

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: James Wolfgang

FILE No.: 2001/801

DATE OF HEARING: March 19, 2002

DATE OF DECISION: April 11, 2002

DECISION

APPEARANCES:

| | |
|---------------|--|
| Denise Oakley | for Jafic Holdings Ltd. |
| Sharon Gould | for Jafic Holdings Ltd. |
| Diane Grant | for herself |
| Ian MacNeill | for the Director of Employment Standards |

OVERVIEW

This is an appeal by Jafic Holdings Ltd. (“Jafic”) pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) of a Determination issued by the Director of Employment Standards (the “Director”) dated October 26, 2001. The Determination originally applied to two complainants however one has withdrawn her complaint against Jafic. The Determination found Diane Grant (“Grant”) to be an employee within the meaning of the *Act* and that commissions are wages by definition of the *Act*.

The Determination found Jafic had failed to pay wages as per Section 18(2) and vacation pay as per Section 58(3) of the *Employment Standards Act*. It was determined Jafic owed Grant \$2,946.53 in wages, vacation pay and interest.

There was no penalty imposed by the Determination.

In their appeal to the Tribunal Jafic argued they have a policy that no commission is paid on any file until after the company receives the final payment. This means if an employee quits or is terminated before the final payment is received no commission is paid to that former employee.

Jafic argue if the Tribunal finds Grant is owed commission that amount should not be 100%. They stated they had paid the full commission on the files in question to the agent who took over the file.

The dispute is over the commission on seven files for tours or cruises that had been initiated by Grant and were not completed by the time she left. They were in various stages of progress, however the final payment had not been made. In each case a client had booked a cruise or tour and a deposit or credit card imprint had been taken by Grant.

ISSUE

Is Grant entitled to any of the commission from the files in dispute and, if so, how much?

THE FACTS AND ARGUMENT

Grant was employed as a travel agent by Thomas Cook Travel from July 18, 1994 to October 13, 2000. She was paid on a commission basis at the rate of 42%. There was no written contract of employment between Jafic and Grant.

Jafic take the position they do not consider it a “sale” until the final payment is received. They claim when an employee leaves or is terminated the unfinished files of that employee are to be turned over to management for reassignment to another agent. Before leaving Jafic, Grant turned over all of her outstanding files to another agent in the office while the manager was on vacation. This, according to Jafic, is in violation of company policy.

Jafic claim Grant was aware of the above policy and also their policy on not paying commissions if the employee left before the final payment was received. In support of their position they claim she received full commission for a sale started by a former employee when that employee left before the final payment was made.

Grant denies she received full commission on the file she brought to completion from the other employee and further claims there were no written copies of policies in effect at the time she was employed.

Jafic claim they have paid Grant all monies owed to her however if the Tribunal finds she is entitled to commission on work performed before she left she should not be paid full commission. They have supplied copies of the client file printouts for the seven files. This contains all the information in their computer relating to those files. They also presented a spreadsheet of the time recorded in the computer and the information taken from the paper files, which indicates the total amount of time spent on each file. They then determined the amount of time Grant spent on each outstanding file compared to the time other agents spent after Grant left. These are expressed as percentages and are divided into the commission payable for each file. That calculation would give Grant \$237.84 compared to the commissions calculated in the Determination of \$2,650.90. Jafic indicates the average amount of work done in the early stage of a file is about 20% of the total.

Grant claims she had done the majority of the work on the files in dispute and there was minimal work to be done after she left. Her evidence was that approximately 60% of the work on the file is normally done in the early stages of the transaction. This position is supported by the Determination. The Determination states the Delegate interviewed the clients affected on the amount of time they spent with Grant in setting up their travel and the amount of time spent later with the agent who took over the file. The Determination found the majority of the work occurs in the early stages of the preparation of travel plans and Grant had done this work. On that basis the Determination awarded the full commission on those seven files to Grant.

The Determination further established that wages are earned when the work is done not when the employee is paid. It is then that money is owed to the employee although they may not receive their payment until the travel agency receives the final payment.

ANALYSIS

The travel industry is a situation where a client makes contact with a travel agent and arranges a tour or cruise normally well in advance of the travel date. There is a considerable amount of work done by the agent in the early stages of planning by advising the client of the various options available, destinations, the best fares or rates, the type of accommodations, side trips etc. This may or may not be indicated in either the computer or paper file of the client. When the client has made their decision on where to go and how to get there the agent books the travel and the client pays a deposit. This is the first major work done on the file. Unless there are significant changes little is done on the file until the time of travel approaches. The agent must notify the client when the final payment is expected and, when that is received, the actual transfer of money from the agency to the tour operator or cruise line takes place. Last minute details are checked with the client to ensure they have current passports, visas, picture I.D. or whatever is required. The itineraries are printed, checked and reviewed with the client.

Jafic claims it is policy that commissions are not paid to travel agents until the customer makes the final payment on a trip or package. This could be some months after the initial contact and deposit had been made. Jafic allege their policy is no commission is paid to former employees who have left the company before the customer makes the final payment.

Section 1 of the Act defines wages:

“wages” include

(a) salaries, commissions, or money, paid or payable by an employer to an employee for work, (emphasis added)

Much has been made in the appeal about when the sale is completed. In my view, that concern is largely irrelevant. It might be a concern if the issue was whether the sales were completed, but there is no dispute that they were completed. The facts are “work” was performed by Grant and that, under the *Act*, requires the payment of wages.

As indicated in BC EST #D376/96 (*Fabrisol Holdings Ltd. operating as Ragfinder*):

As a matter of law, the *Act* identifies wages in the context of work performed by an employee. Simply put, wages are earned when work is performed. (emphasis added)

Further in the same Decision it states:

Also, Section 18 requires all wages owing an employee to be paid within 48 hours, if the employment is terminated by the employer, or within 6 days, if terminated by the employee. In this context, it is the practice of the director to require all commissions to be paid if they have been earned, without regard to when they might otherwise be paid had the employment not terminated. There is no exception to this practice.

The *Act* requires that wages must be paid for work performed. I am satisfied Grant “worked” on the seven files. The difficulty I have is in deciding how much work Grant performed and how much work the agent

taking over the file performed. Jafic take the position Grant performed only 20% of the work on the files and Grant stated, on average, the work she performed amounted to 60% of the file.

The Delegate interviewed the clients concerned and their evidence supports the contention that Grant spent considerably more time with them than the agents that took over the files.

Jafic prepared spreadsheets, which they claim reflect the proportional time by Grant and the other agent on those files. I do not believe those to be an accurate indication of the time spent by Grant and the other agent. They were created from the computer and paper file records in the office. There were errors in the preparation of the spreadsheets that were identified at the hearing. Duplicate credit was given to the agent that took the file over from Grant. While they were of assistance I do not believe they can accurately reflect the time spent with a client, either directly or by telephone in which no entries are made into the computer or notes in the paper file.

Also there is the question of what, if any, recognition should be given to the fact that without the original contact and sale there would be no commission. Many of these clients were repeat customers of Grant. While it was Thomas Cook's office, these people came back to see Grant.

There is no dispute the files were not completed at the time Grant left. I therefore feel it to be unfair to award Grant the total commission on each file. Grant herself admits that there was work that was to be performed on the files after she left. Her evidence was that about 60% of the work on the files was performed by her. I believe there is some "value added" benefit to the repeat business that Grant appeared to enjoy. Taking all of that into consideration I believe there is enough evidence to award her 60% of the commission on the files in dispute.

ORDER

In accordance with Section 115 of the *Act* I refer the Determination dated October 26, 2001 back to the Director for recalculation to establish the commission payable to Grant to be 60% of the total commission payable. Additional interest is to be calculated in accordance with Section 88 of the *Act*.

James Wolfgang
Adjudicator
Employment Standards Tribunal