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 -

Blackie Holdings Inc.
("Blackie")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	David Stevenson
FILE NO.:	1999/10
DATE OF HEARING:	April 22, 1999
DATE OF DECISION:	May 6, 1999

DECISION

APPEARANCES

Erich Penner	for Blackie Holdings Inc.
Brad Junkin	in person

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) by Blackie Holdings Inc., ("Blackie") of a Determination which was issued on December 20, 1998 by a delegate of the Director of Employment Standards (the "Director"). In the Determination, the Director found Brad Junkin ("Junkin") to be an employee of Blackie and that Blackie had contravened Sections 17(1), 18(1), 27(1)(b), 28(1)(d), 40(1) and(2), 44(a), 45(b) and 58(3) of the *Act* in respect of the employment of Junkin, ordered Blackie to cease contravening the *Act*, to comply with the requirements of the *Act* and to pay an amount of $20,812.04.

Blackie says the Director erred in concluding Junkin's "regular wages", for the purpose of calculating the amounts owed to Junkin, was $21.69 an hour rather than $15.00 an hour. Blackie also says the credibility of Junkin is an issue and the Director was wrong to accept many of the facts asserted by Junkin in his complaint and during the course of the investigation and appeal.

The finding that Junkin was an employee of Blackie for the purposes of the *Act* has not been appealed nor has the conclusion that Junkin worked a total of 626.5 hours between June 5, 1998 and July 17, 1998.

ISSUE TO BE DECIDED

The issue is whether Blackie has met the burden of persuading the Tribunal that the Determination ought to be varied or canceled because the Director erred in fact or in law.

FACTS

In early 1998, Blackie obtained a grass cutting contract to mow 2061 km. of highway on Vancouver Island. Blackie agreed to employ Junkin to assist on this contract. On June 2, 1998, Blackie and Junkin signed an agreement which stated:

> As we agree that Brad Junkin will provide sub-contracting services through Raven Outfitters:
>
> > for supplying services to support grass cutting contract on Vancouver Island.
> >
> > duration to be as long as it takes to complete contract, starting June 01/98.
> >
> > payment to be a flat fee of $15,000.00
> >
> > WCB will be provided by Blackie Holdings

The agreement is signed by Junkin, on behalf of Raven Outfitters, and Erich Penner ("Penner"), on behalf of Blackie Holdings. At the time the agreement was made and signed, Blackie and Junkin had discussed what payment Junkin would receive for this employment. They had also discussed whether Junkin's services would be performed as an employee or as a "sub-contractor" working through Junkin's business name, Raven Outfitters". It was agreed that Junkin would provide his services through Raven Outfitters and that he would perform the work he was hired to do for a "flat fee of $15,000.00".

I was not impressed with Junkin's evidence relating to the signing of the agreement and the discussion which took place about whether he would be paid an hourly rate or a "flat fee". I choose to accept the evidence of Dennis Krahn, a former employee of Blackie, about what discussion occurred prior to the signing of the agreement between Blackie and Junkin relating those matters.

Mr. Krahn said Junkin was given the option of being paid an hourly wage of $15.00 or of being paid a "flat fee" of $15,000.00 for the work. He said that when those two options were discussed, Penner, Junkin and he had "looked at some numbers". He and Penner believed the contract could be done in 40 to 50 days, working "long hours" (up to 16 hours a day), seven days a week. He said that when overtime, vacation pay and holiday pay were projected on the estimate of the time it would take to complete the contract at $15.00 an hour, it worked out to about $15,000.00. He said that Junkin opted for the "flat fee". He believed Junkin chose the "flat fee" because it would pay him more than $15.00 an hour if the contract was completed sooner than the length of time he and Penner had estimated the "flat fee" on. It was "understood" by Junkin that the "flat fee" was inclusive of overtime, vacation and holiday pay.

Junkin worked for Blackie until July 17, 1998, when he was asked to leave the job by Penner. The Director concluded he had worked 626.5 hours from June 5, 1998 to that day. That conclusion is not challenged by either party to this appeal and it is consistent with the intention of Blackie to work long hours and consecutive days on this contract.

ANALYSIS

Blackie says one of the issues here is the credibility of Junkin. The key issue, however, does not turn on any finding of credibility. The key issue is whether the Director correctly calculated the wage rate upon which the amount owing to Junkin is based. In respect of the wage rate calculation, the Determination states:

> The *Act* clearly defines how an employee's regular wage is to be calculated:
>
> ***"regular wage"*** *means*
>
> *(a) if an employee is paid by the hour, the hourly wage,*
>
> *(b) if an employee is paid on a flat rate, piece rate, commission, or other income incentive basis, the employee's wages in a pay period divided by the employee's total hours of work during that pay period,*
>
> *(c) if an employee is paid a weekly wage, the weekly wage divided by the lesser of the employee's normal or average weekly hours of work,*
>
> *(d) if an employee is paid a monthly wage, the monthly wage multiplied by 12 and divided by the product of 52 times the lesser of the employee's normal or average weekly hours of work, and*
>
> *(e) if an employee is paid a yearly wage, the yearly wage divided by the product of 52 times the lesser of the employee's normal or average weekly hours of work;*
>
> The evidence indicates the complainant was to be paid a flat fee of $15,000.00 for the entire period of work. It is clear that the complainant did not complete the work on the Vancouver Island highway and is therefore not due the full amount. By Blackie's calculation, Junkin's wages should be calculated on the percentage of the kilometers Junkin worked versus the total kilometers completed by Blackie. Blackie calculates that Junkin worked 91 per cent of the total kilometers in the contract and is therefore entitled to 91 percent of $15,000.00, which is 13,650.00.

> It is unknown what pay periods were envisioned by the employer; however for the sake of the calculation of the complainant's regular wage, the Director's delegate will utilize the entire period of employment as a single pay period. The total hours worked in this pay period are 626.5 hours. The *Act* requires the total hours to be divided into the total wages for the period to arrive at an hourly rate to be applied to the hours worked. This yields the following calculation of the complainant's regular wage: $13, 650 / 626.5 = $21.79 per hour.

Blackie says that the Tribunal should conclude the "flat fee" accepted by Junkin, and agreed by Blackie and Junkin as payment for the work performed, was really just $15.00 an hour with overtime and vacation and holiday pay already included. Accordingly, Blackie argues that the Tribunal should give effect to the agreement between Blackie and Junkin to perform the job for $15,000.00 or, alternatively, that the calculations for wages owing should be based on the hourly wage rate of $15.00.

I am unable to give effect to the agreement between Blackie and Junkin for two reasons. First, there is nothing in the agreement itself indicating the "flat fee" was inclusive of overtime, vacation and holiday pay. Second, even accepting that such an "understanding" is implicit in the agreement, the agreement does not comply with the requirements of the *Act* and, pursuant to Section 4 of the *Act*, cannot be given force or effect.

In response to the alternate argument, Blackie has not shown that Junkin ever agreed to or was paid, an hourly wage rate of $15.00. In fact, all the evidence is against such a conclusion. Mr. Krahn says that Junkin opted for the "flat fee" over an hourly wage and that choice is reflected in the agreement. On the evidence, there is simply no room for argument by either party that Junkin was not paid on a flat rate basis for the work he performed for Blackie. That is an incontrovertible fact, regardless of what Blackie says the flat rate was based upon.

Having reached that conclusion, the result is dictated by the *Act*. In order to determine the wage at which work should be paid, the *Act* requires the Director to find the hourly wage using the formula set out in Section 1, definition of *"regular wages"*. This provision is set out above. The formula for converting a flat rate to an hourly wage, or *"regular wage"*, is not ambiguous. It requires a simple mathematical application, dividing the wage received in a pay period by the number of hours worked in that period.

The Director did what was required under the *Act* and Blackie has not met the burden of showing that the Director was wrong in fact or in law.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated December 20, 1998 be confirmed, together with whatever interest has accrued since the date of issuance pursuant to Section 88 of the *Act*.

David Stevenson
Adjudicator
Employment Standards Tribunal