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 -

W.M. Schulz Trucking Ltd.
("Schulz Trucking")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE NO.: 96/635

DATE OF HEARING: March 3, 1997

DATE OF DECISION: March 26, 1997

DECISION

APPEARANCES

David A. McMillan, Esq.	For the Appellant
W. M. Schulz	For the Appellant
Della Schulz	For the Appellant
William Lewis	For Himself
Earle Thompson	For the Director

OVERVIEW

This is an Appeal by W.M. Schulz Trucking Ltd. ("Schulz Trucking") pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) of a Determination, No. CDET 003731, dated October 8, 1996, issued by a delegate of the Director of Employment Standards (the "Director"). The Determination declared Schulz Trucking had contravened Section 44 and subsections 57(1), 58(1), 58(2) and 58(3) in respect of the employment of six persons, Raymond Campbell, Arnie Haltli, Charles LeBeau, William Lewis, John Miske and Robert Walker. The Determination also declared Schulz Trucking had contravened subsection 63(1) in respect of the termination of William Lewis. Schulz Trucking was ordered to pay an amount of $10,506.99.

Schulz Trucking has appealed all monetary aspects of the Determination, apparently accepting the conclusion it failed to give employees an annual vacation as required in subsection 57(1) of the *Act*.

ISSUES TO BE DECIDED

There are three issues to be decided:

1. Whether Schulz Trucking has paid statutory holiday pay and annual vacation pay in compliance with the requirements of the *Act*;

2. Whether Schulz Trucking has been discharged from its statutory liability to pay William Lewis length of service compensation when his employment with Schulz Trucking terminated; and

3. Whether the director has any authority to make a Determination in favour of employees who have not filed any complaint with the Employment Standards Branch alleging a contravention of the *Act* in respect of their employment.

FACTS

I heard evidence from Mr. and Mrs. Schulz and from Mr. and Mrs. Lewis. Mrs. Lewis is the daughter of Mr. and Mrs. Schulz and was, for a period of time, the bookkeeper for Schulz Trucking. I also received from Mr. McMillan the Statutory Declarations of Raymond Campbell and Chuck Lebeau, two of the persons on whose behalf the Determination was made. For reasons stated below, I did not place much weight on those Statutory Declarations.

Schulz Trucking owns several logging trucks. It is in the business of hauling logs for several mills and brokers in and around the Kamloops region. The complainants were drivers of these trucks. I use the term "complainants" in a general sense, as four of the individuals for whose benefit the Determination was made had not filed complaints under Section 74 of the *Act*. The initial complaints were filed by Mr. Lewis and Mr. Walker. The other four employees were included in the Determination because the delegate, when investigating the complaints or Mr. Lewis and Mr. Walker, concluded the contravention of Section 44 and subsections 57(1), 58(1), 58(2) and 58(3) of the *Act* had application to these employees, as well as to Mr. Lewis and Mr. Walker.

Schulz Trucking does not pay its employees a fixed hourly rate. Instead it pays them a percentage of the gross income generated by the truck they are driving. The income of the truck is generated by the weight of logs hauled by the truck for a number of clients. What each client pays may vary, but there is a general range of acceptable compensation for the service performed. Mr. Schulz, owner and manager of Schulz Trucking receives the weigh bills for the loads hauled by the respective trucks, applies the rates to convert those weights to a dollar amount and pays to the drivers the agreed percentage of that dollar amount. During the time relevant to the complaints and this appeal, the drivers were being paid 28%. The first issue in dispute is whether that percentage was or, under the *Act*, could be, inclusive of all wages and benefits, including statutory holiday pay and annual vacation pay.

The original investigation and this appeal have been complicated because Schulz Trucking failed to comply with Section 27 of the *Act*. There was insufficient information on the statement to allow a conversion of the wages paid to an hourly rate. The delegate indicated that he was unable to determine, from the information provided in the wage statements given to the drivers, an hourly rate or an amount for statutory holiday or annual vacation pay. He also indicated the hourly rate would have been more than minimum wage.

The wage statement provided by Schulz Trucking to its drivers consisted of a brief summary of wage for a generally undefined or non specific period of time, scratched by hand on what seemed to be any convenient available sheet of paper. I received some of the wage statements for the relevant period in evidence; there were others in the file: some were done on Quotation Sheets; others were done on Work Order forms. The content of the statements provided were generally consistent: the name of the driver (no address); a date (presumably the date the statement was issued); a reference to the subject of the statement, e.g. "July wages", "wages for October"; the comment "wages 28% plus holiday pay", or something akin; an amount; a list of deductions: income tax, pension contribution, unemployment insurance contribution and any advance that might have been made during the period covered; a total of the deductions and a balance due (presumably the wages paid for the relevant period). In most cases it is signed by Mr. Schulz, often the only indication of the source of the statement.

When a driver was hired, he was told that his wage would be 28% of the gross income of the truck they drove. They were also told the 28% was inclusive of holiday pay and benefits. Holiday pay was not defined. Mr. Lewis testified he was told the 28% included holiday pay. He did not agree with that, but it did not matter. Those were the terms upon which the job was offered and those were the terms upon which he worked, for three years. Over the three years, he argued with Mr. Schulz for an increase in wages and on more than one occasion extracted an agreement from Mr. Schulz to either review his wage or increase it, but Mr. Schulz reneged on each of those occasions.

Mr. Lewis testified statutory holidays, with the exception of Christmas Day and Good Friday, were always worked. The evidence supports a conclusion the employer simply ignored statutory holidays. There is no indication any aspect of their obligation concerning statutory holidays were ever addressed, either when they were worked or when they were not worked. Not only is there no indication any driver was ever paid for statutory holidays, there is no indication, or even suggestion, alternative days off, with pay, were arranged for employees required to work a statutory holiday. I have no difficulty concluding Schulz Trucking failed to meet its obligations under the *Act* respecting statutory holiday pay.

In reaching that conclusion, I do not find the Statutory Declarations of Mr. Campbell and Mr. LeBeau to be helpful. To the extent they agreed to accept less than the minimum requirements of the *Act*, the agreement is, according to Section 4, of no effect.

In any event, the Statutory Declarations reinforce the conclusion the statutory holiday obligations in Section 44 were ignored. In the Declarations, both speak of a wage increase "negotiated" with Mr. Schulz in February, 1996 following which:

> ". . . the employer and the drivers agreed to maintain the calculation of wages at 28%, and add an additional 4% designated as holiday pay to the calculation of wages."

Under this new arrangement it appears the requirements of Section 44 of the *Act* continue to be ignored.

I heard evidence on the second issue in the appeal, respecting the termination of Mr. Lewis. On August 29, 1995 Mr. Lewis fell from a truck. He injured himself. Mr. Lewis decided not to file a claim immediately as he thought it would resolve itself within a short time. Mrs. Lewis notified her mother of the accident just after it occurred and requested an accident report form. She was told the employer did not have any. She wrote the details of the accident on a slip of paper and pinned it to the bulletin board in the office. The slip of paper later disappeared without any report being made up or filed by Schulz Trucking. The injury did not resolve itself and Mr. Lewis found it more and more painful to continue to work. On October 24, 1995 he saw a doctor and filed a compensation claim. He continued to work, visiting the doctor again on November 7 and 9, 1995. On the latter visit he was told to take some time off work. He told Mr. Schulz the same day. On November 10, 1995 Schulz Trucking filed an Employer's Report of Injury. The report was prepared and signed by Mr. Schulz. On the report Mr. Schulz says he was told about the accident when it occurred and says he was told by Mr. Lewis he had seen a doctor on November 9, 1995. The report also suggests Mr. Schulz was told Mr. Lewis would be off work for two weeks.

Mr. Lewis attempted to return to work on December 1, 1995. He worked that day, December 2 and December 3. He continued to be in pain. On December 5 he visited his doctor. He was told by his doctor to stay off work until the injury was healed. The doctor's report to the Worker's Compensation Board indicates he expected Mr. Lewis to be disabled for more than 20 days.

Prior to this visit Mr. Lewis had been scheduled by Mr. Schulz to transport a load to Cache Creek in the morning of December 6. Mr. Lewis decided he would tell Mr. Schulz that morning he would be off again with his injury, but he would transport the load, giving Mr. Schulz some time to find another driver. On December 6 Mr. Lewis arrived at the truck at 3:30 am. He was late and Mr. Schulz was angry. What occurred following his arrival is the basis upon which it is argued Mr. Lewis quit his employment with Schulz Trucking.

For the most part, I accept Mr. Lewis' version of the events of that morning. I find the confrontation was initiated by Mr. Schulz, even though I accept that both men were angry by the end of it. Mr. Schulz was angry with Mr. Lewis' tardiness and his refusal to leave with the load at 10:30 the previous evening. It may also have been that Mr. Schulz was upset with Mr. Lewis for initiating the WCB claim and taking time off with the injury. Some words were exchanged and Mr. Schulz told Mr. Lewis if he didn't want to put in the hours required by the employer, he could leave and would be replaced, although it was stated in slightly stronger terms than I have summarized it. Mr. Lewis left. At no time during the exchange did he say he was quitting.

I reach the above factual conclusions on the basis of several facts and factors, including my assessment of the relative credibility of the two principal combatants on this issue. Mr. Schulz was not a credible witness and I place no weight on his evidence in critical areas. In his testimony he demonstrated an almost complete inability to recall dates, events or conversations, except where it suited him. It was my impression most of his evidence was simply made up as he went along. He testified he had no knowledge that Mr. Lewis had been absent on a Workers Compensation claim just before the confrontation on December 6, although four weeks earlier he prepared and signed an Employer's Report of Injury indicating he was told of the accident and that Mr. Lewis would be off work.

There was some conflicting evidence concerning a telephone discussion later in the morning of December 6 between Mrs. Schulz and Mr. Lewis. Mrs. Schulz testified Mr. Lewis told her in that conversation he quit. Mr. Lewis says he never told her that. He says he told her he was "fed up with all the bullshit and wasn't going to take it any more". He says he expressed the view he had been fired that morning. Mrs. Lewis testified she heard her husband's side of the conversation and he did not use the word "quit". I conclude Mr. Lewis did not use the word "quit". I accept the evidence of Mr. and Mrs. Lewis on this point. I find Mrs. Schulz to have honestly but mistakenly misinterpreted the actual words used by Mr. Lewis as stating he quit.

ANALYSIS

I will address the issues in the order which I set them out, dealing first with the question of whether the inclusion of either, or both, statutory holiday pay and vacation pay in a piecework or commission wage structure complies with the requirements of the *Act*.

Section 44 of the *Act* says:

> *44. After 30 calendar days of employment, an employer must either*
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> *(a) give an employee a day off with pay on each statutory holiday, or*
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> *(b) comply with Section 46*

With the exception of Christmas Day and Good Friday, all statutory holidays were worked by the drivers employed by Schulz Trucking. For the requirements of the *Act* to be met for those statutory holidays worked, not only is an employee entitled to 1 ½ times their regular wage for the time worked, but they are also entitled to a regular day off with pay, which must be scheduled as set out in subsection 44(4). The argument of the employer, statutory holiday pay is included in the 28% paid on the gross earnings of the truck driven, leads to the curious result that the regular wage of the employee when he works the statutory holiday is less than the regular wage when he takes the day off with pay. This inconsistency becomes even more pronounced if I am also being asked to accept the payment for the additional day off is also included in the 28% figure. The result is an employee would have his regular wage adjusted up and down depending on whether the pay period for which they received wages included a statutory holiday, whether the statutory holiday was worked or not worked and whether the statutorily required day off with pay is part of the 28%. This would be an absurd result, and the *Act* cannot be interpreted to cause a reduction in an employees regular wage in order to receive a statutory benefit. The inclusion of statutory holiday pay in a piecework or commission wage structure does not comply with the requirements of the *Act*. The appeal on this aspect of the Determination is dismissed.

For similar reasons I also conclude the inclusion of annual vacation pay in a piecework or commission wage structure does not comply with the requirements of the *Act*.

This issue has already been addressed by an Adjudicator of the Tribunal. In *Foresil Enterprises Ltd.*, BCEST #D201/96, Adjudicator Roberts, faced with the same argument in the context of an employer in the silviculture industry who had incorporated annual vacation pay into the calculation of the average daily rate for the tree planters employed by it, stated, at pages 3-4:

> The *Act* prevents the inclusion of annual vacation pay as part of a unit pay scheme, or price per tree or hectare. If it were otherwise, employees would have no method of determining what the basic hourly or per tree rate would be for conversion purposes. In addition, employees with more seniority entitled to a higher rate of vacation pay would actually be paid less on a per unit basis than more junior employees.

Mr. McMillan, on behalf of Schulz Trucking, argued the decision was distinguishable on its facts and, in any event, was wrongly decided. I respectfully disagree on both points.

On the first point, while the circumstances of the *Foresil Enterprises Ltd.* case arose in the silviculture industry as opposed to the trucking industry, the factual matrix within which the case was decided was identical. Both in that case and in this the employer had purported to include statutory holiday pay and annual vacation pay in a piecework or commission wage structure. The fact the Employment Standards Branch had provided guidelines to the employers in the silviculture industry to assist in ensuring compliance with the *Act* is irrelevant. The employer in that case was required to comply with the minimum requirements of the *Act* in respect of payment for statutory holidays and annual vacation, just as Schulz Trucking is required to do. The argument all other employers in the trucking industry include holiday pay in a piecework or commission wage structure not helpful if that method of payment contravenes the minimum requirements of the *Act.*

On the second point, in reaching her conclusions, Adjudicator Roberts relied upon a decision of Braidwood, J., *Atlas Travel Service Ltd. -and- Director of Employment Standards*, unreported, October 24, 1994, Vancouver Registry (B.C.S.C.) on appeal under subsection 14(3) of the *Employment Standards Act*, S.B.C., 1980, c.10. In that case four employees of a travel agent claimed entitlement to annual vacation and general [statutory] holiday pay. The director had agreed and had issued a certificate for the amounts claimed. The employer appealed, arguing each of the employees had signed a commission agent's contract with Atlas containing a clause which stated statutory and vacation pay was included in the commission. The issue was whether the clause met the requirements of the *Act*. The Court found it did not. There were a number of reasons given for its conclusion.

First, the Court found the statutory provisions of the *Act* establishing the entitlement to annual vacation, the method of payment to an employee for their annual vacation, the requirement to maintain a record of annual vacations and the amount of vacation pay earned by an employee to be minimum requirements. Relative to these minimum requirements, the Court confirmed subsection 2(1) [now Section 4] of the *Act*, gave no effect, for the purposes of the *Act*, to any agreement to waive them.

Second, the Court found the argument of the inclusion of annual vacation pay to be illogical because it would have had the absurd result of reducing an employee's total wage to fund an increase in a statutory benefit as their years of employment increased their entitlement to annual vacation pay.

Third, the Court recognized the inclusion of annual vacation and statutory holiday pay in an "all inclusive" wage structure did not comply with the statutory scheme which requires annual vacation and statutory holiday pay to be calculated on total wages and paid as something in addition to total wages. Under the employer's wage structure in that case, as in this, the employer would never pay annual vacation pay on total wages, but only on the regular wage portion of total wages. This would result in less than the required statutory benefit being paid. This result is sufficient, standing alone, to conclude the *Act* prohibits the type of wage structure imposed by Schulz Trucking.

The reasoning of Braidwood, J. in *Atlas Travel Service Ltd. -and- Director of Employment Standards*, supra, is still valid under the new *Act*. Despite the able arguments of Mr. McMillan, and while I have some sympathy for Mr. Schulz, who believed he had an understanding with at least some of his employees about their holiday pay, Schulz Trucking has been unable to demonstrate any basis for varying the conclusion of the delegate for the director that it has contravened Section 44 and subsections 58(1), 58(2) and 58(3) of the *Act*.

Turning to the issue of length of service compensation for William Lewis. Section 63 of the *Act* places a statutory liability upon an employer to pay length of service compensation to each employee upon completion of three consecutive months of employment. In a sense length of service compensation is an earned statutory benefit conferred upon an employee. The amount of compensation increases as the employee's length of service increases to a maximum of 8 weeks' wages. An employer may effect a discharge from this statutory obligation by providing written notice to the employee equivalent to the length of service entitlement of the employee or by providing a combination of notice and compensation equivalent to the entitlement of the employee. An employee may cause an employer to be discharged from the statutory obligation by doing one of three things: first, self terminating employment; second, retiring from employment; and third, giving just cause for dismissal.

There is no assertion Mr. Lewis either retired or was dismissed for cause. If Schulz Trucking is to be discharged from its statutory obligation to pay length of service compensation, it will be because they have shown Mr. Lewis terminated his employment.

While the *Act* uses the word "terminate" in paragraph 63(3)(c) to describe the action of employee which would discharge the statutory obligation of an employer to give notice and/or compensation, the term is intended to capture any manner by which an employee chooses to end the employment relationship. Labour relations concepts such as abandonment, resignation and voluntary termination or severance of employment are all notions caught by the term. To the lay person, however, it is simply known as a "quit".

The question I have to answer is whether, in all of the circumstances present in this case, I can find Mr. Lewis quit his employment with Schulz Trucking. The position the Tribunal takes on the issue of a quit is now well established. It is consistent with the approach taken by Labour Boards, arbitrators and the Ontario Employment Standards Tribunal. It was stated as follows in the Tribunal's decision *Burnaby Select Taxi Ltd. -and- Zoltan Kiss*, BC EST #91/96:

> The right to quit is personal to the employee and there must be clear and unequivocal facts to support a conclusion that this right has been exercised by the employee involved. There is both a subjective and an objective element to a quit: subjectively, the employee must form an intent to quit; objectively, the employee must carry out some act inconsistent with his or her further employment. The rationale for this approach has been stated as follows:
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> > ". . . the uttering of the words "I quit" may be part of an emotional outburst, something stated in anger, because of job frustration or other reasons, and as such it is not to be taken as really manifesting an intent by the employee to sever his employment relationship." Re *University of Guelph,* (1973) 2 L.A.C. (2d) 348

On the facts of this case, Schulz Trucking has not demonstrated the clear and unequivocal facts necessary to support a conclusion Mr. Lewis quit his employment on December 6.

I do not see any facts supporting a conclusion Mr. Lewis intended to quit when he drove home that morning. He had no reason to quit. He had been told by his doctor to take an indeterminate period of time off work to rehabilitate his injury and he intended to do that following the trip to Cache Creek he had agreed to make December 6. His decision to not do that trip was clearly a response to the events of that morning, but I cannot equate his decision to not do the trip with an intention to quit. Nor can I find any conduct of Mr. Lewis inconsistent with his further employment. The act of going home on the morning of December 6 was a combination of the anger of the moment, an invitation to leave or accept what he felt were unreasonable demands from Mr. Schulz and a decision already made to heed his doctor's advice to stay off work until his injury was healed. No statement suggesting an intention to quit accompanied the act of going home.

While it is not determinative, an employer's response to the conduct of an employee can sometimes assist in identifying whether the employee had or had not demonstrated the elements of a quit. In this case, the conduct (and evidence) of the employer would indicate Mr. Lewis had not demonstrated to Mr. Schulz an intention to quit on December 6. No Record of Employment was issued by the employer until February, 1996. When issued, the Record of Employment stated the reason for issuing the document was "A", shortage of work, and the expected date of recall was marked as "unknown". Also, Mr. Schulz testified Mr. Lewis had returned to work on two separate days after December 6. I cannot reconcile that recollection with a suggestion Mr. Lewis had clearly and unequivocally quit on December 6. Finally, Mrs. Lewis stated, during cross examination, she had met with her father on or about December 20, 1995 in an effort to put things back on track between him and her husband. They had coffee together. During the discussion Mr. Schulz said words to the effect that as far as he was concerned, he [Mr. Lewis] was not coming back; he was fired. That comment was unnecessary if Mr. Lewis had already quit.

As I have already indicated, I cannot conclude on the facts of this case Mr. Lewis quit his employment on or about December 6, 1995. I find Mr. Lewis to have been terminated by reason of being laid off from his employment for more than a temporary layoff. As a result, Schulz Trucking must pay to Mr. Lewis length of service compensation. The Appeal from the conclusion Schulz Trucking contravened subsection 63(1) is dismissed.

On the issue of the authority of the director to issue a Determination in favour of person who have not filed a complaint under Section 74 of the *Act*, I also dismiss this aspect of the Appeal. The argument misconceives the mandate and role of the Employment Standards Branch. One of the principal elements of their mandate is to ensure employees in the province receive at least the basic standards of compensation and conditions of employment. In order to assist the director in fulfilling the mandate of the Branch subsection 76(3)of the *Act* gives the director the authority to conduct an investigation even in the absence of a complaint:

> *76. (3) Without receiving a complaint, the director may conduct an investigation to ensure compliance with this Act.*

Subsection 79(1) allows the director to make a determination on the basis of any investigation, including one made under subsection 76(3). That determination may require a person, usually the employer, to remedy a contravention of the *Act*. This includes the option of compelling the employer to pay wages which ought to have been paid under the *Act*. To reiterate, the object is to ensure compliance with basic standards of compensation and conditions of employment. The *Act* does not require the filing of a complaint for the director to address this mandate or to make a determination of contravention of the *Act* or to require the contravention be remedied.

ORDER

Pursuant to Section 115 of the *Act*, I order that Determination CDET 003731, dated October 8, 1996, be confirmed.

David Stevenson
Adjudicator
Employment Standards Tribunal