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-

Troy Lambert operating as the "Fitness Garden"
("Lambert" or the "employer")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 98/380

DATE OF DECISION: August 27th, 1998

DECISION

OVERVIEW

This is an appeal brought by Troy Lambert operating as the "Fitness Garden" ("Lambert" or the "employer") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination issued by the Director of Employment Standards (the "Director") on June 5th, 1998 under file number 88029 (the "Determination").

The Director determined that Lambert owed his former employee, Ms. Joanna Dunn ("Dunn"), the sum of $8,615.47 on account of regular and overtime wages, vacation and statutory holiday pay and interest.

FACTS

According to the information set out in the Determination, Dunn worked as a fitness instructor and part-time manager of the employer's fitness club from April 18th (I believe this a typographical error and should read August 18th) to the end of December 1997 when she resigned. Upon resignation she presented a handwritten statement to Lambert which recorded her hours (877 at $11 per hour) worked from August 18th to December 30th, 1997. This latter record showed an amount of $3,300 as "paid to date". The record was signed by Lambert with the following notation appearing above his signature--"I Troy Lamber agree with all the hours worked and rate of pay". The employer, contrary to section 28 of the *Act*, did not maintain any payroll records of his own.

Upon her resignation, Dunn opened a similar fitness centre in a nearby community. Dunn denies, as alleged by the employer, that she solicited Fitness Garden members for her own club and further denies making some $400 in personal telephone calls on the employer's account--Dunn says the figure is closer to $20. Dunn does admit to holding "2 or 3" staff shirts but also says that "they are of no use to me" and that the employer "is welcome to them back". In any event, these issues are not properly before me as there was no suggestion that Dunn was terminated for cause--she resigned--and she was not awarded any termination pay under section 63 of the *Act*.

ISSUES TO BE DECIDED

The employer appeals the Determination on the grounds that:

- Dunn's wage rate "was never discusted durring employment at Fitness Garden" [sic];
- Dunn did not work all the hours she claimed to have worked;
- Dunn received more than the $3,300 in wage advances credited in the Determination; and

• the employer should be credited for personal phone calls and other items of employer property that Dunn wrongfully removed and retained.

In a further written submission to the Tribunal dated July 31st, 1998, among other claims, the employer asserted that Dunn improperly solicited Fitness Garden members.

ANALYSIS

In light of the employer's signed acknowledgement regarding its liability to Dunn on account of unpaid wages, I cannot accept the employer's assertion that Dunn's claims as to the hours worked, the wage rate, or the wage advances received, is inaccurate. By reason of the parol evidence rule, the Director's delegate's reliance on the wage statement signed by the employer was entirely proper.

With respect to the employer's assertion that Dunn received more than $3,300 in wage advances, the information noted on the cancelled cheques provided by the employer is more consistent with the position advanced by Dunn than with that advanced by the employer. For example, the employer says that Fitness Garden cheque numbers 0034 and 0048--dated November 14th and December 15th, 1997, respectively--were issued on account of wages. Dunn, on the other hand, says that these cheques were issued as monthly installment payments on a piece of exercise equipment (a "stairclimber") that Dunn says she sold to Lambert. On each cheque there appears a notation under the column headed "description" that the cheque was issued for "stairclimber". Thus, on the balance of probabilities, I cannot accept that Dunn received any other wage advances than the $3,300 set out in the statement signed by Lambert and so credited in the Determination

In my view, and as noted above, the Director's delegate was entitled, especially in the absence of *any* payroll records from the employer, to rely on the statement prepared by Dunn and *signed by the employer* in determining Dunn's complaint in her favour. The employer's assertion that this statement was signed under duress is completely without any evidentiary foundation.

With respect to the employer's claims that he is entitled to some sort of "credit" for unreturned merchandise or for personal telephone calls made, leaving aside the question as to the veracity of these claims, section 21 of the *Act* prohibits an employer from setting off these sorts of claims against an employee's wages. If the employer is of the view that he has a valid claim for reimbursement of expenses against Dunn, or that Dunn improperly solicited Fitness Garden customers, the employer will have to pursue such a claim in the courts.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **$8,615.47** together with whatever further interest that may have accrued, in accordance with section 88 of the *Act*, since the date of issuance.

_____

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal