

**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 -

Restauronics Services Ltd  
operating  
Victoria International Airport Island Cafe

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** John M. Orr

**FILE NO:** 1999/460

**DATE OF HEARING:** October 18, 1999

**DATE OF DECISION:** November 5, 1999

**DECISION**

**APPEARANCES:**

Harry Steele	On behalf of Restauronics Services Ltd
Nasrin Sepehri	On her own behalf (by teleconference)
David Darvill	Assistant to Nasrin Sepehri
Terry Hughes	Delegate of the Director

**OVERVIEW**

This is an appeal by Restauronics Services Ltd operating Victoria International Airport Island Cafe ("Restauronics") pursuant to Section 112 of the Employment Standards Act (the "Act") from a Determination (No. 069898) dated June 28, 1999 by the Director of Employment Standards (the "Director").

Nasrin Sepehri ("Sepehri") applied for work at the Island Cafe, owned and operated by Restauronics, at the airport and was offered a full-time job in the cafe doing "customer service" work. She was to start two weeks later. When she contacted the Cafe manager two weeks later she was told that the full-time customer service position was no longer available but that she could have full-time work in the cafe in the kitchen. Sepehri rejected this offer and shortly afterwards made a claim to *The Employment Standards Branch* that Restauronics was in breach of section 8 of the *Act*.

The Director's delegate investigated Sepehri's complaint and determined that she had been offered the full-time customer service position and that the offer of a full-time kitchen job amounted to a misrepresentation of the type of work and that the employer, Restauronics, had therefore violated the section 8 of the *Act*. The Director awarded Sepehri, under the auspices of section 79(4)(c) of the *Act*, the equivalent of 10 weeks full-time pay plus some expenses.

Restauronics has appealed on several grounds. Firstly they contend that there was no misrepresentation of the position and that events had simply changed from when the original offer was made to the time that Sepehri was to start work. Secondly that there was no significant difference in the original position and the position offered and thirdly that Sepehri had a duty to mitigate any losses and should have taken the job offered. A fourth point argued was that the award given by the Director was excessive under the circumstances.

## ISSUES TO BE DECIDED

The issues to be decided in this case are (1) whether Restauronics misrepresented the type of work offered to Sepehri, (2) whether Restauronics was bound to fulfil the offer of employment even though events had changed the employment needs of the employer, (3) whether the employee has a duty to mitigate, and (4) whether the Director's award was excessive under the circumstances.

## THE FACTS

The following facts are as I have found them, bearing in mind all of the materials and evidence before me. Sepehri was a social work student in Winnipeg Manitoba and travelled to Victoria, British Columbia, in the early Summer of 1998. She arrived in Victoria on May 13th and commenced looking for work. She attended the Canada Employment Centre who assisted her in preparing a resume and locating potential employers. During her job search Sepehri went to the airport and handed in her resume to the Island Cafe and arranged to attend for an interview. In the meantime she accepted a position working in the kitchen at the Ardmore Golf Club.

Approximately two weeks later Sepehri had an interview at the Airport with Tracy Hilton ("Hilton"), the manager of the Island Cafe. Ms Hilton testified at the hearing by teleconference. During the interview Hilton told Sepehri that there were two types of jobs available in the cafe. One involved customer service and the other was in the kitchen. Sepehri's main interest was to find full time employment in order to pay down her student loans but she was also most interested in a job that would have people contact because of her interest in social work. Hilton offered Sepehri a full-time job described as "customer service". There were no detailed discussions about what was involved in this job or how it differed from a kitchen job. These positions were elsewhere described as "Front" and "Back" jobs.

Sepehri told Hilton that she was presently employed but that her job "was finishing" in two weeks. Sepehri testified that she then went to the Golf Club and tendered two weeks notice. She attended one training day at the airport for the new position. However she did not hear anything more from Hilton over the next two weeks until Hilton returned her calls on June 19, 1999.

On June 19, 1999 Hilton told Sepehri that the full-time job in customer service was not available any more but there was a full time position in the kitchen or part-time customer service. Hilton testified that Sepehri could have done part-time customer service work and part-time kitchen but that this option was not discussed because Sepehri became angry about the change in jobs and became "abusive" on the phone.

The evidence which I heard, and which I accept, was that there was very little actual difference between the two types of positions. The pay was the same, the hours of work were the same, and the benefits were the same. The Island Cafe is a cafeteria style restaurant. The two positions have also been described as "Front" and "Back". The staff who work the "Front" restock the food shelves, answer questions from customers, deliver food to the tables, clear and clean tables, and take payments from the customers. The staff who work in the "Back" prepare the food but also attend tables to deliver food, answer questions from customers and clear and clean tables.

However, Sepehri viewed the positions as being different. She believed that the Front job would have more contact with customers and therefore more interesting to her given her educational program. It was apparent that the "front" job, or customer service position was viewed by Sepehri as having more status.

Neither Sepehri nor Hilton discussed the availability of a combined Front and Back position and there was never any real discussion between them about the nature of, or differences between, the two areas of work.

## ANALYSIS

Section 8 of the *Act* provides as follows:

### 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 this case we are dealing with section 8(b) because Sepehri was offered a position in which the wages and conditions of employment were as discussed. I have little doubt that Sepehri was *influenced* to accept the position because of the type of work she believed she would be doing but the question is whether the employer *misrepresented* the type of work to her. On the evidence before me I am satisfied that the employer has met the onus of establishing that there was no real misrepresentation of substance. Sepehri applied for and was given full-time employment with the same hours, same pay, same conditions of employment and comprised of substantially the same work for which she applied. There was in fact virtually no difference between the position applied for and the position offered.

I can not find that Ms Sepehri's subjective believe that one position was somehow better than the other amounts to a misrepresentation by the employer. The employer can not be expected to know the subjective beliefs and motivations of a prospective employee. It was clear from the evidence before me that Sepehri could have accepted work full-time for the Summer as was her stated plan and that she would have been able to work as much with people as she hoped. She chose not to explore that possibility as she was somehow insulted by the offer made to her and declined to accept the position.

As I have found that the appellant has met the onus of establishing that there was no misrepresentation I do not need to address the other issues raised in the appeal. However, despite

my conclusions above Ms Sepehri did attend for the one-day training for which she was not paid and this amount (\$59.29) remains unpaid.

**ORDER**

Pursuant to Section 115 of the *Act* I order that the Determination is varied to show that Nasrin Sepehri is entitled to \$59.29 together with any further interest to date of payment.

**JOHN M. ORR  
ADJUDICATOR  
EMPLOYMENT STANDARDS TRIBUNAL**