

**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 -

Ralph Nachbaur  
(“ Nachbaur ”)

- of a Determination issued by -

The Director Of Employment Standards  
(the “Director”)

**ADJUDICATOR:** Hans Suhr

**FILE NO.:** 97/685

**DATE OF DECISION:** October 9, 1997

**DECISION**

**OVERVIEW**

This is an appeal by Ralph Nachbaur (“Nachbaur”), under Section 112 of the *Employment Standards Act*, the (“*Act*”), against a Determination dated September 2, 1997 issued by a delegate of the Director of Employment Standards (the “Director”). Nachbaur alleges that the delegate of the Director erred in the Determination by concluding that Coldwell Banker Rosling Real Estate (“Rosling”) did not misrepresent the availability of a position to him.

**ISSUE TO BE DECIDED**

Did Rosling misrepresent the availability of a position to Nachbaur ?

**FACTS**

Ben Arcuri, (“Arcuri”) of Rosling wrote a letter dated May 8, 1996 which was copied to the Appeal Division, WCB in which he states “Coldwell Banker, Castlegar office, foresees a growing need for Property Management and will be able to offer such a position to Mr. Nachbaur upon completion of the real estate sales person (Property MGT) course offered through UBC.

Nachbaur wrote the exam on March 13, 1997 and learned on April 10, 1997 that he had not passed the exam.

Nachbaur re-wrote the exam in Vancouver on April 28, 1997 and learned on May 2, 1997 that he had passed the exam on this occasion.

Nachbaur appeared at Rosling’s office on May 5, 1997 to discover that another individual, Randall Popoff (“Popoff”) had been hired to fill the position of Property Manager.

Nachbaur contends in his submission accompanying this appeal that he informed Cordell Shattenkirk (“Shattenkirk”), the manager of Rosling, that he had not passed the exam written on March 13, 1997 but had made arrangements to re-write the exam in Vancouver on April 28, 1997.

With respect to the issue of notifying Rosling of his failure to pass on March 13, 1997, Nachbaur has provided contradictory information in earlier submissions dated May 10, 1997 and July 3, 1997 to the Employment Standards Branch office in Nelson. Nachbaur stated on May 10, 1997 that “I informed the Manager at Coldwell Banker, Cord Shattenkirk, of this and that I would make a special trip to U.B.C. to re-write my initialed (sic) to exam”. However, in the submission dated July 3, 1997, Nachbaur states “If I were to schedule for the next available exam in Castlegar, I would have to wait until June 3, 1997. The other option offered, was to do my entialed (sic) re-write in Vancouver at B.C.I.T. which I did on April 28, 1997. **This was relayed to Cord by Rick Miller**(my nieghbor) (sic) who is a realestate sales person also employed at Coldwell Banker”.

Rick Miller (“Miller”), the neighbour of Nachbaur, confirms in a letter dated August 15, 1997 to the delegate of the Director that “I remember Ralph (Nachbaur) telling me about re-writing the exam. I remember relaying this fact to Cord. I do not remember the exact time frames”.

Shattenkirk confirms that he was advised that Nachbaur had failed the March 13, 1997 exam by “one of my salespeople”.

Shattenkirk states that he did not hire Popoff until after he had discovered that Nachbaur had failed. Shattenkirk states that Nachbaur did not inform him of the intention to re-write the exam on April 28, 1997.

## **ANALYSIS**

The burden of proving that the delegate of the Director erred in the Determination rests with the appellant, Nachbaur.

The relevant provision of the *Act* is Section 8 which states:

*Section 8, No false representations*

*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.*

The reasons for appeal submitted by Nachbaur do not contain any evidence which had not been already provided to the delegate of the Director.

The offer of a job was **subject to Nachbaur completing the required course**. Nachbaur did not complete the course as he failed the exam written on March 13, 1997.

There is no evidence that Nachbaur directly advised Rosling that he had failed the exam and had made arrangements to re-write. There is no obligation on Rosling to seek out Nachbaur to determine the results of the exam written on March 13, 1997.

There is no evidence that Rosling had committed to make the position available until such time as Nachbaur eventually did pass the exam.

I conclude that Nachbaur has not established that the delegate of the Director erred in the Determination.

For all of the above reasons, the appeal by Nachbaur is dismissed.

**ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determination dated September 2, 1997 be confirmed in all respects.

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**Hans Suhr**  
**Adjudicator**  
**Employment Standards Tribunal**