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 -

A.E. Bradford Trucking Ltd.

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Ian Lawson
FILE NO.:	96/248
DATE OF HEARING:	August 16, 1996
DATE OF DECISION:	September 16, 1996

DECISION

APEARANCES

For the Appellant	Shawn A. Bradford
For the Respondent Thomas E. Kindler	Mark Burger, Articled Student
For the Director of Employment Standards	John Dafoe

OVERVIEW

This is an appeal by A.E. Bradford Trucking Ltd. pursuant to s. 112 of the *Employment Standards Act* (the "*Act*"). The appeal is from Determination No. CDET 001690, issued by John Dafoe as a delegate of the Director of Employment Standards on March 21, 1996.

The Determination required the Appellant to pay to its employee Thomas Kindler overtime and holiday pay, plus interest, in the total amount of $4,363.04. The Appellant filed an appeal on April 9, 1996. An oral hearing was held at Smithers on August 16, 1996.

FACTS

Thomas Kindler was employed by the Appellant as a truck driver between July 5, 1995 and September 26, 1995. There is agreement among the parties regarding the number of hours worked by Mr. Kindler. There is considerable disagreement regarding the manner in which he was to be paid.

Mr. Kindler says that when he was hired, he was told by Shawn Bradford of the Appellant that he would be paid $18.00 per hour, plus overtime at time and a half. He was given a calendar on which he was to record his hours. It appears that most of the work done for the Appellant related to driving low-bed trucks. Customers were charged an hourly rate for low-bed service, which was either $75.00 or $85.00 per hour.

Mr. Bradford for the Appellant says that none of his truck drivers, including Mr. Kindler, have ever been paid by the hour.

Instead, the terms of their employment, including Mr. Kindler's, were that drivers would be paid a percentage of what was charged to the customer. For Mr. Kindler, that percentage was 24%. Employees received an advance at the end of each month worked, and then their percentage was paid on the 15th of each month, based on the previous month's work.

ISSUE TO BE DECIDED

This appeal requires me to decide whether the Appellant must pay overtime wages and holiday pay to Mr. Kindler.

ARGUMENT

Mr. Bradford argued that it is a long-standing practice in the trucking industry that employees are paid a percentage of what is charged to customers. He urged me to find that his evidence given under oath as to the terms of Mr. Kindler's employment should be preferred over Mr. Kindler's evidence, because Mr. Kindler's credibility is in doubt.
In support of this assertion, Mr. Bradford alleged that Mr. Kindler made a false statements to the Unemployment Insurance Commission regarding the commencement date of his employment, and that Mr. Kindler several times reported more hours on his calendar than were actually worked. Mr. Bruce Kaun of Prince George was to represent the Appellant at this hearing, but at the last minute was unable to attend. Mr. Bradford referred to a letter filed by Mr. Kaun which contained the following submission:

> The calculation of payment of Truck Drivers in the North in the logging industry is historical and is presently a subject which has been put squarely before the Employment Standards Tribunal in a request to recommend to the Lieutenant Governor in Council an exemption from hours of work and overtime for the logging industry. Notwithstanding that, the agreement [between Mr. Bradford and Mr. Kindler regarding rate of pay] included the concept of overtime pay in that if Mr. Kindler made his trip without incident he would be paid the same amount for less as he would were he [*sic*] to work extra hours to deliver the same load of logs. In other words, he was able to double and triple his pay on certain days on a percentage basis and then after he was terminated he has used the good offices of the Employment Standards Branch to now claim, in addition to the bonus monies he made on a percentage basis, overtime pay. It is the position of the employer that he wishes to put before the Employment Standards Tribunal evidence of the historic practice in the industry to demonstrate that Mr. Kindler has not only been paid more than adequately for his services but that the concept of the percentage payment encompasses overtime hours of work.

Mr. Burger, on behalf of Mr. Kindler, urged me to find that the terms of Mr. Kindler's employment were that he would be paid $18.00 per hour, that his pay stubs indicate an hourly rate in the same amount, and that in any event 24% of the lowbedding rate to customers of $75.00 per hour amounts to $18.00 again. Mr. Burger submitted that the overtime provisions in s. 40 of the *Act* are implied terms of every employment contract, and that by virtue of s. 4, any agreement to waive the *Act's* minimum requirements is void.

On behalf of the Director, Mr. Dafoe submitted that the *Act* includes a formula for calculating overtime payable to employees who work on a percentage or commission basis: the definition of "regular wage" for such employees under that *Act* requires the employee's wages in a pay period be divided by the employee's total hours of work during that pay period. Overtime is then calculated on the basis of this regular wage. Mr. Dafoe pointed out there is a logical inconsistency in the assertion that 24% of a truck's gross pay includes a "bonus" on account of overtime hours: there is no premium paid to workers for overtime driving -- workers would be paid the same rate no matter how many hours they worked. As an example of logical inconsistencies in the context of workers paid by commission, he referred me to the case of ***Atlas Travel Services Ltd. v. Director of Employment Standards*** (1994), 99 B.C.L.R. (2d) 37 (S.C.). In that case, Braidwood J. held an employer's argument that vacation pay is included in commissions paid must fail, because to accede to the argument would result in a logical absurdity.

ANALYSIS

If my decision was to turn on whose version of the terms of Mr. Kindler's employment contract is more credible, I would be inclined to find in favour of Mr. Bradford, who testified convincingly that all of his drivers were paid on the same percentage basis and Mr. Kindler was no exception. Unfortunately for the Appellant, however, my decision would be no different if I concluded Mr. Kindler was paid on a percentage basis as opposed to an hourly rate.

The *Act* defines certain minimum terms of employment for all workers not specifically exempt from its provisions. The legislative policy behind those portions of the *Act* relevant to this appeal is to ensure workers are compensated fairly for any work they perform for an employer beyond an 8-hour day or a 40-hour week. I heard very little evidence regarding historical practice in the trucking or logging industry, but more important, I am aware of no legal doctrine that could relieve an employer from the *Act's* requirements simply because workers have always been treated in a certain way. Further, I am influenced by the fact Mr. Kindler drove a truck owned by the Appellant, that he did not have to service or maintain the truck on his own, that the Appellant's drivers are employed on a year-round basis, and that hours of work are the basis for calculating wages paid. These are the trappings of an employment relationship which the *Act* is expressly designed to cover.

I am aware, however, that B.C. Reg. 105/96 does exempt logging truck drivers and intra-provincial truck drivers from the overtime provisions of the *Act*, and that this exemption took effect on April 26, 1996. No similar exemption was in effect at the time of Mr. Kindler's employment. The fact that an Order in Council was made granting this exemption for a limited time lends considerable moral force to the Appellant's argument that truck drivers paid in the traditional way should not receive overtime pay. I would make an error in law, however, if I were to decide s. 40 of the *Act* did not apply to Mr. Kindler at the time he worked for the Appellant.

The same holds true for the obligation to pay holiday pay in accordance with the *Act.* If there is any reason for me to question the correctness of the Determination, it would be whether it was proper for Mr. Dafoe to use an hourly rate of $18.00, as opposed to Mr. Kindler's "regular wage rate" calculated under the *Act.* Mr. Dafoe suggested that the difference in the amount owing by the Appellant would be slight. This issue was not raised by the Appellant, however, and no interest was taken in it by the Appellant at the hearing of the appeal.

ORDER

After carefully considering the evidence and argument, I find that the Determination made by Mr. Dafoe is correct and the appeal should be dismissed. Pursuant to Section 115 of the *Act*, I order that Determination No. CDET 001690 be confirmed.

Ian Lawson
Adjudicator
Employment Standards Tribunal