EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act S.B.C. 1995, C. 38

- by -

Wilfred Chipman

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: James E. Wolfgang

FILE NO.: 96/660

DATE OF HEARING: February 26, 1997

DATE OF DECISION: March 10, 1997

DECISION

APPEARANCES

Wilfred Chipman for himself
J. Walsh Jr. for the employer

OVERVIEW

This is an appeal by Wilfred Chipman ("Chipman"), pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination letter dated October 4, 1996, identified as ER number 76880. The letter was issued by a delegate of the Director of Employment Standards (the "Director"). The Determination found no violation of the *Act* had taken place and no action would be taken. The letter states:

> "As the complaint you filed is regarding Payment of overtime to a farm employee which is covered by the *Employment Standards Act* if the hours worked exceed (120) hours in a two week period in this case they did not. As the employer had cause for termination no compensation is required. Expenses and rent are not covered by the *Employment Standards Act*. No action can be taken by the Branch in regards to your complaint" (sic)

A hearing was held on February 26, 1997, at which I took evidence.

Chipman's complaints were as follows:

1. Unauthorized deductions had been made from is paycheques covering a rent increase.
2. Withholding annual vacation pay as a damage deposit.
3. Overtime claim for statutory holidays worked.
4. Failure to pay minimum scheduled hours of work.
5. Claim for the difference of hours worked by another employee and himself.
6. Compensation for length of employment.
7. Claim for overtime worked for the period of May 18, 1994 to May 17, 1996.

During the hearing Chipman reduced his claims to three:

1. Unauthorized deductions from his paycheques.
2. Pay for work on statutory holidays.
3. Pay for length of service.

The other claims were withdrawn.

J. Walsh Holdings Inc. ("Walsh") denies any obligation to pay moneys to Chipman.

ISSUES TO BE DECIDED

Is Chipman entitled to the return of the deduction covering the rent increase from his paycheque? Is he entitled to pay for work on statutory holidays, and pay for length of service?

FACTS

Chipman was employed by Walsh from January 1991 to May 17, 1996, when his employment was terminated. He was hired primarily as a truck driver to deliver cut and regular potatoes to retail customers. He also did some other jobs on the farm from time to time.

Chipman went on vacation from April 1 to April 14, 1996 and while he was absent a new driver was hired. When he returned to work he was assigned other duties on the farm and shortly after was terminated.

Chipman had rented a cabin from Walsh in June 1992 at the rent of $350.00 per month. It had been agreed that Walsh would deduct the $350.00 from Chipman's pay. In October 1994 Walsh increased the rent to $375.00 without the consent of Chipman. Chipman moved out of the cabin on January 31, 1996.

Walsh had withheld part of the annual vacation pay from Chipman as a damage deposit on the cabin. Since vacating the property Walsh had returned the money.

Chipman had worked four statutory holidays for which he was paid straight time rather than time and one half. Walsh claims he was advised by the Employment Standards Branch it was correct to pay straight time to their employees for work on statutory holidays as they were a farm operation.

Walsh claims that Chipman had personally extended credit to several customers on what was called his "Driver Credit Plan". This was directly in violation of company policy. As of January 1997 there was $3,000.00 credit outstanding, much of which could not be recovered as a number of those companies had gone out of business.

Walsh further claims that Chipman had allowed a transmission on one vehicle to run out of oil which caused serious damage in the amount of $3,000.00.

Chipman claims he had brought the problem with the transmission to the company's attention but nothing had been done.

Walsh also held Chipman partially responsible for an engine failure which cost $6,000.00. The company claims Chipman operated that vehicle 90% of the time.

Chipman denies any responsibility for that incident.

Walsh states they had given Chipman several verbal warnings regarding a number of problems they were having with him. These were finally issued as three written complaints on August 23, 1995.

Walsh claims the culminating incident to Chipman's termination happened when they received an invoice from Inland Kenworth on May 17, 1996. The invoice was for putting air in the tires of the truck and trailer driven by Chipman. Chipman was told to air the tires himself.

