Employment Standards TRIBUNAL

An appeal

- by -

Compass Group Canada (Beaver) Ltd.
-and by-
Avrum C. Pfeffer

- 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: Lorne D. Collingwood

FILE No.: 2002/628

DATE OF DECISION: March 25, 2003

DECISION

OVERVIEW

Compass Group Canada (Beaver) Ltd. (I will use "Compass" and "the employer" for ease of reference.) appealed, pursuant to section 112 of the *Employment Standards Act* ("the *Act*"), a Determination issued by a delegate of the Director of Employment Standards (the "Director") on October 3, 2002. The Determination ordered Compass to pay Avrum C. Pfeffer $421.77 in vacation pay and interest.

Avrum C. Pfeffer also appealed the Determination. He claimed overtime pay and statutory holiday pay. He claimed that he was entitled to a bonus for increased sales in both the first and second years of his employment. He claimed compensation for the reason that his extended health care was cut off in June, 2002. And he claimed that he had been promised, and should receive, one additional week's pay because of overtime work in the year 2000.

I deal with each of the appeals in *Compass Group Canada (Beaver) Ltd. and Avrum C. Pfeffer*, BCEST No. D504/02 ("*Compass*"). My decision is that the delegate correctly treated what the parties call "gratuities", and what the employer refers to as "on-call pay", as wages for the purpose of his vacation pay calculations. The decision is that the delegate correctly decided that Mr. Pfeffer is not entitled to a bonus for the second year of his employment. I decided that if the employee was entitled to overtime wages, it could only be for reason of the *Act*: I was not shown that there is an agreement which requires the payment of overtime wages for work performed in the first year of the employment. All other matters were referred back to the Director. The delegate had failed to decide the matter of whether the employee is or is not entitled to compensation for the reason that his health and welfare coverage was cut short. I was led to believe by a witness for the employer that Mr. Pfeffer stood to receive a bonus for the first year of his employment, depending on performance, and the matter of whether he is or is not entitled to that bonus was sent back to the Director. Last but not least, I sent the matter of whether the employee is or is not a manager during the employment and the related statutory holiday pay and overtime compensation issues, back to the Director. My reading of the Determination was that the delegate had decided that the employee is not entitled to statutory holiday pay, nor overtime pay, because the employee had agreed or at least did not dispute that he was a "manager" as that term is defined in the *Employment Standards Regulation* (the "*Regulation*"). In my view, a delegate must decide whether the employee is or is not a manager. The requirements of the *Act* are minimum requirements and an employee may not waive an entitlement to overtime pay or statutory holiday pay through agreement that they are a manager.

The Director has now reported back to the Tribunal and the parties have been given an opportunity to respond to the report, a letter from the delegate dated December 16, 2002. I am satisfied with the report in all respects but one. The delegate has failed to decide whether the employee is or is not entitled to a bonus for his first year of employment. That matter is therefore sent back to the Director yet again, this time with a recommendation that the Director might want to consider assigning the matter of the bonus to another delegate.

ISSUES TO BE DECIDED

I must decide whether there is or is not a reason to vary the Determination or again refer a matter or matters back to the Director, now that the Director has reported back to the Tribunal.

It is not for me to revisit what has already been decided.

FACTS & ANALYSIS

Mr. Pfeffer again claims that he is owed a bonus for the second year of his employment. I have already found that the delegate was correct in deciding that the employee is not entitled to a bonus for that year. I had this to say in *Compass*,

> "Pfeffer argues that the delegate is wrong in concluding that he is not entitled to a bonus for 2000/2001. There are, however, plain clear facts to show that he is not entitled to receive a bonus for that year. No bonus is to be paid in the event that the employment is terminated. (See Awards and Payments section of the employer's 2000/2001 Bonus Incentive Plan.) It is, moreover, a requirement that a person be "actively employed within Compass Group Canada or subsidiary company at the time of their individual award distribution". (See Requirements section of the 2000/2001 Bonus Incentive Plan.) Pfeffer's employment was severed on the 8th of June, 2001. That is well before the point that bonuses were to be calculated and awarded for the period 2000/2001. According to the employer's bonus plan, bonuses are "calculated following finalization of the fiscal year-end audited operating results with payment being made at the end of December or early January" ("Awards and Payments", the employer's 2000/2001 Bonus Incentive Plan)."

Pfeffer again claims that he is entitled to overtime pay under the initial terms and conditions of his employment agreement and, also, because of what is said to be a subsequent agreement to pay overtime. In *Compass*, I found that he is not.

