Employment Standards TRIBUNAL

An appeal

- by -

Jafic Holdings Ltd. operating Thomas Cook Travel
("Jafic" or "Employer")

- 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: Paul E. Love

FILE No.: 2002/609

DATE OF DECISION: February 26, 2003

DECISION

OVERVIEW

This is an appeal by an employer, Jafic Holdings Ltd. ("Jafic" or "Employer"), from a Determination dated November 15, 2002 (the "Determination") issued by a Delegate of the Director of Employment Standards ("Delegate") pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the "*Act*"). The Employer seeks to appeal the Delegate's finding that the Employee was entitled to wages and vacation pay. At the time of the investigation, the Employer sought to justify a deduction from wages for "60 % of the employer's cost of a familiarization trip" ("fam trip"), on the basis that it had a policy that this amount had to be repaid by the Employee, if the Employee left the Employer's employment within 6 months of the date of the fam trip. On appeal, the Employer argued that the Employee had taken vacation days, and the value of those vacation days should be applied to and deducted from the wage entitlement owing to the employee.

The Employer's argument rests on the characterization of days spent on a fam day, and days spent escorting a tour, as vacation days. The Employer appears to have authorized those trips, but now seeks to have the costs of those trips deducted from wages. The Employer's position seems to be that it would not have authorized either trip because the office was not performing profitably. In my view, the Employee was working when she went on the fam trip as this was training for the employer. The Employee was also working when she escorted the tour. An Employer is not entitled to recoup the business costs of a fam trip, despite a policy that provides that the costs of such trips would be paid by the Employee, if the Employee left within six months. The cost was a business cost at the time it was incurred. The *Act* provides that an Employer shall not require an employee to pay a business cost. An employer policy that requires repayment upon termination, violates section 4 of the *Act*. Further an Employer is prohibited from deducting a business cost from wages, pursuant to section 22 of the *Act*.

ISSUE:

Did the Delegate err in finding that the employee, was entitled to vacation pay?

FACTS

I decided this case after considering the written submission of the Employer, Employee, and the Delegate. Lynn D. Parfitt worked as a travel agent for Jafic Holdings Ltd., which operates Thomas Cook Travel, in Prince George. She worked for this Employer from July 1, 2001 to May 21, 2002. She had worked for the predecessor business for a number of years previously. She worked for 20 years with the predecessor and Jafic in the Thomas Cook Travel business.

Effective May 1, 2002, Ms. Parfitt, commenced working a four day work week. Ms. Parfitt gave written notice on May 7, 2002, advising that her last day of work would be May 21, 2002. On May 13, 2002, Ms. Parfitt worked a ½ day and gave the Employer a doctor's noted indicating that she would be off on sick leave from May 14 to May 21, 2002. Ms. Parfitt filed a complaint with the Employment Standards Branch, following the end of her employment. It appears that the Employer did not pay the full pay entitlement, on the last paycheque. After an investigation the Delegate found that Ms. Parfitt was entitled

to regular wages in the amount of $830.78, plus vacation pay on those wages at 4 % in the amount of $332.23, plus interest in the amount of $17.80.

The Employer's position before the Delegate, set out in its letter of October 22, 2002, was that Ms. Parfitt owed the Employer money. The Employer said that the gross pay was $830.78, less a $975.60 fam trip deduction. A "fam" trip, is a familiarization trip. The fam trip deduction is 60 % of the Employer's cost of a familiarization or fam trip taken by Ms. Parfitt to China. Ms. Parfitt attended a fam trip to China during the period February 1 to 8, 2002. The Employer deducted this money, from the final cheque issued in May of 2003, on the basis of its policy, that an Employee is required to pay 60 % of the Employer's cost of the fam trip, if the Employee leaves within six months of the taking of that trip.

Ms. Parfitt escorted 25 "seniors" to Cuba during March 11 to March 21, 2002. The trip was arranged prior to this Employer purchasing the travel agency that Ms. Parfitt had worked at for 19 years prior to the purchase. The Employer indicates in its letter to the Tribunal dated January 16, 2003 that "we would not have authorized either of these trips as the office was not profitable ...". The issue of "authorization" does not appear to have been raised by the Employer during the investigation, as it is not mentioned in the Determination.

Employer's Argument:

The Employer disagrees with vacation pay added to the Determination. The Employer says that the Employee took 18.5 paid days of holiday, and that the Delegate should have accounted for this in the calculation and therefore has been overpaid $1,089.25**.** The Employer's argument rests on a characterization of the fam trip days as the escorted trip to Cuba days, as vacation days.

In a letter to the Tribunal dated January 16, 2003, the Employer stated that the Employee took 27.5 days as vacation, and counted a China fam trip, and the Cuba trip as vacation time. The Employer has supported its argument by altering a document which was supplied to the Delegate as part of a response to a demand for Employer records showing a "V" for Vacation for the days February 1, 4,5,6,7, and 8, when the original document showed a "C" for China.

Employee's Argument:

The Employee says that the Employer has characterized time spent in escorting a group, and time spent on a familiarization trip as vacation time. The Employee says that this is incorrect, and that the time was spent working, rather than as her vacation.

Delegate's Argument:

The Delegate says that section 58 of the *Act*, provides that vacation pay must be added to the Determination, and the Employer is obligated to pay vacation pay on wages earned. The Delegate says that the Employer has altered a record attached to its submission to the Tribunal from what was provided to the Delegate pursuant to the Demand for Employer Records. The Delegate says that the Employer has put a V, instead of a C for the days of February 1, 4,5,6,7, and 8, when the Employee was in China on a familiarization trip. The Delegate submits that "fam" trips are part of a training program and therefore the employee is working, and the work is compensable.

The Delegate submits that the issue of "overpayment of vacation pay" was not raised during the investigation, and is simply an offset now raised by the Employer against the wages found to be due and owing by the Delegate. The Delegate submits that the "new issue" should not be considered on appeal: *Grant (c.o.b. as Small-A-Fare Café)* #D437/02. The Delegate submits that the appeal should be dismissed.

ANALYSIS

In an appeal under the *Act*, the burden rests with the appellant, in this case, the Employer, to show that there is an error in the Determination, such that the Determination should be canceled or varied.

New Issue:

The Delegate argues that this appeal should be dismissed because the Employer raises a "new issue" concerning vacation pay. In my view, the Employer did raise, in part, the notion that the Employee was not entitled to vacation pay, because of vacation days previously taken. While the Employer has "escalated" the number of days, in my view, I do not believe this is an appropriate case to dismiss the appeal on the basis of "new issue" not raised before the Delegate.

I note that the Employer presents its argument on the basis of "evidence that was not available at the time the Determination is made". The argument presented to the Delegate during the investigation, contained in the Employer's letter dated October 22, 2002 was:

> No vacation pay is due to Lynn (see attached vacation schedule)
>
> Lynn participated in a familiarization trip to China from Feb 1-8/02, which costs the company $1176.00 plus expenses of $450.00 ($300 US), total o $1626.00 (copies of cheques attached). We have a company policy that if an agent leaves the company within 6 months of returning from a Familiarization training trip a percentage of the cost of this trip may be deducted from their final pay (see attached company policy). On this basis we believe that we are justified in deducting 60 % of $1626.00 ($975.60) from Lynn's final cheque.

In my view, this is not a point of "new evidence". It is rather an attempt by the Employer to "recharacterize" facts. The Employer wishes the Tribunal to accept that days taken as a familiarization trip, and days spent escorting a trip to Cuba, ought to be considered vacation. In my view, the Employer cannot "recharacterize" time spent on a familiarization trip, months after the fact, as an Employee's vacation or personal time, simply because the employment relationship has terminated. Further, an Employer cannot "recharacterize" time spent escorting a trip, arranged prior to its purchase of a business, simply because of its view that it would not have authorized the trip because the office was unprofitable.

The Employer has raised an issue concerning correctness of the calculation of vacation pay. I note that if wages are properly found to be due and owing by the Employer to the Employee, the Delegate is obliged, by section 58 of the *Act*, to add vacation pay to the wage entitlement expressed in a Determination. The "factual" basis for the Employer's argument rests in its attempt to "re-characterize" trips taken in the course of company business as "vacation". I wish to address the merits of this argument, despite the fact that it appears to be an argument contrived by the Employer after the fact.

In my view, when an employee in a travel agency attends a familiarization trip, that Employee does so for the benefit of the Employer, and is being trained in the employer's business. The Employee is working, within the definition of work in section 1 of the *Act*:

> means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.

The fact that employee resigns, quits or terminates, at a time after the "work" was performed, is immaterial to whether Ms. Parfitt worked when she went on the fam trip. Further, Ms. Parfitt apparently escorted "25 seniors" on behalf of Thomas Cook Travel during the Cuba trip. The Cuba trip, which was arranged prior to the Employer's purchase of the business, was an escorted trip, where Ms. Parfitt escorted the Employer's customers. She had a past history of escorting the trip. She was working within the definition of work at that time. Her resignation at a later date cannot alter the fact that at the time of escorting the trip she was working.

If the Employer did not wish the Employee to escort the trip, or take the fam trip, it should have given Ms. Parfitt clear directions at a time before the Employee travelled on the trip. In the absence of any clear directions, in my view, the trips were authorized by the Employer. Certainly the trips were taken for the benefit of the Employer, and labour or services were performed for the Employer during the course of the familiarization trip and escorted trip. The fact that the Employer now claims that it would not have authorized the trip, because the office was not profitable, does not bear on the issue of whether Ms. Parfitt worked at the time, the work was performed.

Deduction of Business Costs:

The Delegate characterized the value of the fam trip deducted as an employer business cost. The Delegate decided this matter on the basis of section 22 of the *Act* which provides that an Employer may not require an employee to pay the Employer's business cost. Section 22(2) provides that:

> An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.

This is a sound method of addressing the Employer's claim for recovery of the business cost, but really leaves open the issue of whether it could have been something which could have been deducted, if the Employer obtained a written authorization from the Employee. The Employer's policy concerning repayment of any portion of the cost of fam day trips, violates section 22 of the *Act*, and also violates section 4 of the *Act*. The Employer policy has no effect:

> The requirements of this Act and the regulations are minimum requirements and an agreement to waive any of those requirements, not being an agreement referred to in section 3(2) or (4), has no effect.

I think that the Delegate was correct in his view, that the deduction was unauthorized, but in my view, the policy setting out the Employer's policy and deduction pursuant to that policy is also unlawful, by virtue of section 4 of the *Act*.

For all the above reasons, I therefore dismiss this appeal.

ORDER

Pursuant to s. 115 of the *Act* the Determination dated November 15, 2002 is confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal