to determine the appropriate statutory holiday pay.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination dated March 15, 2000 be referred back to the Director for a recalculation of wages in accordance with the method outlined above.

C. L. ROBERTS

C. L. Roberts

Adjudicator

Employment Standards Tribunal