> "… terms and conditions of the employment are as set out in documents headed "Unit Managers", Schedules A and B. Schedule A calls for a salary of $36,000 a year and no less than $4,000 a year in 'gratuities'. In Schedule B it is made clear that it was not the intention of the employer, at least initially, to pay any overtime wages at all. At 7) of that latter document, it is stated that "due to the regular eating periods associated with our business, a Unit Manager is expected to provide services in excess of the typical 40 hour work week in order to fulfil the responsibilities of the position. The Unit Manager's salary shall cover such hours worked <u>without the Company incurring overtime costs</u>." That is clearly not an agreement to pay overtime."
>
> (emphasis added)

I went on to find that there is not evidence to show that the employment contract was subsequently amended in a way that requires the employer to pay overtime wages for work in the first year of the employment.

> "I find that the employment contract was subsequently amended in that the employer began paying Pfeffer overtime wages in the second year of his employment. Pfeffer claims that he is owed overtime wages for work in the first year of his employment but he cannot prove that the agreement to pay overtime is somehow retroactive. If Pfeffer is owed overtime wages in the first year of the employment, it is for reason of the overtime provisions of the *Act* and not because it is a term or condition of the employment contract."

It is not for me to revisit the above matters at this point. What I must do is address the matters that were referred back to the Director. There are three issues by my count.

1. The Issue of Health and Welfare Benefits

In filing his complaint, Pfeffer claimed compensation for the reason that his health and welfare benefits had been cut off in June, 2002. It was pointed out to me by the employee that the delegate had failed to decide the issue and so the matter was sent back to the Director.

The matter was investigated. The Director's report is that, contrary to what the employee believed, his health and welfare coverage was not cut short. It was in full effect until August of 2002.

The report of the Director has been accepted by the employee insofar as it pertains to the matter of his health and welfare benefits. I consider this matter to have been resolved.

2. The Matter of Whether Mr. Pfeffer is or is not a Manager

The Determination is that the employee is not entitled to statutory holiday pay, nor overtime wages, because a "manager", as that term is defined in the *Regulation*, is not entitled to such pay and, as the delegate said in the Determination, "it is a fact not in dispute that the (employee) was a manager.

I sent the matter of whether the employee is or is not a manager back to the Director on belief the delegate had not yet decided the issue but had merely found that Mr. Pfeffer had agreed or at least, appeared to agree, that he was a manager. In my view, a delegate must decide whether the employee is or is not a manager because an employee cannot waive any of the *Act*'s minimum requirements through agreement that he is a manager (section 4 of the *Act*).

In reporting back to the Tribunal, the delegate claims to have been misunderstood. According to the delegate, he decided the matter of whether the employee is or is not a manager when employed by Compass. What the delegate was trying to say is the employee, when told of the decision, which was that he was a manager, did not then dispute the decision but indicated that he thought that managers should not be excluded from the overtime provisions of the *Act*. I accept this, nothing to the contrary.

I now turn to the appeal. It is Pfeffer's position that he is not a manager and that the Determination is wrong.

The term "manager" is defined in the *Regulation* and it is as follows:

> "manager" means
>
> a) a person whose primary employment duties consist of supervising and directing other employees, or
> b) a person employed in an executive capacity.

The delegate has decided that Mr. Pfeffer was a manager because he was primarily concerned with the supervision and direction of employees. The Tribunal has said (See *Director of Employment* Standards, BCEST No. D479/97) that any conclusion about whether the primary employment duties of a person consist of supervising and directing employees depends upon a total characterisation of that person's duties and will include the following:

1. the amount of time spent supervising and directing other employees;
2. the nature of the person's other (non-supervising) employment duties;

3. the degree to which the person exercises the kind of power and authority typical of a manager;
4. to what elements of supervision that power applies;
5. the reason for the employment; and
6. the nature and size of the business.

The delegate tells me that his decision is based on what the employee had to say. I am shown that the employee had himself said that he was responsible for "staff hiring and termination, training and schedules" (letter to delegate dated September 12, 2001). The delegate goes on to say that Pfeffer, in a fact finding conference, confirmed that it was a primary part of his job to supervise and direct other employees, that he had in fact hired, trained, and disciplined employees under his command, and that he scheduled the work of employees and approved leaves from work.

Mr. Pfeffer, in appealing the Determination, is not arguing that the delegate's decision is unreasonable given the evidence that had been put before him. What Mr. Pfeffer does on appeal is change his story. It is now his claim that he was not responsible for hiring, discipline or termination in the last part of the employment, only the first 60 percent of his employment.

Through numerous decisions, the Tribunal has said that it will not normally allow an appellant to submit new evidence on appeal and I am not going to accept new evidence in this case. The Appellant is not only seeking to submit evidence which could have, indeed, should have, been submitted to the delegate. This is a case where, faced as he is with a decision that he does not like, the Appellant changes his story.

The delegate notes that the employee's primary concern is the overtime issue. And the delegate suggests that, even if I were to find that the employee was not a manager, it does not follow that the employee is then entitled to overtime pay. He notes that the employee is concerned with overtime work in first year of the employment. And he notes that the employer did not agree to pay for overtime worked in the first year of the employment: The agreement on pay is in writing and it clearly calls for Pfeffer to work more than 40 hours a week for a set amount of salary. The delegate goes on to point out that it follows that the employee could only be entitled to overtime wages if he were paid less than minimum wages (the minimum wage and overtime pay which is based on the minimum wage). And the delegate points out that Mr. Pfeffer was in fact paid much more than the amount that would be due even if the employee had consistently worked 12 hour days.

Mr. Pfeffer argues that the delegate is wrong in what he suggests, that his employment agreement calls for something like $19 an hour and overtime wages over and above that. He is wrong in his thinking. The agreement on pay is that he would be paid a certain salary regardless of the number of hours worked. It is the minimum wage provisions of the *Act* that would apply.

3. The Matter of the Bonus

Pfeffer claimed that he is entitled to performance bonuses, one for each year of his employment. The delegate decided that Pfeffer is not entitled to a bonus for the period 2000/2001 (the employer's fiscal year) because his employment was terminated. The Determination makes no mention of whether Pfeffer is or is not entitled to a bonus for 1999/2000.

During the course of my hearing, held before my first ruling, I was led to believe, by a knowledgeable witness for the employer, that Mr. Pfeffer was open to receiving a bonus for the first year of his employment, depending on performance.

> "… I find, however, that it is not that the employer has no knowledge of the bonus plan and the circumstances under which a bonus is to be paid. The bonus plan is generic and applied to a large number of people. I also find that there is compelling reason to believe that Pfeffer is covered by the employer's bonus plan for the fiscal year 1999/2000. Claude Helm, Pfeffer's supervisor, demonstrated a superior knowledge of such matters. And it is his recollection of matters that Pfeffer was in fact covered by both the 1999/2000 and 2000/2001 bonus plans."

I also found the following:

> "The bonus plan uses terms that make it difficult to understand in some respects. Helm tells me that Pfeffer is not entitled to a bonus for 1999/2000 because the "unit margin" (what is said to be gross income) of his group, number 63115, did not exceed its "plan margin" (what is said to have been the group's expenses). That may be but the employer did not produce financial information to confirm it. And Mr. Helm's comments are contrary to comments by Rick Irvine, Compass' Vice-President of Human Resources. Irvine in a letter dated October 3, 2000 told Pfeffer that the incentive bonus plan is constructed so as to reward "individual effort" and that the bonus depends on whether Pfeffer met his "personal incentive target". Deciding whether a bonus is or is not owed for 1999/2000 is going to require further investigation."

I was, furthermore, led to believe that the employer has and can produce Pfeffer's bonus plans and that the matter of whether the employee is or is not entitled to a bonus for his first year of employment is therefore something which can be determined. The matter was sent back to the Director.

The matter of the bonus was assigned to the delegate that issued the Determination. The delegate made no attempt to obtain a copy of the bonus plan that is of interest, never mind determine whether Pfeffer is entitled to a bonus for the fiscal year 1999/2000, the employee's claim, or not entitled to a bonus because the performance of his group did not meet a certain standard, Mr. Helm's claim. The delegate does nothing more than tell me that it was his decision that "no additional wages are owing" and the amount paid "appears to meet any real or implied term of employment". That is not only inadequate, it is unseemly. A decision to send a matter back to the Director does not present a delegate with an opportunity to start defending his or her decision. The delegates are limited to explaining the basis for their decisions and the law.

It may be that all wages have been paid and all terms of the employment have been met by the employer but the employee is entitled to have this matter of the bonus investigated because it goes to the matter of whether he has in fact been paid in full. The matter of whether Mr. Pfeffer is or is not entitled to a bonus for the period 1999/2000 is again referred back to the Director, this time with the suggestion that the Director might want to assign the matter to another delegate.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination be confirmed in respect to the decision that the employee is a manager and the decision that the employee is not entitled to compensation for the reason that health and welfare coverage was cut short.

The matter of whether the employee is or is not entitled to a bonus for the first year his employment is, pursuant to section 115 of the *Act*, again ordered back to the Director, this time with the recommendation that the Director assign the task of decided that question to another delegate.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal