

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 -

Irving M. Kirsch

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: John M. Orr

FILE No: 1999/451

DATE OF HEARING: October 12 1999

DATE OF DECISION: October 21, 1999

DECISION**APPEARANCES:**

Irving M. Kirsch	On his own behalf
David Wright	On his own behalf
Gerry Omstead	Delegate of the Director

OVERVIEW

This is an appeal by Irving M. Kirsch ("Kirsch") pursuant to Section 112 of the Employment Standards Act (the "*Act*") from a Determination (No. 093047) dated June 29, 1999 by the Director of Employment Standards (the "Director").

Kirsch owns an apartment building in Victoria with 16 rented suites. For many years he had a resident caretaker, Jan Bigelow ("Bigelow") who planned to leave her position sometime in the Fall of 1998. In September 1998 Bigelow told David Wright ("Wright"), one of the other tenants in the building, that she was giving up the position as the apartment manager. Wright was immediately interested in taking over the position. After several phone calls Wright believed that the position was given to him but on October 31, 1999 he was advised by Bigelow that Kirsch had given the position to a different person. Wright complained to the Employment Standards Branch that Kirsch was in breach of section 8 of the *Act*.

The Director's delegate investigated Wright's complaint and determined that Wright had been offered the job as the apartment manager and that the employer, Kirsch, had violated the section 8 of the *Act*. The Director awarded Wright the equivalent of one month's wages.

Collaterally to the employment standards investigation there was also a complaint under the *Residential Tenancy Act*. Wright had not paid his rent for the month of November 1998 because he believed that he had been employed as the apartment manager and the consideration for that position included free rent. Eviction proceedings were commenced against Wright for non-payment of rent but the residential tenancy arbitrator believed Wright and awarded him one month's free rent.

Kirsch has appealed on several grounds. Firstly he contends that he never offered the position to Wright and secondly that even if the position was offered there was no breach of section 8 of the *Act*. Kirsch further submits that the award made by the Director to Wright amounted to a double indemnity to him in light of the residential tenancy award.

ISSUES TO BE DECIDED

The issues to be decided in this case are whether the Director made any error in concluding that Kirsch had offered the position to Wright and, if so was there a breach of section 8 of the *Act*, and whether the Director's award amounted to a double indemnity.

THE FACTS AND ANALYSIS

The facts were in dispute as to whether Wright had ever been offered the position at all. It was admitted that Bigelow had told Wright about the position and that Kirsch had talked to Wright on the telephone and had given him many details about the position. It was also clear that Kirsch planned to travel from Montreal to Vancouver to conduct an interview for the position. Wright's interview was cancelled and Kirsch hired another applicant. However, it appears that Kirsch changed his mind about this initial successful applicant and then hired another person other than Wright. Wright testified that after the initial successful applicant was not given the job that Bigelow told him that he now had the position. Wright testified that he had another conversation on the telephone with Kirsch during which Kirsch confirmed that Wright had the job and that an interview was not necessary. Kirsch denies that this confirmation occurred and testified that Bigelow had told him that Wright smoked marijuana and that he had no intention of ever giving Wright the job.

Wright testified in an open, forthright, and apparently honest manner and I have no doubt that he honestly believed that he had been offered the position. On the other hand Kirsch was equally persuasive that he never intended to offer the position to Wright. It is difficult to reconcile the two perceptions but I do not find it necessary to do so in light of my findings on the interpretation of section 8 of the *Act* as follows in this decision.

Section 8 of the *Act* provides as follows:

PART 2

Hiring Employees

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 the Determination the Director's delegate states:

From all the information provided to me in this investigation there is no doubt that Mr Wright was offered the job as manager on not just one occasion but on two occasions. That offer laid out the terms and conditions of the employment relationship, including the commencement date of the employment. I find that the employer violated Section 8 of the Act.

However, the delegate does not indicate in what manner the employer misrepresented any of such terms of employment. The Determination does not identify how the employer "induced" "influenced" or "persuaded" Wright to become an employee.

On the evidence before me I am satisfied that the employer has established that he did not in any way induce, influence, or persuade Wright to become an employee. I am also satisfied that there were no

misrepresentations of any aspects of the position.

Wright was very familiar with all aspects of the position and testified that he was enthusiastic about applying before he had any communication with Kirsch. He also testified, in answers to questions put to him by Kirsch, that there were no inducements offered, no influence exerted, nor any persuasion involved by the employer.

The mere offer of a job and subsequent retraction of that offer does not constitute a breach of Section 8 of the *Act*. I do not have to decide whether or not there was in fact an offer and acceptance of the job because that alone would not give rise to a remedy under the legislation.

I find that the Determination does not substantiate a foundation for a remedy and that the Determination must be cancelled. As a result of this finding I do not have to decide whether the award constituted a double indemnity.

ORDER

Pursuant to Section 115 of the *Act* I order that the Determination is cancelled.

John M. Orr
Adjudicator
Employment Standards Tribunal