

**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 -

Kask Bros. Ready Mix Ltd.  
("Kask Bros." or the "Employer")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** Ib S. Petersen

**FILE NO.:** 98/165

**DATE OF HEARING:** May 25, 1998

**DATE OF DECISION:** July 8, 1998

## DECISION

### APPEARANCES

Mr. Bill Kask    on behalf of Kask Bros.  
Mr. John Kask  
Mr. Quan Lee

Mr. Torr Bailey                                         on behalf of himself

### OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (the “Director”) issued on February 23, 1998 which determined that Kask Bros. was liable for overtime wages to Mr. Bailey (Section 40 of the *Act*). The Director’s delegate found that Mr. Bailey was paid an annual salary which did not include overtime wages and, therefore, was owed \$10,377.89.

The Employer argues that the Determination is wrong. The Employer’s argument boils down to the following proposition: the remuneration paid is in accordance with the *Act*. Mr. Bailey was paid a regular hourly rate of \$8.50 which, with guaranteed overtime, comes to \$30,000 when calculated as an annual basis. After the probationary period, his regular hourly rate was increased to \$10.65, or \$35,000 when calculated on an annual basis. In other words, the overtime wages are included. Mr. Bailey, says the Employer, agreed to this arrangement.

Mr. Bailey does not agree and says that he was paid on the basis of an annual salary and, therefore, is entitled to overtime wages for the hours worked in excess of eight in a day or 40 hours in a week. Mr. Bailey seeks to uphold the Determination.

### ISSUE TO BE DECIDED

The overall issue to be decided in this appeal is whether the Tribunal should vary, confirm or cancel the Determination. In my view, this turns on a narrow issue of fact, namely whether there was an agreement between Mr. Bailey and Kask Bros., the Employer, with respect to the former employee’s hourly wages.

## FACTS

The Employer is in the business of supplying and delivering concrete for the construction industry. Mr. Bailey was employed as an inside sales person and worked for the Employer between September 1, 1994 and April 26, 1996 when he resigned.

Mr. Bill Kask testified that Mr. Bailey was hired through a firm of human resource consultants, the Pirie Bailey Group. The Complainant's mother is one of the partners of this firm. The Employer has utilized the services of this firm on other occasions.

Mr. Bill Kask testified that the Employer discussed the terms and conditions of employment with the firm of human resource consultants: hours, wages, work conditions et cetera., including the regular hourly rate for the position, \$8.50 per hour and how this would result in an annual wage of \$30,000. Mr. Kask also states that he discussed this with Mr. Bailey. According to the Employer, Mr. Bailey's regular hours of work were from 6:45 a.m. to 5:30 p.m. Monday through Friday, and from 6:45 a.m. to 12:00 noon every Saturday. Based on the hourly rate, and payment for guaranteed overtime hours, at \$12.75 per hour, this worked out to the equivalent to an annual salary of \$30,000. After a six months probationary period, Mr. Bailey's remuneration increased to \$35,000 on an annualized basis. His hours of work were reduced such that he only worked every third Saturday.

Mr. Lee, the Employer's bookkeeper/accountant, testified that the annual salary was arrived at by considering the hours of work, regular and guaranteed overtime hours. An annual salary, given the hours of work, would amount to a regular hourly rate of \$8.50. Mr. John Kask stated that Mr. Bailey never asked about his wages or complained.

After he resigned from his employment, Mr. Bailey filed a complaint with the Employment Standards Branch with respect to overtime wages.

As indicated above, Mr. Bailey does not agree that the hourly rate of \$8.50 was ever discussed, either directly with the Employer, or indirectly, with the consulting firm. In short, he says that he was never informed about the regular hourly rate. He never agreed to this. He stated that he was hired at an annual salary of \$30,000 initially, and \$35,000 after the probationary period. He explained that he could not understand how his annual salary was arrived at. He agree that he did not approach either of the Kask brothers because, he stated, he was concerned about his job security. Mr. John Kask agreed that he may have said to Mr. Bailey that he could be "replaced within 24 hours" on one occasion, but that he said this in the context of Mr. Bailey sending a truck to pick up a sandwich. Mr. Bailey did agree that he raised the issue of wages with Mr. Lee but got no explanation.

In cross examination, Mr. Bailey agreed that he had been told about start and finish time during the week, hours of work on Saturdays, the six month probationary period, and hours of work after the

probationary period. He agreed that all the terms and conditions of employment were discussed prior to employment, except the regular hourly rate of \$8.50.

The pay stubs and the records of hours of work are not consistent with the Employer's explanation. There does not appear to be any dispute regarding the actual hours of work. The pay stubs do not indicate any hourly rate. In my view, these records are more consistent with an annual salary. On occasion, there is overtime wages indicated. For example, the pay stub for the pay period ending May 13, 1995, states that there was 3.25 hours of overtime for which Mr. Bailey received \$41.44. The hours worked during the preceding two weeks were 58 and 63.25. This was after the six month probation period when, according to the Employer, Mr. Bailey received pay for 53 hours per week (inclusive of a certain amount of overtime) but, in fact, worked more hours. Moreover, at \$41.44 for 3.25 hours of overtime, the rate is \$12.75. This means that the regular rate would be \$8.50. However, the Employer argued that Mr. Bailey's regular hourly rate at that time was \$10.65 and the overtime rate was \$15.98. Another example is the pay period ending August 5, 1995, which states that there was 5.25 hours of overtime in the amount of \$66.94, which corresponds to an overtime rate of \$12.75. The hours worked during the pay period were 57.75 and 60. Moreover, despite the pay being characterized as pay for guaranteed hours, 10 3/4 per day, Monday through Friday, and 5 1/4 on Saturdays, for a total of 59 hours during the initial six months, and 53 after the probationary period, in fact, the hours of work varied from week to week, without a corresponding variation in pay, as one would have expected if Mr. Bailey was paid on an hourly basis.

In the result, I do not accept that Mr. Bailey was paid on an hourly basis. I am satisfied that Mr. Bailey was paid an annual salary.

## **ANALYSIS**

Given the facts set out above, I am not persuaded that the Determination should be set aside.

Section 40 of the *Act* provides for overtime wages for hours worked in excess of 8 in a day or 40 in a week. Overtime pay is based on the employee's regular wage. Section 1 defines "regular wage", if the employee is paid a yearly wage, as the yearly wage divided by the product of 52 times the lesser of the employees's normal or average weekly hours of work. The delegate calculated the "regular wage" for the first six months to be \$11.11 based on the average hours of 51.9231 and an annual salary of \$30,000 during this period; and \$12.47 thereafter based on the average hours of 53.9467 and an annual salary of \$35,000. The delegate used the lesser of the employee's normal or average weekly hours of work.

While I accept that Mr. Bailey agreed to work the hours for the stated salary (but not the hourly rate), and the Employer questions the propriety of subsequently asserting a claim for overtime, that agreement is void under Section 4 of the *Act*. In my view, the Employer is not prohibited from agreeing with an employee to work for a certain hourly rate, with pay for a guaranteed or minimum

number of hours, including overtime hours, and set out the wages on an annualized basis, provided the agreement otherwise meets the requirements of the *Act* and the *Employment Standards Regulation*. However, the hourly rate must be clearly explained to the employee.

In short, I am not persuaded to interfere with the Determination.

**ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated February 23, 1998 be confirmed in the amount of \$10,377.89 together with such interest as may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

**Ib Skov Petersen**  
**Adjudicator**  
**Employment Standards Tribunal**