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-

Alexander Daniel Babnik

("Babnik")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE No.:	99/68
DATE OF HEARING:	May 27th, 1999
DATE OF DECISION:	June 25th, 1999

DECISION

APPEARANCES

Alexander Daniel Babnik	on his own behalf
no appearance	for Bearpaw Silvicultural Services Ltd.
no appearance	for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Alexander Daniel Babnik ("Babnik") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on January 19th, 1999 under file number 086-409 (the "Determination").

The Director's delegate determined that Bearpaw Silvicultural Services Ltd. ("Bearpaw" or the "employer") owed Babnik the sum of $864.54 on account of unpaid wages (vacation pay and overtime). Babnik had claimed some $2,200 in unpaid wages and accordingly now appeals the Determination.

Neither the employer nor the Director was represented at the appeal hearing which was held at the Tribunal's offices in Vancouver on May 27th, 1999. In addition to the testimony of Babnik, I also heard the *viva voce* evidence of Kevin Moore.

ISSUE TO BE DECIDED

This appeal concerns the terms of the wage bargain reached between the parties.

EVIDENCE AND ANALYSIS

Babnik testified that he was hired by Bearpaw's principal as a "tree spacer" (which involves cutting certain trees in a defined area so that the remaining trees will flourish) and worked for Bearpaw from May 19th to July 14th, 1997. Babnik arrived, in the company of two other individuals, in Hazelton, B.C. on May 18th having been hired over the telephone about one month earlier. Babnik testified that when he arrived in Hazelton he reached an accord with Bearpaw whereby he would be paid at a rate of $400 per hectare.

Apparently after a few days a dispute arose between the parties regarding the surveying of the areas to be "spaced". Babnik says that all three employees were ready to quit and, faced with that threat, the employer agreed to a new method of compensation whereby the three of them would be paid not less than $35 per hour for their labour. As I understand the situation, the $35 per hour figure was a minimum to be paid in the event the three men did not eam at least that much while continuing to work on the $400 per hectare rate. I have nothing in writing before me to corroborate this alleged agreement and the employer apparently denies ever having entered into such an agreement.

Babnik says that he kept track of his daily hours but never submitted any written record of his hours worked to Bearpaw; Babnik was paid intermittently but says his pay was never properly itemized and that he was apparently paid a gross amount without the usual statutory remittances--thus, he thought he was being paid something near the agreed hourly rate. How the employer was able to pay on the basis of an hourly rate when the employer was never provided with a record of the hours worked was not explained to me. In total, Babnik says he received about $6,200 in wages. After about 6 or 7 weeks, Babnik demanded a proper accounting only to be told that his work was quite unsatisfactory. At that point, Babnik quit.

Kevin Moore testified that he was one of the group of three who travelled to Hazelton to work for Bearpaw. He was also employed by Bearpaw as a tree spacer. Moore testified that he understood that he was going to be paid a daily rate of $400 plus a $40 living allowance but when he arrived in Hazelton Bearpaw's principal said that the rate would be $400 per hectare. After about 1 week to 10 days, Moore stated that he and his two colleagues decided to quit unless their wages were increased. After some bickering back and forth--the three opened at $300 per day, Bearpaw countered at $200--Bearpaw's principal agreed to pay them not less than $225 per day. If they made more than $225 on the "hectare rate" that rate would govern but they would earn not less than $225 per day. Moore eventually quit a few weeks before Babnik did. It should be noted that a daily rate of $225 is equivalent to an hourly rate of $28.13 based on an 8-hour day.

In the Determination, the delegate noted Babnik's position that he was to be paid not less than $35 per hour and the employer's position that Babnik was to be paid on a "per hectare" basis. The employer asserted that he never agreed to a minimum $35 hourly rate. The delegate rejected Babnik's assertion that he was to be paid a minimum of $35 per hour and so would I would for several reasons including:

- Babnik never submitted time sheets to the employer, nor were any demanded of him--thus, how could Babnik expect to have been paid a minimum hourly rate if the employer was never advised as to the hours worked?

- the practice in the industry is to pay on a "piecework" basis, not on the basis of an hourly rate;

- the other two employees involved told somewhat different stories about the agreement between the three of them and the employer--in particular, based on Moore's evidence the "hourly rate" works out to $28.13 per hour, well below the $35 per hour minimum claimed by Babnik;

- the hourly rate agreement was never reduced to writing; and

- the pay records are consistent with Babnik being paid a per hectare rate and inconsistent with his being paid a general hourly rate.

ORDER

The appeal is dismissed. Pursuant to section 115 of the *Act*, I order that the Determination be confirmed.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal