EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

Andy Macaulay
("Macaulay")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	David Stevenson
FILE NO.:	97/582
DATE OF HEARING:	September 23, 1997
DATE OF DECISION:	October 15, 1997

DECISION

APPEARANCES

for the appellant	In person
for Tolko Industries Ltd.	Fred Stehle Judy Greig Rob Slater

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) by Andy Macaulay ("Macaulay") from a Determination of a delegate of the Director of Employment Standards (the "Director") dated July 11, 1997. Macaulay had claimed he had not received annual vacation pay from his former employer, Tolko Industries Ltd. (Tolko") during his employment. The delegate concluded Macaulay had received annual vacation pay, finding it, along with his statutory holiday pay, to have been built into the commission structure under which Macaulay was compensated. The delegate also concluded Macaulay was aware he was paid annual vacation pay as part of the commission structure. He reached this conclusion on the basis of the production by Tolko of quarterly statements issued to Macaulay during 1996, which were accepted as typical of commission statements issued employees in the brokerage department and which showed payment of a "benefit allowance" comprising annual vacation and statutory holiday pay.

ISSUE TO BE DECIDED

The issue is whether Macaulay has received annual vacation pay in accordance with the requirements of the *Act*.

FACTS

Tolko operates a Lumber Trader-Brokerage Department in Vernon. They employ a number of persons in that Department as traders. The task of a trader is to buy and sell lumber or related products with the purpose of generating a profit from the transaction. A trader who has completed a training period is compensated on a straight commission earning basis. Each trader receives a monthly draw against commission earnings and the benefit allowance which is paid on those commission earnings. Every three months Tolko prepares a statement of earnings for each trader setting out the total earnings for that trader for the three month period. The statement of earnings identifies the trader, the relevant period, the commission earnings, the draws taken for the period, the difference between the commission earnings and the draws taken, the amount of the benefit allowance paid on the commission earnings and the "incentive due". If earnings are less than the draws taken the "incentive due" will be shown as a negative amount and will either be carried forward and set off against future earnings or will be required to be repaid to Tolko by the trader. Earnings for the period comprise the sum of commission earnings and the benefit allowance. The benefit allowance is calculated at 7.5% for traders with less than five years employment and 9.5% for those with greater than five years employment. The benefit allowance represents a combination of annual vacation and statutory holiday pay entitlement.

Macaulay commenced employment with Tolko as a trader on January 2, 1996. As a new employee it was agreed Macaulay would have a training period, during which he would receive a draw of $3000.00 a month. So long as Macaulay was training, all the draws were "forgiven", in the sense that even if Macaulay did not generate earnings equivalent to the draws, he still received the amount of $3000.00 a month and any negative amount was neither carried forward nor asked to be repaid. Starting April 1, 1996, Tolko prepared a quarterly statement for Macaulay, showing the same information as was shown on the statement prepared for the other traders, but he was never given a copy of the statement. Three statements relating to Macaulay appeared during the investigative process, one for each of the last three quarters of 1996. Even though he did not receive these statements, they confirm what Tolko says: Macaulay received his annual vacation pay in the same manner as other traders received their annual vacation pay. The statements relating to his performance in each quarter show commission earnings were calculated, he was credited with the 7.5% benefit allowance on the commission earnings and the total of the commission earnings and the benefit allowance was set off against the draws he received during the quarter to which the statement referred. His earnings never did equal or exceed the amount of the draws he received.

It is relevant to set out the employment criteria which Macaulay was told would apply to him when he was offered employment. That criteria was set out in a letter dated December 8, 1995, which says, in part:

> The employment criteria relating to this position are as follows:
>
> > Monthly draw of $3,000.00 until training is completed, then on a commission basis as per department program.
> >
> > Eligibility for corporate benefit plan as detailed in the benefit pamphlet.
> >
> > Pension plan - Vesting - 5 years - 100%.

Macaulay terminated his employment January 9, 1997.

ANALYSIS

In the circumstances of this case I conclude that Macaulay has received his annual vacation pay and nothing more is owed to him by Tolko. I agree with Macaulay that the method of payment by Tolko for the annual vacation pay was contrary to the requirements of the *Act*, but that does not justify the result sought by Macaulay in this case, which is that Tolko be required to calculate annual vacation pay on the $3000.00 monthly draw and pay that amount to him.

Macaulay says I should treat the $3000.00 a month as something equivalent to a salary or a set wage and conclude that he received that amount independently of annual vacation or statutory holiday pay. I am unable to do that on the facts presented.

The quarterly statement of earnings prepared by Tolko for each trader, including the quarterly statement of earnings prepared for Macaulay, show that the benefit allowance is calculated on the total amount of commission earnings made by the trader during the period and is paid in addition to those commission earnings, as the *Act* requires. It is the sum of the commission earnings and the benefit allowance which is applied to the draw taken by a trader to arrive at an amount payable to (or owed by) the trader. As I said earlier, during the training period the "incentive due", if it is a negative amount does not result in a pay back requirement, but it does not change the conclusion that a draw, when it is taken, is applied against both commission earnings and the benefit allowance payable on those commission earnings. It is a characteristic of the draw, in the particular circumstances of how Tolko has structured payment for the traders, that it includes the annual vacation pay owed to the trader for the period to which the statement applies.

As a result, the draw which Macaulay received each month should be treated as including the benefit allowance of 7.5% for annual vacation and statutory holiday pay. The Tribunal has said in previous cases the *Act* does not allow the inclusion of annual vacation and statutory holiday pay as part of an hourly wage or commission wage structure, but it is clear in this case that Tolko has not included the annual vacation and statutory holiday entitlement in the commission earnings, but has kept that entitlement separate from and additional to those earnings.

There were some inconsistencies with the requirements of the *Act* in the method of issuing statements relating to annual vacation pay and Tolko was notified by the Director to correct those. That does not alter the conclusion that the basic requirement of the *Act*, to give Macaulay 4% annual vacation pay on earnings, has been met.

I conclude nothing from the fact Macaulay was not given the statements. Because it had been agreed to provide him a draw of $3000.00 a month regardless of his actual earnings, I accept it was probably deemed unnecessary to give him the information normally contained in the statement when his earnings did not equal or exceed the amount of his draw and no carry over or payback was applicable.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination, dated July 11, 1997, be confirmed.

....
David Stevenson
Adjudicator
Employment Standards Tribunal