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 -

Chintz & Company Decorative Furnishings Inc.
(" Chintz ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Barry Goff

FILE No: 1999-409

DATE OF HEARING: October 28, 1999

DATE OF DECISION: January 17, 2000

DECISION

APPEARANCES:

Alan Favell	Legal Counsel for Chintz & Company Decorative Furnishings Inc.
David R. Hurst	For Himself
No Appearance for the Director of Employment Standards	

OVERVIEW

This is an appeal brought by Chintz & Company Decorative Furnishings Inc. ("Chintz" or 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 7, 1999 under file number ER 47529 (the "Determination").

The Director's delegate determinated that Chintz & Company had contravened the provisions of Part 2, section 8, of the *Act* by misrepresenting the availability of employment to David Hurst ("Hurst"). Pursuant to Section 79 of the *Act*, Hurst was awarded $12,190.00 and interest of $449.78, or total compensation of $12,639.78.

The Determination constitutes a "make whole" remedy, to compensate Hurst for losses resulting from the contravention of section 8. The Employer's appeal was heard at the Vancouver office of the Tribunal on October 28, 1999, at which time I heard the testimony of Janet Nimmo, operations manager of Absolutely Diapers (Hurst's former employer). Annabelle Cormack and Deborah Johnstone provided testimony for the Employer and Hurst testified on his own behalf.

THE DETERMINATION

The delegate determined that Chintz's offer of employment to Hurst on October 30, 1998 was a misrepresentation of employment. The delegate rejected the employer's assertion that the employment offer was genuine but was later rescinded because of a downturn in business.

The delegate awarded Hurst compensation based on a "make whole remedy". Section 79 of the Act provides the Director with authority to order reinstatement of and compensation for lost wages, and to place a person as closely as possible in the position they would have been in if the breach had not occurred.

Accordingly, the delegate ordered compensation for loss of wages for a 4-month period based on the complainant's previous earnings of $2,000.00 per month, for a total of $8,000.00, and an additional $2,000.00 for the loss of employment. The award also included $1,500.00 for the loss of a dental plan, $690.00 for out-of-pocket expenses, plus interest of $449.78.

FACTS

Janet Nimmo, the operations manager for Absolutely Diapers, Hurst's former employer, gave evidence under subpoena which confirmed Hurst served a 3-month probation period which commenced about August 8, 1998, and would have received medical benefits at the completion of three months. He did not receive a performance review. Hurst gave notice to Wanda McDonald, the store manager, on October 30, 1998. His last day of work was November 13, 1998. Nimmo reviewed the store's needs after Hurst's departure and concluded that he was not the type of candidate Absolutely was looking for. McDonald took over Hurst's duties on his departure. Hurst wrote his own letter of reference and McDonald signed it without authorization from anyone in authority at Absolutely. Nimmo was aware that Hurst did not fill the position at Chintz.

Annabelle Cormack, a 15-year veteran of the retail trade, has spent two years as a general manager for Chintz. Cormack testified that the key season for Chintz is Fall and Christmas. Cormack stated that sales were up by 32% in July and by 18% in August. Based on these increases, a decision was made in the latter part of September to increase staff and increase store hours from 10:00 a.m. to 6:00 p.m. to 10:00 a.m. to 8:00 p.m. The decision called for two new employees, one for each floor. Chintz operates two businesses. The main floor caters to the retail trade and the lower floor serves the designer trade.

Cormack has the authority to hire and fire. She sought help from the Calgary operation which provided Hurst's name as a candidate. Cormack called Hurst from Calgary. They met on Saturday, October 3rd. According to Cormack, it is store policy to conduct two interviews. At the first interview Hurst provided a resume and filled in his background. Cormack talked about the company philosophy, its commission structure, and how the store was establishing its niche in the market. She stated that Hurst informed her that Absolutely was not his long range plan.

Cormack stated she did not make a formal offer of employment to Hurst and said nothing that would have led Hurst to believe she had offered employment any time prior to October 30. Debbie Johnstone conducted the second interview with Hurst but felt he was not the candidate for her department. Cormack stated she contacted Hurst after the Johnstone interview and advised that Chintz would not be using him in the design department.

Cormack made reference checks on Hurst about a week before October 30th. Cormack called Hurst on the 30th to say she was interested in bringing him on board in sales. She states Hurst told her he had given his notice to Absolutely. The two met on October 31st and signed a contract of employment. Hurst was to start on November 24, 1998. During the discussion, Hurst advised Cormack he would be travelling to Toronto.

According to Cormack, the store's sales volume and customer traffic had trended down at the end of October. After seeing the figures for October, Cormack concluded that an added salesperson would not be beneficial. Cormack said this was a judgment call based on the fact that sales people at Chintz are on 100% commission. A downtrend in sales meant that commission would be reduced for existing staff. She contacted Hurst on November 21st to

advise him not to report to work and explained her reason for the decision. Cormack stated she did not contact Hurst any earlier because she knew he was in Toronto.

Cormack stated that in her view an offer of employment had to be written, and company policy required that all offers of employment be made in writing.

Johnstone, the soft furnishings manager for Chintz, interviewed Hurst on October 9th. She described the interview as a general discussion on the duties and expectations of the position and a review of Hurst's resume. Johnstone decided Hurst was not the appropriate candidate for her department. On the following day, Mr. Brad Malenchuk was hired as a design associate to fill the design floor position.

Hurst testified he called Johnstone on October 29th, seven days after his references had been checked. Hurst maintained that Johnstone told him Cormack would call on the following day as they had reached a decision on the department. In his view, the final decision for his employment with Chintz was confirmed by Johnstone. Cormack called the next day, October 30th, and requested Hurst to sign a contract on the 31st. Hurst gave his store manager, Wanda McDonald, notice on October 30th. He was shocked to learn on the 21st of November that he would not be employed. Cormack told him it would be suicide to come on board.

On cross-examination Hurst stated that Absolutely was a long term position. His probation period with Absolutely was completed by November 13th, his last day of work. He stated that he booked his trip to Toronto at the beginning of October. He began looking for a new job on November 23rd.

Hurst agreed that no specific offer of employment was made by Johnstone but he remembered the words "fit" and "retail and sales", and Cormack saying she wanted him to talk to Johnstone.

Counsel for Chintz argued that, to support a finding of misrepresentation, there must be evidence that Cormack knew there was no job and offered it anyway. The evidence supported her belief that a job was available. The sales were up in Summer supporting the need for additional staff for the key Fall/Christmas season.

Counsel submits the hire date of Hurst as employee and his rights as an employee became effective on October 31st. The Employer has the right under the Act to terminate employment. The obligation to provide notice arises only after three months' employment. Therefore, it does not matter if Hurst was terminated on November 21st, 24th or 25th. Legally, the relationship can be terminated at the option of the Employer.

Hurst submits that he signed a contract for employment which constitutes an inducement. In spite of the contract, he never worked and never received a benefit of any kind. In short, he signed for a job that did not exist. The Employer, therefore, misrepresented the availability of a position. Hurst states that he had a secure position with Absolutely and would not have left it without the position offered by Chintz. He would have cancelled the Toronto trip if he had known that a position was not available on his return. He would also have been eligible for dental benefits if he had remained at Absolutely.

ISSUE TO BE DECIDED

Did Cormack misrepresent the availability of a position, and, if so, what damages are appropriate?

ANALYSIS

Part 2, section 8, of the *Act* provides:

> "An employer must not induce, influence or persuade a person to become an employee, or to work or to be available for work, by misrepresenting
>
> (a) the availability of a position,
>
> (b) the type of work,
>
> (c) the wages, or
>
> (d) the conditions of employment."

In this case, Chintz & Company is alleged to have breached section 8 by misrepresenting the availability of a position. There is no argument concerning a breach of (b), (c) or (d) above.

The Tribunal has confirmed in previous decisions that section 8 is a pre-hiring provision. The protection under the Act and in case law (see *Queen v. Cognos Inc*. (1993), 99 D.L.R. (4th) 626 (S.C.C.)) covers only pre-hiring practices. The key words in this pre-hiring provision are "by misrepresenting". The words preceding "by misrepresenting" are not prohibited forms of conduct. In other words, an employer may induce, influence or persuade a person to become an employee without breaching section 8 provided that no misrepresentation of the availability of a position, the type of work, the wages to be paid, or the conditions of employment has been made during the pre-hiring process.

Black's Law Dictionary defines "misrepresentation" as follows:

> "**Misrepresentation**. Any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts. An untrue statement of fact. An incorrect or false misrepresentation. That which, if accepted, leads the mind to an apprehension of a condition other and different from that which exists. Colloquially it is understood to mean a statement made to deceive or mislead.
>
> In a limited sense, an intentional false statement respecting a matter of fact, made by one of the parties to a contract, which is material to the contract and influential in producing it. A "misrepresentation" which justifies the rescission of a contract, is a false statement of a substantive fact, or any conduct which leads to a belief of

> a substantive fact material to proper understanding of the matter in hand, made with intent to deceive or mislead."

Anson's *Law of Contract* 24th Edition (1975) at p. 227 provides the following meaning of "misrepresentation":

> "An operative misrepresentation consists in a false statement of existing or past fact made by one party before or at the time of making the contract, which is addressed to the other party and which induces the other party to enter into the contract."

The foregoing are the basic definitions of misrepresentation. Where misrepresentation is found to have occurred in law, there are further refinements: for example, fraudulent misrepresentation, negligent misrepresentation, and innocent misrepresentation.

The Director's delegate concluded correctly that an employer's intention was not relevant when determining if a misrepresentation had occurred. However, I disagree with the delegate's conclusion that a misrepresentation occurred in this case.

Cormack has 15 years' experience in the retail industry. In her experience, Fall and Christmas are the significant periods for the Chintz operation. A significant increase in sales in July and August prompted the conclusion that more staff would be required to meet the Fall and Christmas demands. Cormack proceeded to meet this requirement, by seeking recommendations for new staff from the Calgary operation of Chintz and by calling prospective candidates. Cormack met Hurst on Saturday, October 3. Johnstone interviewed Hurst on October 9. The two discussed job duties, expectations and Hurst's resume. Johnstone did not offer employment to Hurst in her department as she concluded that he was not the appropriate candidate. Cormack and Johnstone concluded that Mr. Brent Malenchuk was an appropriate choice for Johnstone's department and he was hired on the following day. On October 10, 1998, Malenchuk signed a contract of employment with Chintz and he remains employed by Chintz. Shortly after Malenchuk was hired, Cormack took a vacation. On her return, she checked and confirmed Hurst's references. The parties differ on who made the reference checks. Hurst testified that his references advised him that Johnstone had called them. He also maintained that Johnstone had spoken with him on October 29, 1998. Johnstone denied speaking with Hurst at any time after the interview of October 9, and stated it was not her job to check references.

In my view, nothing turns on deciding who made the calls. There is no dispute that Hurst's references were contacted by Chintz and shortly thereafter Hurst was offered employment.

There is also a dispute between the parties as to when the offer was made. Hurst maintains that it was made early on but Cormack maintains that it was company policy that all offers of employment must be in writing which would make the date of the offer October 31, 1998. Johnstone stated much the same thing.

In the context of this case, deciding who is correct is not crucial. However, I prefer the position of Johnstone and Cormack. It is the more logical and in keeping with the normal practice of interviews, reference checks, and offers of employment. That is not to say that I doubt the

sincerity of Hurst's feelings on the matter. He was scouted by Chintz and received positive feedback in the interviews. It was not unreasonable for him to believe that a job offer was implicit in the process, albeit not in explicit verbal or written terms.

Hurst was hired and signed an offer of employment with Chintz on October 31, 1998, with employment to commence November 24, 1998.

The original decision of Chintz to hire two employees was completed. On October 10, Malenchuk was hired and, on October 31, Hurst was hired. On October 31, 1998, Hurst had a contract of employment with Chintz and this was the clear end of his pre-hiring process which took place from October 3 to October 31. For a violation of section 8 to be found, it is in this period that evidence of misrepresentation must be present.

The evidence does not support the conclusion that a job for Hurst was not available on October 31st, 1998. Cormack reviewed the sales figures for the month of October some time in early November. They were unexpectedly low, which led her to conclude that an additional sales person would not be appropriate. The sudden drop in sales was an intervening event which belied the earlier and substantial surge in the Summer months. It could not have been predicted by the Employer nor was the Employer reckless in its initial decision to hire Hurst based on the earlier sales figures. The job offer was based on an assertion of the facts at the time Hurst was hired. A change in the facts at a later date cannot be recast as a misrepresentation in the hiring process.

I conclude that Cormack did not misrepresent the availability of a position in the pre-hiring discussions with Hurst.

The termination of Hurst's employment may well be an actionable breach of contract although I make no such finding. However, the offer of employment was not made on the basis of a misrepresentation by Chintz.

I note that counsel for Chintz made a forceful and compelling argument on the issue of damages. In view of my decision to cancel the Determination which set out damages, I have made no reference to that argument.

ORDER

I hereby order that Determination ER47529 be cancelled pursuant to section 116(1)(b) of the Act.

BARRY GOFF

Barry Goff
Adjudicator
Employment Standards Tribunal