

An appeal

- by -

Agropur Cooperative carrying on business as Island Farms  
(“Agropur”)

- of a Determination issued by -

The Director of Employment Standards  
(the “Director”)

pursuant to Section 112 of the  
*Employment Standards Act* R.S.B.C. 1996, C.113 (as amended)

**TRIBUNAL MEMBER:** David B. Stevenson

**FILE No.:** 2009A/135

**DATE OF DECISION:** December 8, 2009

## DECISION

### SUBMISSIONS

Gordon Brougham	on behalf of Agropur Cooperative carrying on business as Island Farms
Bruce G. Fairweather	on his own behalf
Robert Krell	on behalf of the Director of Employment Standards

### OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Agropur Cooperative carrying on business as Island farms (“Agropur”) of a Determination that was issued on September 21, 2009, by a delegate of the Director of Employment Standards (the “Director”). The Determination found that Agropur had contravened Part 2, Section 8 of the *Act* in respect of the employment of Bruce G. Fairweather (“Fairweather”) and ordered Agropur to pay Fairweather an amount of \$5,619.00.
2. An administrative penalty was imposed on Agropur under Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$500.00.
3. The total amount of the Determination is \$6,119.00.
4. The Determination was issued following an investigation in which Fairweather and a representative (or representatives) of Agropur were interviewed and provided the opportunity to present information and state their respective positions.
5. Agropur says the Director erred in law and failed to observe principles of natural justice in making the Determination. Agropur says the Tribunal should cancel the Determination or refer the matter back to the Director.
6. None of the parties has suggested the Tribunal conduct an oral hearing on this appeal and, having reviewed the appeal, the submissions and the material submitted by all of the parties, including the Section 112 (5) Record filed by the Director, I have decided an oral hearing is not necessary in order to decide this appeal.
7. If I find there is merit to the appeal, I can exercise any of the powers set out in Section 115 of the *Act*, including changing or varying the Determination or referring the matter back to the Director.

### ISSUE

8. The issues are whether the Director failed to observe principles of natural justice in making the Determination or erred in law in finding Agropur contravened section 8 of the *Act* and in calculating the wages owed as a result of the contravention.

## FACTS

9. The Determination indicates the facts of the complaint were relatively straightforward and not in dispute. The Determination sets out the following background and other facts:
  1. Agropur operates a dairy business in Victoria, BC;
  2. Fairweather applied for a maintenance position at Agropur's Victoria operations on October 30, 2008;
  3. He was interviewed on November 24, 2008;
  4. A series of e-mails passed between Fairweather and Jody Whyte ("Ms. Whyte"), a Human Resources Generalist for Agropur, between December 7, 2008 and January 15, 2009;
  5. A meeting involving Fairweather and representatives of Agropur occurred on January 16, 2009 during which Fairweather was presented with a formal written offer of employment which, on reflection, he decided not to take.
10. On the facts the Director found that Agropur had influenced Fairweather into terminating the employment he had prior to December 18, 2008 in order to be available for work with Agropur from that date. The Director reasoned that although Agropur had not intentionally influenced Fairweather into quitting his employment, the statements and conduct of Agropur created an understanding in Fairweather that he should be available to commence work for Agropur work as of December 18, 2008 and required Agropur to take steps to notify Fairweather if that was not the case.
11. The Director found Agropur's statements and failure to correct Fairweather's obvious misunderstanding was a contravention of section 8. The Determination also notes there was uncontroverted evidence that Fairweather suffered a wage loss in the period from December 18, 2008 to January 19, 2009 and awarded an amount covering that period, based on the number of hours lost at the wage rate he was receiving at his previous employment.

## ARGUMENT

12. Agropur argues there was a failure by the Director to observe principles of natural justice; that the entire focus of the investigation by the Director was on whether Agropur had misrepresented the availability of a position at Agropur, but the Director decided the complaint more on whether Agropur had misrepresented a "condition of employment" – specifically the starting date for the position – without providing Agropur with an opportunity to speak on that point.
13. Agropur then argues the Director erred in finding there could be a violation of section 8 from December 18, 2008, as the "evidence submitted by Mr. Fairweather clearly indicates that he is not available for work this date." Agropur also says there is, in effect, no evidence that Agropur made a job offer to Fairweather; that the communications between Ms. Whyte and Fairweather clearly contemplated the creation of a future document which would be the job offer and which would detail the conditions of employment, including the start date. Agropur argues that the decision made by Fairweather to quit his job is not their responsibility. Finally on this point, Agropur argues that while there might have been some confusion created about future employment, there was no misrepresentation by Agropur. Agropur suggests the failure by Ms. Whyte to respond to Fairweather's e-mails was a conscious decision made to ensure Fairweather was not being misled about the job or that the company was not misrepresenting the job.

14. In the alternative, Agropur submits that if the Determination is not cancelled, it should at least be varied to reduce the amount of the wage loss found by the Director. Agropur says this result is appropriate because Fairweather “worked in a camp environment”, “was returning to Nanaimo and would not have worked the full period of December 18<sup>th</sup> to January 19<sup>th</sup> anyway.”
15. Agropur says the Tribunal should cancel the administrative penalty because there is “no administrative or legal reason as to why it should be applied.”
16. The Director has filed the section 112 (5) Record and has made no submission.
17. Fairweather has filed a response indicating the submission of Agropur is selective in its reference to the e-mail communications between Ms. Whyte and him. He disputes the suggestion that he was not available for work on December 18. He says the amount awarded to him as lost wages does not represent “a full months’ work” as suggested by Agropur, but two weeks’ camp employment. He also says he lost three statutory holidays by leaving his employment on December 18, which were not included by the Director in the calculation of his wage loss.

## ANALYSIS

18. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in subsection 112(1) of the *Act*, which says:
  112. (1) *Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*
    - (a) *the director erred in law;*
    - (b) *the director failed to observe the principles of natural justice in making the determination;*
    - (c) *evidence has become available that was not available at the time the determination was made.*
19. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds. A party alleging a denial of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.
20. In this case, Agropur has argued the Director failed to observe principles of natural justice in making the Determination. In the context of the natural justice issue as it arises in this case, the obligation of the Director was to provide Agropur with an opportunity to know the case against them; the right to present their evidence; and the right to be heard by the decision maker. This ground of appeal is based on the contention by Agropur that misrepresenting a “condition of employment” was never debated or discussed. That contention does not, however, appear to be supported in the Determination.
21. It is apparent from the Determination that the “condition of employment” being considered by the Director was the matter of a start date for employment with Agropur. The Director found that matter had, by statements and conduct, been misrepresented to Fairweather by Ms. Whyte. It is also apparent from the Determination that Agropur took a position on that matter, contending, as indicated in the Determination, that “at no time before January 16, 2009 did Agropur suggest a start date”. While the Director did not accept that contention, the foregoing reference is some evidence that the matter of the start date was addressed to

some extent by Agropur during the complaint process, suggesting there was both opportunity provided and opportunity taken to discuss that matter.

22. Against the above, Agropur has not provided any evidence to the contrary. The onus on this ground of appeal is on Agropur and I find that onus has not been met.
23. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03. The Tribunal has adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):
1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
  2. a misapplication of an applicable principle of general law;
  3. acting without any evidence;
  4. acting on a view of the facts which could not reasonably be entertained; and
  5. adopting a method of assessment which is wrong in principle.
24. In respect of the argument by Agropur that the Director erred in finding the contravention of section 8 dated from December 18, 2008, that finding is a finding of fact and, as indicated above, is a matter over which the Tribunal has limited authority on appeal. The burden on Agropur in this appeal is to demonstrate such a finding was either made on no evidence or on a view of the facts which could not reasonably be entertained. While Agropur might quarrel with the Director finding Fairweather was available for work on December 18, 2008, there was evidence provided by Fairweather on which that finding could be made and the finding made was specifically grounded in that evidence. Accordingly, there is no error of law shown and no authority for the Tribunal to consider this argument.
25. The same considerations apply to the argument that Agropur made no offer of employment to Fairweather prior to the formal written offer made on January 16, 2009. On the evidence, the Director was entitled to find an offer of employment had been made to Fairweather through the exchange of e-mails between him and Ms. Whyte prior to December 18, 2008. No reviewable error has been shown.
26. Agropur contends there was no misrepresentation. Section 8 of the *Act* provides:
- 8** *An employer must not influence or persuade a person to become an employee, or to work or to be available for work, by misrepresenting any of the following:*
- (a) *the availability of a position;*
  - (b) *the type of work;*
  - (c) *the wages;*
  - (d) *the conditions of employment.*

27. Section 8 is a pre-hiring provision and its protection covers only pre-hiring practices. That is not an issue in this case. The provision does not prohibit an employer from inducing, influencing or persuading a person to become an employee, provided that in so doing there is no misrepresentation of any of the four matters identified: the availability of a position, the type of work, the wages and the conditions of employment. The Tribunal has adopted and applied a basic legal definition of misrepresentation when considering whether an employer has misrepresented any of those four matters: see *Chintz & Company Decorative Furnishings Inc.*, BC EST # D007/00; *Jeff Parsons*, BC EST # D110/00; *CYOP Systems International Incorporated and others*, BC EST # D02/03. That definition describes misrepresentation in the following terms:

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 or 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.

28. In *Chintz & Company*, *supra*, the Tribunal acknowledged that a misrepresentation may be fraudulent, negligent or innocent. In *Parsons*, *supra*, the Tribunal stated the employer's intention is not relevant to whether there has been a contravention of section 8. The definition of misrepresentation adopted for section 8 indicates the matters of primary relevance are the untruth of the statement, its materiality to the contract and its influence on the party to whom it is made. The intention of the employer may bear on the remedy, but not on whether there has been a misrepresentation made.

29. While the Director's analysis could have been more focussed, I accept the Director found there was a representation by Agropur to Fairweather, by words and conduct, that he was being offered employment which would commence imminently, that the representation was not true, that Agropur did not intend to misrepresent, but the misrepresentation induced Fairweather to accept immediate employment with Agropur was being offered and to terminate his existing employment in order to make himself available to commence work by December 18.

30. I also accept that the representation made falls within the definition of misrepresentation applied by the Tribunal in the context of section 8. The argument made by Agropur on this point assumes the representation arises only in the words used, rather than in the words used, their obvious effect on Fairweather and in Agropur's conduct in failing to advise him that had misapprehended the words used, that there was no imminent employment and that he should not take the course of action he had planned. Instead, Agropur's failure allowed Fairweather to continue to act on a belief in a set of facts that Agropur had generated and which they knew was not correct.

31. The Director has made no error of law in finding there was a misrepresentation by Agropur.

32. Agropur argues that even if there was contravention of section 8 of the *Act*, the remedial portion of the Determination should be varied. Once again, while the reasons provided in the Determination could have been clearer, I conclude the Director exercised the authority provided in section 79(2)(c) in deciding to require Agropur to pay Fairweather the amount of \$5,619.00. That provision states, in part that if the Director finds a contravention of section 8, in addition to the remedies available in subsection (1), the Director may order the employer to:

(c) *pay a person compensation instead of reinstating the person to employment;*

33. While the Director has tied the amount of compensation to the wage loss “on undisputed evidence” provided by Fairweather, the Director was not compelled to tie such compensation exclusively to Fairweather’s wage loss. Having said that, the compensation awarded to Fairweather was based on evidence provided and the amount accepted by the Director as appropriate compensation was a finding of fact. Agropur has not shown the Tribunal has authority to review that finding. I will also note in this respect that while Fairweather may also disagree with the compensation awarded by the Director, he has filed no appeal of the Determination and, in the absence of an appeal by him that is shown to fall within one of the grounds of appeal in section 112, I have no basis for giving consideration to this expressed disagreement.
34. Finally, Agropur says the Tribunal should cancel the administrative penalty imposed for the contravention of section 8. Administrative penalties imposed under the *Act* are mandatory. As stated by the Tribunal in *Marana Management Services Inc. operating as Brother’s Restaurant*, BC EST # D160/04:
- Once the delegate finds a contravention, there is no discretion as to whether an administrative penalty can be imposed. Furthermore, the amount of the penalty is fixed by Regulation. Penalty assessments are mandatory and are thus not subject to mediation. . . .
- As the Tribunal recently noted in *Summit Security Group Ltd.*, BC EST # D059/04, (Reconsidered in BC EST # D133/04), administrative penalties under the *Act* are part of a larger scheme designed to regulate employment relationships in the non-union sector. The Tribunal determined that penalties are generally consistent with the purposes of the *Act*, and the design of the penalty scheme established under section 29 meets the statutory purpose of providing fair and efficient procedures for the settlement of disputes over the application and interpretation of the *Act*.
35. Accordingly, the Director, having found a contravention of the *Act*, was required to impose an administrative penalty and the Tribunal, having upheld that finding, has no authority to relieve an employer from the statutory requirement to pay that administrative penalty.
36. In sum, the appeal is dismissed.

## ORDER

37. Pursuant to Section 115, I order the Determination dated September 21, 2009, be confirmed in the amount of \$6,119.00, together with any interest that has accrued under Section 88 of the *Act*.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**