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 -

Stephan Wilson

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 98/543

DATE OF DECISION: September 22, 1998

DECISION

OVERVIEW

This is an appeal by Stephan Wilson, under Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination which was issued on July 20, 1998 by a delegate of the Director of Employment Standards. Stephan Wilson made a complaint against his former employer, Christopher Wilson operating Emcee Yard & Gardens ("Emcee"), alleging that he was not paid wages for work performed on October 1, 1997 and he was required to work without a meal break.

The Director's delegate conducted an investigation and determined that he had "... no evidence to establish that (Mr. Wilson) worked or did not work on October 1, 1997." He also concluded that without proof that Mr. Wilson worked, he could not require Emcee to pay wages.

Mr. Wilson's appeal is based on the following grounds:

- he is not satisfied with the results of the investigation and the manner in which the Director's delegate conducted his investigation;

- his request for an audit of Emcee's business records was ignored;

- and he did not receive a statement of earnings and deductions.

ISSUES TO BE DECIDED

Did the Director's delegate err in determining that Stephan Wilson's complaint did not establish an entitlement to wages under the Act?

FACTS

Stephan Wilson was employed by Emcee from September 16 to September 30, 1997 and was paid a salary of $750.00 semi-monthly. The Director's delegate reviewed Emcee's payroll records and confirmed that Mr. Wilson was paid wages "... up to and including September 30,1997 including vacation pay." He also attempted to contact Steve Whalin, a co-worker/foreman, without success. Following his investigation, the Director's delegate concluded:

> I have no evidence to establish that you worked or that you didn't work on October 1, 1997. Neither do I have any evidence to establish whether or not you took your meal break. The evidence that I do have indicates that you were paid for the period September 16 to 30, 1997. The employer did

> not keep a daily record of hours for you to establish the hours worked each day.
>
> Without proof that you worked on October 1, 1997, I cannot require the employer to pay you for work on that day, nor can I require the employer to pay extra wages for time that you may or may not have had as a meal break.
>
> Your complaint will now be closed on our file.

ANALYSIS

Section 114(1)(c) of the *Act* allows the Tribunal to dismiss an appeal if it is "...frivolous, vexatious or trivial or is not brought in good faith." Black's Law Dictionary (6th edition) defines "frivolous" as:

> A pleading (which) is clearly insufficient on its face and does not controvert the material points of the opposite pleading, and is presumably interposed for mere purpose of delay or to embarrass the opponent. A claim or defense is frivolous if a proponent can present no rational argument based upon the evidence or law in support of that claim or defense.

Similarly, a frivolous appeal is defined as "...one in which no justiciable question has been presented and appeal is readily recognizable as devoid of merit in that there is little prospect that it can ever succeed."

As the appellant, Mr. Wilson bears the onus of proving his case. To have some prospect of meeting that onus Mr. Wilson must submit some evidence or argument which challenges the material point in the Determination. When I review the Determination and Mr. Wilson's submission I find that this appeal is devoid of merit because Mr. Wilson has not made any submission nor given any evidence to challenge or controvert the findings made by the Director's delegate in the Determination. I can find nothing in the Determination to support a conclusion that the investigation conducted by the Director's delegate was improper in any way. Mr. Wilson's request to audit Emcee's business records is not a proper ground of appeal. The alleged failure by Emcee to provide Mr. Wilson with a statement of earnings and deductions is not dealt with in the Determination and, therefore, is not properly before this Tribunal in this appeal.

Emcee's failure to provide Mr. Wilson with a Record of Employment ("ROE") is not a matter which falls within the jurisdiction of the *Act*. An employer's responsibility to provide an ROE falls under the *Employment Insurance Act*, which is federal, not provincial, legislation.

ORDER

I order, under Section 115 of the *Act*, that the Determination is confirmed.

Geoffrey Crampton
Adjudicator
Employment Standards Tribunal