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.: 2002/376 and 2002/398

DATE OF HEARING: October 17, 2002

DATE OF DECISION: November 13, 2002

DECISION

APPEARANCES:

Raymond Lee, Vivian MacLeod and Claude Helm	For the employer
Avrum Pfeffer	On his own behalf

OVERVIEW

Compass Group Canada (Beaver) Ltd. (I will use "Compass" and "the employer" for ease of reference.) has 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 orders Compass to pay Avrum C. Pfeffer $421,77 in vacation pay and interest.

Compass, on appeal, argues that the Determination is wrong in that gratuities and on-call payments are treated as wages for the purpose of vacation pay calculations.

Avrum C. Pfeffer also appeals the Determination. He claims that he is entitled to overtime pay and statutory holiday pay, that he is entitled to a bonus for increased sales in both the first and second years of his employment, that he should be compensated for the fact that his health care was cut off and that he was promised, and should receive, a further week's pay in lieu of overtime work in the year 2000.

I have in this case decided that the delegate has 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. I have found that there are facts to support the conclusion that Mr. Pfeffer is not entitled to a bonus for the second year of his employment. I am referring other matters back to the Director. The delegate did not decide whether Mr. Pfeffer is or is not entitled to a bonus for 1999/2000, nor did he decide the matter of whether compensation is owed because health care was cut off. I also find that the delegate decided that Mr. Pfeffer is not entitled to statutory holiday pay and overtime compensation without deciding the all important matter of whether he is or is not a "manager" as that term is defined in the *Employment Standards Regulation*. An employee cannot waive his or her right to overtime pay or statutory holiday pay through agreement that they are a manager. Such an agreement is contrary to section 4 of the *Act*.

An oral hearing was held in this case.

ISSUES TO BE DECIDED

At issue is the matter of whether the delegate should or should not have treated what the parties call "gratuities" and the employer refers to as "on-call" pay as wages for the purpose of calculating vacation pay entitlements.

At issue is the matter of whether Mr. Pfeffer is or is not entitled to compensation for overtime hours worked and statutory holiday pay. According to the delegate, Mr. Pfeffer agreed that he held the position of manager.

At issue is the matter of whether the employee is or is not entitled to bonus moneys.

At issue is the matter of whether the employer did or did not cut off the employee's health care and, should it have done so, whether the employee is or is not entitled to compensation as a result of its doing so.

What I must ultimately decide is whether it is or is not shown that the Determination ought to be cancelled or varied or a matter or matters referred back to the Director for reason of an error or errors in fact or law.

FACTS

Compass provides catering and food services.

Avrum Pfeffer worked for Compass from September 7, 1999 to June 8th, 2001. He was the Catering Manager at BCIT for the Chartwells division of the employer. The Catering Manager is not an executive position but that of a "hands on" supervisor who must set out tables and see that everything is ready for each and every function.

The agreement on pay is that Pfeffer was to be paid $36,720 per year and what the parties call "gratuities". Pfeffer was guaranteed $4,000 a year in 'gratuities'.

What the parties call "gratuities" are not tips which are voluntarily given by customers. It is a fee for service that is charged by Compass and the amount is 10 to 15 percent of the basic bill for food and services. Compass does not keep any part of the service charge but turns the entire amount over to the Catering Manager, chef and servers. The amount paid to each person is up to the employer but it is to reflect the amount of work by each person relative to his or her fellow workers.

In claiming wages, Pfeffer claimed that he is entitled to performance bonuses, one for each year of his employment. The delegate has decided Pfeffer is not entitled to a bonus for the period 2000/2001 (the employer's fiscal year) because his employment was terminated. The Determination is silent on the matter of whether Pfeffer is or is not entitled to a bonus for 1999/2000.

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).

On the matter of whether Pfeffer is or is not entitled to a bonus for the fiscal year 1999/2000, the employer has made much of the fact that Pfeffer cannot produce a copy of the Bonus Incentive Plan for that period. 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.

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.

