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-

Anodyne Computers 97 Ltd.

(the "employer")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE No.:	98/450
DATE OF DECISION:	September 3, 1998

DECISION

OVERVIEW

This is an appeal brought by Anodyne Computers 97 Ltd. (the "employer") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on June 19th, 1998 under file number 083866 (the "Determination").

The Director's delegate determined that the employer owed its former employee, Andrew Steinbach ("Steinbach"), the sum of $2,045.45 on account of unpaid wages including one week's wages as compensation for length of service. The delegate found that Steinbach was discharged without just cause and this latter aspect of the Determination is not under appeal.

ANALYSIS

Steinbach was employed as a store manager from February 1st to July 2nd, 1997 at which time he was discharged, allegedly for cause.

At issue in this case is the employer's alleged right to a "credit" or a set-off for certain overtime wages paid to Steinbach during his first month of employment. The employer deducted the amount of the previously paid "overtime" pay from Steinbach's final paycheque.

The employer says that the delegate correctly determined that Steinbach was a "manager" as defined in the *Regulation* and, therefore, he was not entitled to be paid any overtime pay. Thus, the employer says (in its reasons for appeal appended to its appeal form):

> "[The delegate] failed to properly take into account the fact that the payments made to Mr. Steinbach during the first two pay periods he worked for [the employer] included overtime which was not authorized by the Company...We assert, therefore, that the Company was entitled to deduct overtime wrongly paid to Mr. Steinbach from his final pay."

I agree with the delegate that, for the reasons set out in the Determination, the employer was not entitled to simply withhold the monies in dispute from Steinbach's final paycheque on the basis that some four to five months earlier, he had been "overpaid". Such unilateral action on the part of the employer contravenes section 21 of the *Act*.

Further, and in any event, Steinbach alleges that he was, for the first two pay periods, *entitled* to claim overtime pay--as was his practice prior to the change in ownership of the company--and that the new controlling shareholder of the employer specifically agreed to this practice. Although, a "manager" has no legal entitlement to overtime, there is certainly nothing in the *Act* or *Regulation* preventing the parties from agreeing to a pay scheme that includes overtime rates. It must be

recalled that the *Act* and *Regulation* set minimum, not maximum, standards of employment. An employer need not agree to pay its employees an hourly rate above the minimum wage, but, of course, many employers decide to do so and having agreed to pay wages over and above the minimum, will be held liable for the full amount of the wages contractually agreed to be paid. Similarly, "managers" are not entitled to be paid overtime, but nevertheless can, by contract, enter into enforceable agreements with their employers for the payment of overtime wages.

Steinbach alleges that is what occurred in this case; the employer has not presented any *evidence -- i.e.,* something more than a mere denial of the agreement alleged by Steinbach--to suggest that there was no such agreement in place.

ORDER

Pursuant to section 115 of the *Act,* I order that the Determination be confirmed as issued in the amount of $2,045.45 together with whatever further interest that may have accrued, pursuant to section 88 of the *Act,* since the date of issuance.

_____
Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal