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Does an annual salary exclude overtime pay?

Countless employment agreements are simply drafted: an annual salary is specified, and the number of working hours is more or less loosely expressed, if at all. Does such an agreement exclude overtime pay? The Superior Court answered the question in the matter of Godin c. l'Aréna des Canadiens Inc., 2019 QCCS 1678.

The plaintiffs were two workers paid on an annual basis. Since their tasks were related to the activities of the Canadiens hockey team, they could be required to work outside of a typical nine-to-five, Monday-to-Friday schedule. Accordingly, the employer implemented a system under which work performed outside the typical work-week was compensated with time off, determined with a simple scale not based on the actual additional hours worked.

Still, the parties agreed that the employees' theoretical regular work week did not correspond to the number of hours that they performed; and that both were paid truly on an annual basis such that their annual income was in no way dependent upon the number of hours they worked from one week to the next, although one of the plaintiffs was also paid commissions.

The plaintiffs filed an application for a class action on behalf of other employees in the same situation. They sought payment for all the hours actually worked, as well as overtime pay for "[a]ny work performed in addition to the regular work-week [at] a premium of 50% of the prevailing hourly wage" in accordance with the terms of s 55 of Quebec's *Act respecting labour standards* [*Act*].

The Court's decision: no "prevailing hourly wage" is crucial

In an extensively motivated decision, very briefly summarized here, the Court held that the employers were not required to pay overtime because no "prevailing hourly wage" could be established.

That in itself was important in that it was the first time in quite some time

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that the Superior Court reviewed the issue after some amendments to the *Act*.

To arrive at this conclusion, the Court first noted that the *Act* neither dictates nor prohibits any method to determine a salary. The only requirement is that an employee be paid an amount at least equal to minimum wage (par 60–61).

Madam Justice Chantal Lamarche then emphasizes that the *Act* makes a clear distinction between "wages" and "prevailing hourly wage", which is required for the application of s 55.

She then adds:

> [67] An hourly rate necessarily refers to compensation calculated on the basis of hours worked: the total amount will depend upon the number of hours. An annual salary is a fixed salary, which does not vary during the year and in no way depends upon the number of hours worked. The number of hours will change: not the salary. [Our translation]

Without an hourly rate, there can be no "prevailing hourly wage", and s 55 simply won't apply (par 70).

The Court also dealt with the employees' alternative argument: because, in theory, as the employer controlled the number of hours done by the employees, a prevailing hourly rate could still somehow be established. But since the number of hours actually worked by each employee varied from one week to another, depending upon the games played by the team, no "prevailing" rate could be determined because the calculation would fluctuate from week to week (par 105).

Takeaway for employers: careful drafting is still required!

All in all, this is a decision to bear in mind.

For those of us involved in employment law, while specifying an annual salary involved seems to offer an easy out from paying overtime, it is essential to note that, if in a Court's view, the arrangement is in name only, the employer can and will be dinged with the obligation to pay overtime because in such circumstances, the annual salary being nearly a ruse, a prevailing hourly wage could be established (par 54). For the employer to avoid overtime, not only must the employees' wages be stated as an annual sum, but also:

- That sum, whether payable either in weekly, monthly or bi-monthly instalments, must be the same without reference to the number of hours actually worked; and
- The number of hours must necessarily vary from week to week, not as a ruse but as a function of the normal operation of business.

In other words, if it's simply a "manufactured" situation in name only, it will not work!