

**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-

Vince McDonald

(“McDonald”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE No.:** 98/423

**DATE OF DECISION:** August 25th, 1998

## DECISION

### OVERVIEW

This is an appeal brought by Vince McDonald (“McDonald”) 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 15th, 1998 under file number 088-205 (the “Determination”).

Relying on section 32(1)(f) of the *Employment Standards Regulation*, the Director’s delegate dismissed McDonald’s complaint for unpaid commission earnings. This latter subsection provides as follows:

#### **Employees excluded from the Act**

32.(1) The Act does not apply to any of the following: ...

(f) a person receiving benefits under the *Unemployment Insurance Act* (Canada) as a result of working on a job creation project under section 25 of that Act.

It is apparently conceded by all parties that McDonald’s employment was secured through a job creation program administered by Human Resources Development Canada (“HRDC”) and funded under the auspices of what was formerly section 25 of the federal *Unemployment Insurance Act* (now entitled the *Employment Insurance Act*).

### ISSUE TO BE DECIDED

In his written “reasons for appeal”, McDonald asserts that he was never advised by HRDC, or by the employer, that by accepting the employment in question he would be excluded from the provisions of the *Act*. McDonald says that he had been aware of his legal situation vis-à-vis the *Act*, he would not have accepted the position.

### ANALYSIS

Without in any way suggesting that I doubt the appellant’s assertions contained in his “reasons for appeal”, the fact remains that by virtue of section 32(1)(f) of the *Regulation*, McDonald’s employment was *not* governed by the *Act*--nothing that was said, or not said, by a representative of HRDC or of the employer, can create a legislative entitlement that does not otherwise exist. If McDonald has any claim at all, it lies in a civil action against one or both of HRDC or the former employer.

Although the matter is not before me, I might add that such a claim is probably of dubious legal merit inasmuch as McDonald admits that there was no representation made to him regarding his

status under the *Act* (thus an action for misrepresentation would fail) and I question whether HRDC or the former employer could be characterized as a fiduciary thereby triggering some sort of disclosure obligation.

McDonald does not challenge the delegate's interpretation of the subsection in question, or its applicability in this case. I am of the view that the delegate correctly applied the provisions of section 32(1)(f) of the *Regulation* to the facts at hand and thus this appeal must be dismissed.

**ORDER**

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued.

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