While Pfeffer claimed that the employer cut him off his health care plan and that he is owed compensation for that reason, the delegate did not address the matter in the Determination.

The delegate does not award overtime pay or statutory holiday pay because Pfeffer did not dispute that he is a "Manager" as that term is defined in the *Employment Standards Regulation* (the "*Regulation*"). He did not decide whether Mr. Pfeffer is in fact a manager for the purposes of the *Act*.

Pfeffer claims that he is entitled to overtime wages for all work after 40 hours because that is a term and condition of the employment. That is denied by the employer. I find that 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 without the Company incurring overtime costs." That is clearly not an agreement to pay overtime.

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.

Pfeffer claims that he has been promised, and should receive, a further week's pay in lieu of overtime work in the year 2000. I am not shown that the employer made any such promise.

ANALYSIS

Vacation pay is to be calculated and paid as follows:

> **58** (1) An employer must pay an employee the following amount of vacation pay:
>
> (a) after 5 calendar days of employment, at least 4% of the employee's **total wages** during the year of employment entitling the employee to the vacation pay; … .
>
> (my emphasis)

In calculating Pfeffer's entitlement to vacation pay, the delegate treated what the parties call "gratuities" and the employer calls "on-call" pay as a form of wages. The employer appeals that decision: According to the employer, neither gratuities, nor on-call pay, should have been considered wages.

The term "wages" is defined in section 1 of the *Act*. The definition is as follows:

> "**wages"** includes
>
> (a) salaries, commissions or **money, paid or payable** by an employer to an employee **for work**,
>
> (b) money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency,
>
> (c) money, including the amount of any liability under section 63, required to be paid by an employer to an employee under this Act,
>
> (d) money required to be paid in accordance with a determination or an order of the Tribunal, and
>
> (e) in Parts 10 and 11, money required under a contract of employment to be paid, for an employee's benefit, to a fund, insurer or other person,
>
> but does not include
>
> (f) **gratuities**,
>
> (g) money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency,
>
> (h) allowances or expenses, and
>
> (i) penalties; … .
>
> (emphasis added)

The employee claims that he was never on-call but whether he was or was not is immaterial to the matter of the vacation pay calculations. An employee who is on-call is deemed to be at work as the term "work" is defined in the *Act*. It follows that on-call pay is money paid or payable for work, what are wages for the purpose of vacation pay calculations.

> "**work"** means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.
>
> (2) **An employee is deemed to be at work while on call** at a location designated by the employer unless the designated location is the employee's residence.
>
> (emphasis added)

Gratuities

As the term "wages" is defined in the *Act*, it does not include what are called "gratuities". The facts of this case are that the employee was paid what the employer calls "gratuities" but the delegate has decided that those moneys are not gratuities at all but wages in that they are paid or payable for work.

Unlike the term "wages", the term "gratuities" is not defined in the *Act*. It can be concluded from the definition of the term "wages", however, that gratuities are to be distinguished from money which is paid or payable for work and also money which is paid or payable as an incentive and relates to hours of work, production or efficiency. It follows that it is unimportant that an employer may call a payment "a

gratuity". If what is said to be a gratuity is money paid or payable for work, or money paid or payable as an incentive to work and relates to hours of work, production or efficiency, the amount paid or payable is to be treated as wages.

There are definitions of the term "gratuity". They include "something acquired or otherwise received without bargain or inducement", "something given freely or without recompense; a gift" and "something voluntarily given in return for a favour of especially a service, hence , a bounty, a tip; a bribe" [*Black's Law Dictionary*, Sixth ed., (1990)]. The Supreme Court of Canada has in a case said that a gratuity is a tip [*Canada (Attorney General) v. Canadian Pacific Ltd.* (1986) 1 S.C.R. 678, 11 C.C.E.L. 1, 66 N.R. 321, 27 D.L.R. (4th) 1].

