

**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 -

Royal Canadian Legion Branch 43  
("RCL Branch 43")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**Adjudicator:** Hans Suhr

**File No.:** 1998/744

**Date of Hearing:** January 29, 1999

**Date of Decision:** February 12, 1999



- Gurnsey was responsible for the day to day operation of the Branch and as a result supervised all other employees;
- Gurnsey also supervised and gave direction to the bookkeeper although all cheques were signed by the appropriate authorities established by RCL Branch 43. Gurnsey did not sign cheques;
- Gurnsey took some time off to attend to previously scheduled commitments with the approval of RCL Branch 43;
- RCL Branch 43 did not keep any daily record of hours worked by Gurnsey;

RCL Branch 43 states that:

- Gurnsey was paid all wages due to him for the period of his employment;
- Gurnsey was a monthly salaried employee with a salary of \$3,000 per month for all hours worked and therefore not entitled to overtime wages;
- Gurnsey was advised at the time of his hire that he was responsible to arrange his schedule to accommodate the work required and that he was not required to work extra hours;
- Gurnsey made no mention of wages owing or extra hours worked until after his employment ended.

Gurnsey states that:

- he structured his compensation to show wages at \$7.00 per hour for hours worked and the balance of the \$3,000 per month to be categorized as “eligible business expense”;
- he had discussed this with a Certified General Accountant and was told that this would enable him to maximize his personal income while minimizing the tax payable;
- he discussed his compensation format with Al Saville (“Saville”) a member of the executive of RCL Branch 43 at that time, and was told they didn’t care as long as Gurnsey only received \$3,000 per month;
- he kept track of his hours worked and operated a “time bank” to which he added or subtracted hours as he either worked extra hours or took time off;
- RCL Branch 43 paid for a computer he had brought for use at work and upon ending his employment, he took the computer home;
- he did not bring copies of his daily record of hours worked to the hearing although he had previously submitted copies to the Employment Standards Branch;
- he was owed for 94 hours of extra work performed during his period of employment.

## **ANALYSIS**

The burden of establishing that the delegate of the Director erred in the Determination rests with the appellant, in this case, RCL Branch 43.

The parties do not agree on the form that compensation for Gurnsey was to take. I must then review the documentary evidence provided to see if that sheds some light on the manner in which compensation was provided to Gurnsey.

RCL Branch 43 provided copies of the payroll ledger, other payroll information and copies of cheques which clearly show that Gurnsey was paid at the rate of \$7.00 per hour for work performed and those records also show that Gurnsey was paid for work performed the week commencing May 27, 1996.

The *Act* defines wages as:

*"wages" includes*

- (a) salaries, commissions or money, paid or payable by an employer to an employee for work,*
- (b) money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency,*
- (c) money, including the amount of any liability under section 63, required to be paid by an employer to an employee under this Act,*
- (d) money required to be paid in accordance with a determination or an order of the tribunal, and*
- (e) in Parts 10 and 11, money required under a contract of employment to be paid, for an employee's benefit, to a fund, insurer or other person,*

*but does not include*

- (f) gratuities,*
- (g) money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency,*
- (h) allowances or expenses, and***
- (i) penalties;*

(emphasis added)

Based on the evidence provided I conclude that Gurnsey's wage rate was \$7.00 per hour with the balance of his \$3,000 per month compensation being "eligible business expense" which does not meet the definition of wages pursuant to the *Act*.

I further conclude that Gurnsey was paid for work performed during the period May 27 - May 31, 1996.

There is no dispute by the parties that Gurnsey was a "manager" as defined by the *Act*. There is also no dispute that "managers" are excluded from the provisions of Part 4, "Hours of Work and Overtime" and Part 5 "Statutory Holidays".

Managers are however, like any other employee, entitled to the provisions contained in the parts of the *Act* from which they are not excluded. One of the parts of the *Act* that does apply to managers is Part 3, Wages, Special Clothing and Records and it provides:

*Section 16, Employers required to pay minimum wage*

*16. An employer must pay an employee at least the minimum wage as prescribed in the regulations.*

I must then consider what the ‘contract of employment’ between the parties required with respect to hours of work. I am assisted in that regard by the minutes of the executive meeting provided by RCL Branch 43 in which it is stated “M/S/C/ - that the manager works 5 days a week”. I am further assisted by the payroll records which indicate that Gurnsey was paid for 40 hours at \$7.00 per hour during his period of employment.

On the basis of the information set forth above, I conclude that Gurnsey’s hours of work were to be 40 per week. Gurnsey is entitled to be compensated for hours worked in excess of 40 per week pursuant to the provisions of Section 16 of the *Act*.

RCL Branch 43 did not keep daily records of hours worked by Gurnsey. Therefore, I am prepared to accept Gurnsey’s records which indicate he worked an additional 94 hours for which he claims he did not receive wages.

Due to the fact that in a couple of pay periods the pay cheque included expenses and, based on the oral evidence. I am required to recalculate Gurnsey’s wage earnings for his period of employment to determine exactly how much is owed.

<b>Pay Period</b>	<b>Wages Earned</b>	<b>Wages Paid</b>
May 27 - June 14	840.00	840.00
June 14 - June 28	560.00	560.00
June 28 - July 12	560.00	560.00
July 12 - July 26	560.00	560.00
July 26 - Aug. 9	560.00	560.00
Aug. 9 - Aug. 23	560.00	560.00
Aug. 23 - Aug. 31	280.00	adv. rec'd Aug16-1,000.00
<b>Total Wages</b>	<b>3,920.00</b>	<b>4,640.00</b>
8% Vac. Pay	313.00	775.38
Compensation for length of service (severance pay)	280.00	692.31

Based on the above calculations, Gurnsey was entitled to be paid a total of **\$4,513.00** (wages \$3,920.00 + vacation pay \$313.00 + compensation for length of service \$280.00) . When I add wages for the extra 94 hours claimed to have been worked (94 x \$7.00 = \$658.00) Gurnsey's entitlement is **\$5,171.00**

Gurnsey actually received **\$6,107.69** (wages \$4,640.00 + vacation pay \$775.38 + compensation for length of service \$692.31) .

Based on the evidence provided and on the balance of probabilities, I conclude that Gurnsey is not entitled to any further wages from RCL Branch 43.

### **ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determination dated November 23, 1998 be cancelled.

**Hans Suhr**  
**Adjudicator**  
**Employment Standards Tribunal**