Chipman claimed Inland Kenworth would not allow him to do the work by himself, citing W.C.B. Regulations. Chipman further claims he worked with the mechanic to air up the tires as it was a difficult job.

ANALYSIS

The letter Determination found Chipman was a farm worker. Section 1(1) of the *Employment Standards Regulation* defines a "farm worker", in part:

> *a person employed in a farming, ranching, orchard or agricultural operation, but does not include (a), a person employed to process the products of a farming, ranching, orchard or agricultural operation ...*

Chipman was hired primarily as a truck driver to deliver whole or cut potatoes from a farm to stores or restaurants. He did the "Fry Run" taking potatoes two or three times a week, and a "Wholesale Run" three days per week. He did work from time to time on the farm but his main job was as a delivery driver. The question of whether Chipman is a farm worker, however, is not relevant in this appeal. Chipman is claiming for statutory holiday pay, compensation for length of service and reimbursement for deductions from his cheques. Whether Chipman is farm worker or not does not affect his potential entitlement to these wages.

Walsh claimed they received an interpretation from the Employment Standards Branch regarding work on a statutory holiday. He indicates they were not required to pay time and one half for work performed on a statutory holiday plus provide an additional day off with pay. This interpretation may have been made under the former *Act*. Section 46(1) of the current *Act* states, in part:

> *(1) An employee who works on a statutory holiday must be paid for that day*
> *a) 1½ times the employee's regular wage for the time worked up to 11 hours, and*
> *b) ....*
>
> *(2) In addition, the employer must give the employee a working day off with pay according to Section 45.*

Chipman claims to have worked four statutory holidays at straight time. That claim was not disputed by Walsh. In accordance with Section 46(1) Chipman is entitled to pay at 1½ times the regular wage for the time worked which he said was six hours per day.

4 days x 6 hours per day x $4.50 per hour = $108.00

There was no dispute that Walsh had raised the rent on the cabin from $350.00 to $375.00 per month. Walsh also admits they did not have a signed authorization to increase the rent deduction. Section 21(1) provides that no money can be withheld from an employee's pay except provided in Section 22. That provision has not been met and Walsh can not deduct the rent increase from Chipman.

Chipman has claimed the $25.00 increase for the period the new *Act* has been in effect. That period was 15 months. The amount to be returned is:

$25.00 x 15 months = $375.00

Walsh may seek other avenues for recovering rent owing.

The withholding of money from the annual vacation pay of Chipman for a damage deposit on the cabin is also a violation of Section 21. As the money withheld has now been returned no action is contemplated.

On May 17, 1996 Chipman's employment was terminated by Walsh. This action followed the receipt of the invoice from Inland Kenworth. Chipman had not reported to Walsh that he had gone to Inland Kenworth and had been charged for putting air in the tires, only that it had been a difficult job. Walsh assumed Chipman had done the work himself. Walsh said this was "the last straw".

While that action in isolation would hardly seem to be grounds for dismissal it was the culminating incident in the long line of complaints by Walsh. Some of those complaints were in writing and given to Chipman on August 23, 1995. They involved misappropriation of company time, refusal to follow company policy, harassing other employees and included failure to complete pre-trip inspection forms.

The company gave Chipman ample opportunity to correct the problems he was having. He failed to do so and was terminated. While there is always some confusion in these matters I feel that Walsh has met the burden of proof and was justified in terminating Chipman's employment. No change is made in respect to that part of the letter of Determination.

The Determination letter dated October 4, 1996 is varied as follows:

1. Pay for work on statutory holidays	$108.00
2. Return of rent increase deduction	$375.00
Total	$483.00

The matter is referred to the Branch for the calculation of interest owed.

ORDER

I order, under Section 115 of the *Act*, that Determination letter dated October 4, 1996 be varied as indicated above.

James E. Wolfgang
Adjudicator
Employment Standards Tribunal