

An appeal

- by -

Gary Gurnsey
("Gurnsey")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Mark Thompson

FILE No.: 2000/810

DATE OF DECISION: March 2, 2001

DECISION

OVERVIEW

This is an appeal by Gary Gurnsey (“Gurnsey”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against a Determination issued by a delegate of the Director of Employment Standards on November 2, 2000. The Determination found that Gurnsey’s former employer, Community Futures Development of Stuart Nechako (the “Employer”) did not owe Gurnsey for vacation pay or regular wages and vacation pay for overtime hours worked. Gurnsey appealed the conclusion in the Determination that he was not entitled to overtime pay. This decision was based on written submissions from Gurnsey, the Employer, and the Directors’ delegate.

ISSUE TO BE DECIDED

The issue to be decided in this case is whether Gurnsey is entitled to overtime pay and associated vacation pay pursuant to his contract of employment with this employer.

FACTS

Gurnsey worked as the Executive Director of the Employer from July 21, 1997 until October 15, 1999. The Employer terminated his employment. The circumstances of the termination and any issues arising from it are before the courts. This case concerns only Gurnsey’s claim for compensation for overtime hours worked in excess of 40 per week and associated vacation pay.

Both parties acknowledge that Gurnsey was a manager as defined in the *Employment Standards Regulation*. There was no formal contract of employment between the parties that defined Gurnsey’s hours of work. The Employer issued a policy document to all employees, “Terms of Employment & Staff Benefits Policy,” on October 1, 1998. The basis of Gurnsey’s appeal is that he was covered by the policy document and is entitled to the terms it contained.

Gurnsey stated that he worked more than 40 hours in many weeks. He further alleged that he was given no direction to restrict the hours he worked, many of which committee meetings or meetings of the Employer’s board of directors. The Employer was aware of his attendance at these meetings and gave him no direction to reduce his activities. In his appeal, Gurnsey stated that his practice as executive director had been to take time off to compensate for overtime worked, as other employees did. After his termination, the Employer refused to compensate him for the time he had accrued under this system.

In the course of his investigation of Gurnsey’s complaint, the Director’s delegate spoke to the Employer’s bookkeeper, who told him that Gurnsey had told her a few months before his termination that he was working “a lot of overtime,” but was not keeping track of it. According

to the bookkeeper, Gurnsey remarked that he should keep track of overtime worked, and she agreed with him.

The Employer stated in response to Gurnsey's appeal that he participated in many community activities due to his own interests, not because his job required this work. In the spring of 1999 the board of directors asked him to do more work in the office and to reduce his involvement in outside activities.

ANALYSIS

Section 34(f) of the *Employment Standards Act Regulation* excludes a manager from Part 4 of the *Act*. Part 4 of the *Act* deals with hours of work and overtime. Since Gurnsey was a manager, he was not entitled to overtime at a premium rate, a fact he acknowledged in his appeal. He did not allege that he received less than the minimum wage for the hours he worked.

The remaining basis of Gurnsey's appeal is the Employer's policy document setting out terms of employment and benefits for staff. In essence, Gurnsey argued that he was covered by the policy document. The policy document established terms and conditions of employment extensively, but an analysis of its text leads to the conclusion that it did not include Gurnsey. Several provisions of the policy document distinguish between the executive director, Gurnsey, from other staff members, including the managerial role of the executive director.

The probation period for "regular employees" was three months, "except for the Executive Director," for whom the period was six months. The executive director was to appraise the performance of "the staff." A grievance procedure provided that an employee should raise a potential grievance with the "supervisor and/or the Executive Director." An employee who had a problem with the executive director was to take the matter to the board of directors. Employees who were required to travel outside of the boundary of the Employer's operations were required to obtain permission of the executive director. Employees who were unable to report to work were required to notify the executive director. There was no evidence of the application of other terms of employment to Gurnsey, such as sick leave, staff training, RRSP contributions, or overtime meal allowances.

Perhaps the most significant provisions of the policy document for this case concerned hours of work. The document stated that the "average workweek, exclusive of meal periods, will be 35 hours." It further stated that employees were not allowed to work overtime without the permission of the executive director. Employees were also given the right to establish a time bank to receive overtime compensation in the form of time off. The policy document stated that the Employer would maintain payroll records for each employee, including "dates taken and amounts paid from the employees time bank."

The document clearly distinguished between "employees" and the executive director, who was a manager. Gurnsey based his appeal on a 40-hour week, not the 35-hour week established in the

policy document. The requirements for overtime work did not apply to Gurnsey. In his conversation with the bookkeeper, Gurnsey acknowledged that he was not recording the hours he worked, contrary to the requirements of the policy document.

In appeals to the Tribunal, the appellant bears the onus of demonstrating that the Determination contained an error of law or fact. In this case, the Determination noted that no agreement between Gurnsey and the Employer specified his hours of work. Gurnsey has not proven that the policy document constituted a contract of employment between him and the Employer.

ORDER

For these reasons, the Determination of November 2, 2000 is confirmed, pursuant to Section 115 of the *Act*.

MARK THOMPSON

Mark Thompson
Adjudicator
Employment Standards Tribunal