

**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 -

Thomas I. Hosie

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

<b>ADJUDICATOR:</b>	ohn M. Orr
<b>FILE No:</b>	1999/260
<b>DATE OF HEARING:</b>	July 22, 1999
<b>DATE OF DECISION:</b>	August 11, 1999

## DECISION

### APPEARANCES

Thomas I. Hosie	On his own behalf
Brian Mayzes	On behalf of The Range Neighborhood Pubs Ltd operating as the Esquimalt Inn

### OVERVIEW

This is an appeal by Thomas I. Hosie ("Hosie") pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") from a Determination (File No. 040913) dated April 09, 1999 by the Director of Employment Standards (the "Director").

Hosie was a "line cook" employed by the Six Mile Pub in the Spring of 1998. The Range Neighborhood Pubs Ltd ("Range") operated a competing business called the Esquimalt Inn. In May of 1998 Hosie entered into discussions with Brian Mayzes ("Mayzes"), the manager employed by Range, about moving to work at the Esquimalt Inn. Hosie claims that certain inducements and representations were made to persuade him to move from the Six Mile Pub to the Esquimalt Inn. He gave his notice and terminated his employment at the Six Mile Pub but never commenced work at the Esquimalt Inn. Hosie claims that the employer never fulfilled the terms of the anticipated employment contract and was in breach of Section 8 of the *Act*.

The Director's delegate determined that the employment contract was frustrated and that the employer did not breach section 8 of the *Act*. Hosie has appealed on the basis that the delegate erred in several findings of fact and misapplied section 8 of the *Act*. Hosie added a further submission after his initial appeal alleging that the delegate wrongly applied the contractual principle of "frustration".

### ISSUE TO BE DECIDED

The issues to be decided in this case are whether Range was in breach of section 8 in its dealings with Hosie and, if so, what compensation is owing to Hosie.

A further issue arose, for the first time at the hearing, which put in question whether Range was in fact the employer.

### FACTS AND ANALYSIS

Section 8 of the Act provides as follows:

***No false representations***

8. *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 any of the following:*

- (a) the availability of a position;*
- (b) the type of work;*
- (c) the wages;*
- (d) the conditions of employment.*

In this case Hosie says that he was induced, influenced and persuaded to leave his employment at the Six Mile Pub to take up the offered position at the Esquimalt Inn by the representations made by Mayzes that there would be a brand new kitchen installed at the Inn and that he would be working in the new kitchen. Hosie says that Range did not deliver on this representation and the employment did not materialize as promised. Hosie claims substantial loss from the failure of Range to deliver on its promise.

Mayzes, and, through him, Range do not deny that such a representation was made and that there was every intention of a new kitchen being built. In fact a new kitchen was eventually built. The real difference in view point is a matter of the chronology of events.

The agreement between Hosie and Range was made on or before May 11, 1998. On May 11, 1998 Hosie gave notice at the Six Mile Pub to terminate his employment as of May 25, 1998. The representation about the new kitchen at the Inn was that it would not be built until June 16th. However, Hosie testified at the hearing that he agreed to start work at the Inn on Monday, June 8th and he further conceded that he knew that this work would be in the old kitchen.

It is important to note that Hosie was familiar with the existing kitchen set-up at the Inn as he had visited the Inn and had worked there as casual on May 15th.

On June 7th Hosie phoned the Inn and spoke to Tim Lewis ("Lewis") who was the current operator of the kitchen and asked Lewis whether the new kitchen was built yet. Hosie was told that the kitchen was not yet built. Hosie then said that the situation was "unacceptable" and he declined to report to work as agreed on June 8th.

Hosie did not speak to Mayzes or a representative of Range about his failure to report to work. On June 15th Hosie again called Lewis who said that because Hosie had not reported to work on June 8th he had hired other help. Lewis also advised Hosie that the kitchen work was delayed and would not be finished until June 28th.

Hosie again called Lewis on June 27th. The new kitchen was not yet built and Lewis had hired other people to help him. The employment situation did not materialize as Hosie did not follow-up

any further. In fact the kitchen was not finished until September.

Mayzes testified that, if Hosie had reported to work on June 8th as agreed he would still be employed. He would have had the new kitchen by September as promised. Mayzes testified that there were only "target dates" for completion of the new kitchen but no firm commitment on completion dates as there were delays due to permits and customs.

Mayzes also raised an issue that had not been dealt-with earlier in the investigation primarily, it would appear, through inadvertence. Mayzes testified that the kitchen operation at the Inn was leased-out. The kitchen was not in fact operated by Range but by a lessee, T. Lewis Foods Ltd. On the one occasion that Hosie worked in the kitchen, May 15th, he was paid by Lewis and not by Range.

Hosie presented a brief of authorities dealing with the issue of "frustration of contract" and I agree with his submission that the principles associated with the law of frustration have no application to the facts of this case. Where the delegate referred to, or relied upon, the notion of frustration he was in error. However I must still consider whether the employer was in breach of section 8 as alleged.

On this latter basis I agree with the delegate. There is no doubt that Mayzes made representations to induce Hosie to change employment but Hosie terminated the employment himself by declining to report to work on June 8th. Hosie agrees that the earliest date the new kitchen was promised was June 16th. He had no grounds to allege a misrepresentation on June 8th. Weighing the evidence before me I would find that there was no fixed date for the new kitchen to be finished and that Hosie agreed to commence work on June 8th knowing that the kitchen would be completed sometime thereafter. His announcement on June 7th that it was "unacceptable" for him to commence employment before the new kitchen was completed was a unilateral termination of the employment contract.

I conclude that Mayzes did not make any *misrepresentations* to Hosie that would constitute a breach of section 8 of the *Act*.

In light of the foregoing conclusion it is not central to this decision whether the contemplated employer was Range or Lewis. However, if my decision were reconsidered or set aside this issue would require some investigation.

## **ORDER**

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

**John M. Orr**  
**Adjudicator**  
**Employment Standards Tribunal**