EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act

-by-

David Munday

("Munday")

-of a Determination issued by-

The Director of Employment Standards

(the "Director")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE No.:	96/369
DATE OF HEARING:	August 19th, 1996 and October 29th, 1996
WRITTEN SUBMISSIONS RECEIVED:	November 1st, 1996
DATE OF DECISION:	November 15th, 1996

DECISION

APPEARANCES

David Munday on his own behalf

Dan Odobas for In-Home Shopco Services Ltd.

No appearance on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal brought by David Munday ("Munday") pursuant to section 112 of the *Employment Standards Act* (the "*Act*") from Determination No. CDET 002399 issued by the Director of Employment Standards (the "Director") on May 30th, 1996. The Director determined that In-Home Shopco Services Ltd. ("Shopco") did not owe Munday any monies on account of unpaid overtime (section 40 of the *Act*).

The appeal hearing in this matter commenced on August 19th, 1996 and continued on October 29th, 1996. The appeal hearing continued on October 29th for the primary purpose of hearing certain audiotape evidence of conversations between Mr. Odobas and Mr. Munday (conversations that were surreptitiously recorded by Munday). I was first advised about the existence of the audiotapes during Munday's final submission on August 19th. I adjourned the appeal hearing so that I could consider whether or not the tapes ought to be considered as part of the evidentiary record.

On September 18th, 1996 I ruled, without having heard the tapes, that the tape recordings (and the accompanying "transcripts" prepared by Munday--which proved to be incomplete and replete with "editorializing" by Munday) may be admissible pursuant to section 13 of the Evidence Act. However, now having heard the tapes (or at least those portions that Munday claimed supported his case), I must conclude that the tapes have absolutely no probative value and do not relate, in any material way, to the issues that were before me in this appeal hearing.

Mr. Dan Odobas, a Shopco shareholder, officer and director, testified as the sole witness for Shopco; Mr. Munday testified on his own behalf. Mr. Munday also called one witness, Greg Lemon, a former Shopco employee. Following the hearing of all of the evidence presented, both parties indicated that they wished to

present final written submissions--these submission were received on November 1st, 1996.

FACTS

Shopco provides home delivery of food products to residential customers throughout the greater Vancouver area. The company employees approximately 60 people as sales representatives, office clerical staff and as delivery drivers. The company has four offices in the lower mainland area. Munday initially worked out of the Surrey office and in late April 1995 was transferred to a warehouse on Brighton Avenue in Burnaby where he was styled, according to Odobas, as the "warehouse manager".

Munday testified that he commenced his employment with Shopco as a sales representative and, as and from November 1994, he worked as a delivery driver. Munday says that his hours were recorded on "scraps of paper" and handed in to "Varda" who worked in the Shopco office; Munday was paid by way of a cheque on the 15th and at the end of each month. At the appeal hearing, Munday maintained that the employer's records as to his (Munday's) hours of work were inaccurate and that some of the employer's records were, in fact, fabricated after Munday filed his complaint with the Employment Standards Branch. Munday maintains that, throughout his tenure with Shopco, he worked an average of 50 hours per week but that his weekly hours varied dramatically. Munday also testified that the bulk of his claim relates to overtime hours worked after May 1st, 1995.

After Munday was transferred to the Burnaby warehouse he was more or less an autonomous employee along with another employee, Greg Lemon (who had also previously been a Shopco sales representative). Odobas testified that he was not very frequently at the the Burnaby warehouse and that Munday and Lemon worked at that location, more or less, on their own. They were jointly responsible for putting orders together and delivering the orders to Shopco customers.

At the date of his termination, on July 5th, 1995, Munday was being paid a monthly salary of $1,600.

Both Munday and Lemon were terminated on July 5th, 1996, allegedly for cause. In mid-June, accordingly to BCLRB Decision No. B297/95 (Exhibit 20 at the appeal hearing), Munday contacted a labour organization and on July 5th, 1995 an application for certification respecting a two-employee bargaining unit (the Burnaby warehouse) was filed with the B.C. Labour Relations Board. The Board held that Munday and Lemon had been discharged for cause (essentially, but not entirely, related to poor work performance) and, accordingly, the union's certification application was dismissed as there were no bargaining unit employees on the date of the certification application.

I should note that there is no issue as to entitlement to termination pay before me. Munday never claimed, as part of his original complaint, that he was discharged without cause; nor did he seek termination pay pursuant to section 63 of the *Act* in his original complaint filed with the Employment Standards Branch.

Shopco's defence to Munday's overtime claim is two-pronged. First, Shopco says that, as least from April 1995 Munday when was appointed "warehouse manager", Munday was not entitled to claim overtime pay by reason of section 34(1)(f) of the ESA Regulations. Second, Shopco says that, in any event, Munday has not proved a valid claim for unpaid overtime.

ANALYSIS

The Labour Relations Board did not decide whether or not Munday was an "employee" for purposes of the Labour Relations Code (i.e., whether or not Munday fell within the "managerial exclusion" set out in the Code). Thus, the matter is not *res judicata* as a result of the Board's decision (and given the differences in statutory language between the Code and the *Act*, the doctrine of *res judicata* may not apply even if the Board had made a decision regarding Munday's employment status). Based on the evidence before me, I am not satisfied that Munday was a "manager" as defined in section 1 of the Regulations. In particular, there is no evidence before me that Munday directed and supervised other employees--Lemon's evidence was that the two of them "worked together" when they were both on duty in the Burnaby warehouse and that, frequently, one or the other worked alone. Even if it could be said that Munday, on occasion, did

"supervise" Lemon, there is no evidence that such supervision was Munday's "primary employment duty".

As for Munday's unpaid overtime claim, I am not satisfied that Munday has met his burden of proof in this regard. An appeal of a Determination issued pursuant to section 79 of the *Act* does not proceed as a trial de novo. In an appeal hearing, the burden of proof rests with the appellant to show that the Determination is clearly wrong.

In the Reason Schedule accompanying the Director's Determination the investigating employment standards officer notes that upon a review of the employer's records, which were complete and apparently unaltered, it appeared that Munday was entitled to be reimbursed for an unauthorized payroll deduction and to be paid certain monies on account of unpaid vacation pay. These amounts have now been paid to Munday.

Munday maintains that the employer's payroll records are, in essence, a fraud and submits that he is entitled to be paid "at least $1,000" on account of unpaid overtime. This argument is precisely the same argument that was advanced by Munday during the original investigation of his complaint. It must be reiterated that I am sitting as an appellate body, not as a body conducting an original hearing of the dispute. When, as is the case here, an appellant is challenging findings of fact made by the Director, the appellant must show that the findings of fact are perverse--that is, that there was no underlying evidentiary foundation for the factual conclusions reached the Director.

It is clear that I have two very different versions of the facts before me. However, the version Munday presented before me is not materially different from that alleged by him during the initial investigation of his complaint--a version that was ultimately rejected by the Director.

The employer produced payroll records that appear to be legitimate query. If the employer fabricated the payroll records (and I have no credible evidence before me that such was the case), as suggested by Munday, why would the employer have produced records that showed, upon closer examination, that Munday was entitled to vacation pay and reimbursement for an unauthorized payroll deduction? The only records that Munday has produced are of his own hand and have not been corroborated by any independent evidence. Further, if Munday was, as he says, regularly submitting his hours of work for each pay period to Shopco on "scraps of

paper", why was his complaint as to unpaid overtime only filed after he was terminated?

ORDER

Pursuant to section 115 of the *Act*, I order that Determination No. CDET 002399 be confirmed as issued.

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Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal