

**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 -

Matthew Phillips  
(" Phillips ")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** James Wolfgang

**FILE No:** 1999/743

**DATE OF HEARING:** February 9, 2000

**DATE OF DECISION:** March 22, 2000

**DECISION**

**APPEARANCES:**

Christine Stocker for Wickaninnish Inn  
Matthew Phillips for himself by conference call  
No one represented the Director.

**OVERVIEW**

This is an appeal by Matthew Phillips (Phillips) pursuant to Section 112 of the *Employment Standards Act (the "Act")* from a Determination issued by the Director of Employment Standards on November 29, 1999.

The Determination dealt with four complaints from two different people. In the case of Donna Gunness, both complaints were addressed in the Determination. In the case of Phillips, the Determination found the Wickaninnish Inn (the "Inn") owed him for clothing he had purchased as it constituted "special clothing" within the meaning of the *Act*. The Determination did not award any overtime pay claimed by Phillips.

Phillips is seeking to have the Determination varied to include his claim for ½ hour overtime for the period he was employed as a night auditor. The question of overtime was not dealt with in any detail. The only reference to the issue of overtime was identified as "clearly defined in Exhibit "A". The Determination does not contain a copy of Exhibit "A". The Inn did include a document titled Exhibit "A" in their appeal and it may be the same letter.

Phillips requested the Tribunal be supplied copies of the sign-in sheets from the Inn for the period he was employed. The employer presented these at the hearing.

A hearing was held and I took evidence from all parties. Phillips attended by telephone conference call.

**ISSUE TO BE DECIDED**

Is Phillips entitled to overtime pay he claims he worked as a night auditor?

**FACTS**

The Inn employed Matthew Phillips as a night auditor from July 26, 1998 to May 7, 1999. His normal hours were from 11:00 pm until 07:30 am and his rate of pay was \$11.25 per hour. Phillips also worked occasionally as a Valet and a Guest Service Representative (GSR). The Valet duties would normally be for part of a shift while the GSR position was a full day shift.

Phillips claims it was not possible to take a break during his shift as night auditor, when he was the only person on duty. In addition to his bookkeeping duties he was required to operate the telephone switchboard, check in late arrivals and checkout early departures. He was responsible for the night security and fire control. He carried a set of the manager's keys, which were the master keys of all the hotel doors. Phillips claims he could not leave the building as the manager's keys were not to be taken off the premises. He admits he was not told to work through his 8 1/2 hour shift but he was also not told emphatically to take a break and leave the hotel switchboard and desk unattended. Phillips feels it was left up to him to decide if he should leave or not and he felt responsible to remain on duty. The night auditors are the only employees who are allowed to eat their lunch in the back office located behind the front desk. All other employees must eat in the cafeteria downstairs.

Phillips claimed he became aware he was entitled to overtime when he was reviewing *Employment Standards Act* material that was posted in the lunchroom. He wrote a note to the manager of the Inn on May 4, 1999 concerning his hours of work without a break.

The Inn agrees there were times when Phillips would be the only person on shift late in the evening and overnight. They responded with a letter addressed to Phillips dated May 4, 1999, identified as Exhibit "A" in their appeal to the Tribunal. The letter states, in part:

Breaks. From your note it sounds like you are not taking your breaks. You must take a 1/2 hour break regardless of the shift you are working. We have always given Auditors the flexibility to take these breaks in the lunchroom or in the back office, but the point remains that you must take them. You are not and have never been expected to work through your break. You are scheduled for an 8-1/2 hour shift just as every other GSR and the majority of the Valets are. You work 8 hours and get paid for 8 hours. You take a 1/2 hour break that the Inn is not required to pay you for. As per the Employment Standards Act, an employee is entitled to a half-hour, unpaid meal break after working 5 hours in a row.

In a letter dated December 28, 1999 to the Tribunal the manager states:

Employees working this particular shift do have the flexibility to take this break whenever they chose. During the break the night auditor may be unavailable. If the Night Auditor chooses to leave the office during this break, we only instruct that they lock the back office.

At the hearing the Inn gave evidence the night auditors may leave the building during their break, and could even go down to the beach if they wished. They were aware this left the building, the switchboard and the fire alarm system unattended however; they were prepared to accept that risk. They further stated the Manager's keys could be taken out of the building for this period of time.

**Phillips believes he worked 90, 8 1/2 hour shifts. He is claiming one half hour at overtime rates for each shift. Phillips requested the Inn bring the sign in sheets to the hearing for the period he was employed. The Inn complied with that request and some were reviewed at**

**the hearing. Phillips wanted to make reference to the sign in sheet of May 3, 1999. On that day Phillips left work at 7:15 am and claimed 15 minutes overtime. The Inn changed the sheet by crossing out the overtime claim and deducted 15 minutes regular pay from him, paying only 7.75 hours.**

## ANALYSIS

The issue before the Tribunal is whether Phillips was available for work during his break, regardless of whether he took one.

In checking with other hotels, I find the 11:00 to 7:30 shift is not uncommon in this industry and, in most cases, the person works alone for a period of time. The hotels indicated they prefer to pay the one half hour extra time to ensure they have staff on duty at all times.

The Inn claims the night auditors must take a break, which may well be the case, however I believe they are available for work during that time therefore are entitled to be paid for the break, if working alone

I do not believe the night auditor is as free to take a break as the Inn contends. The fact they are the only employees allowed to take their meal break in the back office suggests to me they are expected to be on call during their break. If a guest were to come to the desk for a late check-in or early checkout I believe the Inn would expect the night auditor to stop his break and serve the guest. I do not believe they would want the guest to wait 20 or 30 minutes while the employee finished his break. The same would be true if an emergency arose and a guest could not reach the switchboard. I agree with Phillips when he stated he would feel responsible if an emergency occurred while he was on a break and was unavailable to deal with the matter.

At the hearing Phillips admitted no one actually told him he could not leave the building, however he knew he was responsible for the keys and he had been told they were not to be taken out of the building. This, I believe, would be a dilemma for a conscientious employee.

Apparently there is an Employee Handbook, which outlines the policy of the Inn. We are not aware if the requirements to take the mandatory breaks are contained in that document. In fact, no evidence was presented indicating the night auditors had been advised to take their breaks. The evidence of Phillips was he found this in the Employment Standards Bulletins posted in the lunchroom. However, that is not the issue. The issue is whether a night auditor working alone, whether taking a break or not, is on call during that period.

The letter to the Tribunal dated December 28, 1999 is the only evidence presented to indicate Phillips was advised he was to take the required breaks and "may be unavailable" however this was after he had been terminated.

Section 32 (2) of the *Act* states:

An employer who requires an employee to be available for work during a meal break must count the meal break as time worked by the employee.

The Inn has tried to present a case where they do not require a night auditor to be available for work during his break. For the reasons set out above, I believe a night auditor who failed to respond to the needs of a guest, whether an emergency or not, while on their break would find themselves in some difficulty with management.

I have reviewed the sign-in sheets supplied at the hearing and find there appears to be times when more than one night auditor would be on shift. If more than one night auditor was on shift it would have been possible for Phillips to take a break, as required by the Inn. I believe there were 64 days when Phillips was working alone, according to the sign-in sheets, and he is entitled to be paid ½ hour at the overtime rate for those days plus vacation pay. This matter is referred back to the Branch to confirm the calculation of the number of days when Phillips was working alone as night auditor.

**ORDER**

In accordance with Section 115 of the *Act* I order the Determination dated November 29, 1999 be amended and is referred back to the Branch for the calculation of the proper amount owing. Interest is to be calculated in accordance with Section 88 of the *Act*.

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**James Wolfgang**  
**Adjudicator**  
**Employment Standards Tribunal**