

**BC EST #D265/99**  
**Reconsideration of BC EST #D025/99**

**EMPLOYMENT STANDARDS TRIBUNAL**  
In the matter of a reconsideration pursuant to Section 116 of the  
*Employment Standards Act R.S.B.C. 1996, C. 113*

- by -

Gary Gurnsey  
("Gurnsey")

- of a Decision issued by -

The Employment Standards Tribunal  
(the "Tribunal")

**ADJUDICATOR:** Cindy J. Lombard

**FILE NO.:** 1999/196

**DATE OF DECISION:** June 29, 1999

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**DECISION**

**OVERVIEW**

This is an application for reconsideration by the employee, Gary Gurnsey, under Section 116 of the *Employment Standards Act* (the “Act”) of a decision of the Employment Standards Tribunal on February 12, 1999.

**ISSUES TO BE DECIDED**

1. Was the employee compensated in wages for work performed during the week of May 27, 1998?
2. What was the employee’s hourly rate of pay for the purpose of compensating him for agreed over-time of 94 hours?

**FACTS**

The decision of the Employment Standards Tribunal was issued pursuant to an appeal under Section 112 of the Act by the employer from a Determination of the Director of Employment Standards (the “Director”) issued on November 23, 1998, wherein the Director found that the employer owed the employee the sum of \$2,819.20 being one week’s wages, overtime and vacation pay and interest.

The Employment Standards Tribunal issued an Order that the Determination dated November 23, 1998, be cancelled.

**ANALYSIS**

The employer and employee agree that the Appellant was hired to work as a manager at a monthly salary of \$3,000.00 per month. The employer states that the employee was to be entitled to no overtime hours. However, in the letter from Gurnsey to Ted Turvey, the President of the employer which is Exhibit #2 to the Determination, after leaving his employment Mr. Gurnsey confirms the agreement that he would be reimbursed the \$3,000.00 per month with an agreement that for income tax purposes the employee would go on payroll for \$7.00 per hour with the remaining amount being available to be claimed as eligible business expenses. The employer agrees that this was the case as long as the salary did not exceed \$3,000.00 per month. The note on that letter made by a member of the employer states as follows:

“discussed in detail, and approved in principle – subject to available funds. Gary to submit claim for overtime in a separate submission. Claims to reimburse

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eligible expenses will be submitted in several claims, until the total amount has been paid. The total amount will be paid by December 31, 1996.”

It appears at that point in time that the employer agreed with the fact that the employee’s total salary was \$3,000.00 per month payable in part as wage and part as business expense to avoid attraction of income tax payable and further that the employee would receive payment for overtime.

The official commencement date of the employee’s employment was June 1, 1996; however, during the week prior to that date he states that the employee worked for one week training and seeks reimbursement for that week.

In addition, the employee states that he is due to be reimbursed for 94 hours of overtime and the employer agrees, both with respect to the number of hours and the fact that it would be paid based on straight time.

The Employment Standards Tribunal based its decision to cancel the Determination of the Director on the following calculations:

“Pay Period	Wages Earned	Wages Paid	
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 – August 9	560.00	560.00	
August 9 – August 23	560.00	560.00	
August 23 – August 31	280.00		
	adv rec’d Aug 16	-1,000.00	
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Total wages		\$3,920.00	\$4,640.00
8% Vacation 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 wages for the extra 94 hours claimed to be worked (94 x \$7.00 = \$658.00) is added, 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).”

I have concluded that the Tribunal decision does contain an error based on the following:

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1. The parties agree that the employee's monthly salary was \$3,000.00 per month and in fact as is evidenced in Mr. Gurnsey's T-4 for 1996, he was paid that amount with the starting dated being June 1, 1996. The T-4 shows a total employment income paid of \$10,917.69 for the period June 1 to August 31, 1996, which is calculated as follows:

	\$3,000.00 x 3 months =	\$9,000.00
car allowance	150.00 x 3 months =	450.00
1 week severance pay		<u>692.31</u>
Total:		\$10,917.69

2. The Appellant says that he worked training for the position for the week commencing May 27, 1996. The employer does not deny this but simply says that Mr. Gurnsey is owed no further salary. Contrary to the conclusion of the Tribunal, there is no evidence that Mr. Gurnsey was paid for that period.
3. In addition, it is agreed by both the employer and employee that Mr. Gurnsey is due overtime hours totaling 94 hours. What is in dispute is his rate of pay. There was an agreement between the employer and the employee that Mr. Gurnsey's salary was \$3,000.00 per month with \$7.00 per hour showing on the books for wages and the balance classified as expenses to avoid incurring income tax. Therefore, it is clear that Mr. Gurnsey's regular hourly rate at which overtime hours should be paid is calculated on the basis of \$3,000.00 per month. Therefore, that the Director's determination that that hourly rate works out to \$17.31 per hour is the correct one.

**CONCLUSION**

In conclusion, the Director's determination as to the amount of money owing to Mr. Gurnsey is correctly calculated as follows:

1 week's wages based on \$3,000.00/month	\$692.31
overtime hours (94 hours @ \$17.31/hour)	1,627.14
vacation pay @ 8%	<u>185.56</u>
Total	\$2,505.01

The determination included interest to the date of the determination on November 23, 1998, in the amount of \$314.19.

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**ORDER**

Pursuant to Section 116, I order that the decision of the Employment Standards Tribunal of January 29, 1999, be cancelled and the determination of the Director dated November 23, 1998, be confirmed as issued in the amount of \$2,819.20 together with whatever further interest that may have accrued pursuant to Section 88 of the Act since the date of the issue.

**Cindy J. Lombard**  
**Adjudicator**  
**Employment Standards Tribunal**