I have not had the benefit of extensive submissions on the matter of what is a gratuity for the purposes of the *Act*, yet I must reach a conclusion in that regard. The *Act*'s definition of wages in mind, I find that gratuities are payments for service that are discretionary and not related to an employee's hours of work, production or efficiency but qualitative or intangible aspects of the service. My reading of the definition of wages is that a payment that is by an employer and discretionary is to be considered wages unless it is not related to hours of work, production or efficiency in any way.

The above in mind, I find that the delegate is correct in treating all of what the parties call "gratuities" as wages for the purpose of vacation pay calculations.

The employer had to pay Pfeffer $4,000 a year in 'gratuities' as a term of employment. In that the payments were guaranteed, they are in my view nothing more than salary by another name.

What remains of what the employer has paid Pfeffer and is calling a "gratuity" is also wages in my view. These particular moneys are not tips. They represent the employee's share of service charges which form part of the customers' bill for food and service. It is the employer that decided on what to charge, between 10 and 15 percent I am told, and it is the employer that decided what each employee would receive. The employer as such exercised a certain amount of discretion. But each worker is to have been paid a share of each service charge that reflects the amount of their work relative to their fellow workers. And these are not payments which were withheld. I am satisfied that the payments are not discretionary in the sense that tips are discretionary and they also bear a relation to hours worked and production if not efficiency as well.

Issues not Addressed by the Determination

Pfeffer claimed that the employer cut him off his health care plan and that he is owed compensation for that reason but the delegate has for some reason failed to address his claim in the Determination (nor has the delegate had anything to say in respect to this claim on appeal). I am referring this matter back to the Director so that the Director may assign this issue to a delegate for a decision with reasons as are required by section 81 of the *Act*.

The Determination is silent on the matter of whether Pfeffer is or is not entitled to a bonus for 1999/2000. It is not something that I can decide on the basis of the information before me. The matter is therefore referred back to the Director so that she may have a delegate decide the issue.

Overtime Pay and Statutory Holiday Pay

Part 4 of the *Act* requires that employers pay overtime wages and Part 5 of the *Act* calls for the payment of statutory holiday pay. However, sections 34 (1) and 36 of the *Employment Standards Regulation* ("*Regulation*") provide that Parts 4 and 5 of the *Act* do not apply to managers.

> **34**(1) Part 4 of the Act does not apply to any of the following:
>
> (f) a manager: … .
>
> **36** Part 5 of the Act does not apply to a manager.

The term "manager" is defined in the *Regulation*. The definition 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 in this case decided that an employee is not entitled to overtime pay or statutory holiday pay but he has done so without ever deciding whether the employee is or is not a "manager" as that term is defined in the *Regulation*. As far as I can tell, the Determination appears to reflect Pfeffer's title, Catering Manager, and either the fact that Pfeffer failed to question whether he is a manager within the meaning of the *Regulation* or that he expressed agreement with the idea that he held the position of manager.

The Tribunal, in decision after decision, *Director of Employment Standards*, BCEST No. D479/97, for example, has said that a person's title is largely unimportant. It is unimportant whether the employee questioned whether he is a manager as the term "manager" is defined in the *Regulation* or whether the employee may have agreed that he is a manager. If he is a manager it is simply the case that he not entitled to overtime pay or statutory holiday pay. But if he is not a manager, then he is entitled to statutory holiday pay and also overtime pay for all work after 8 hours in a day and 40 hours in a week. And that cannot be altered by agreement.

> **4** The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.

In my view, the matter of whether Mr. Pfeffer is or is not a manager is a matter for the Director to decide in the first instance. Depending on that decision, there may or may not be a need to calculate statutory holiday pay and overtime wages. If Pfeffer is entitled to further compensation for overtime worked in the second year of his employment, that can be addressed through the calculations, should they be necessary.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination be confirmed in respect to the decision that on-call pay and what the parties call "gratuties" be considered wages for the purpose of vacation pay calculations.

I order, pursuant to section 115 of the *Act*, that the Determination be confirmed in respect to the decision that Pfeffer is not owed a bonus for work in the period 2000-2001.

I order, pursuant to section 115 of the *Act*, that all other matters be referred back to the Director so that they may be investigated and decided.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal