

An appeal

- by -

Dr. Winston Tam
(“Tam”)

- 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

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2002/490

DATE OF HEARING: November 27, 2002

DATE OF DECISION: December 10, 2002

DECISION

APPEARANCES:

Winston Tam	on his own behalf
Lydia Arciaga	on her own behalf

OVERVIEW

This is an appeal filed by Dr. Winston Tam (“Tam”) pursuant to section 112 of the *Employment Standards Act* (the “Act”). Dr. Tam appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on August 29th, 2002 (the “Determination”) pursuant to which he was ordered to pay his former employee, Ms. Lydia Arciaga (“Arciaga”), the sum of \$2,963.50 on account of 6 weeks’ wages (including 4% vacation pay). This latter amount was awarded as a remedy for a breach of section 8 of the *Act* (pre-hire misrepresentation).

This appeal was heard at the Tribunal’s offices in Vancouver on November 27th, 2002 at which time I heard the testimony of each of the two parties as well as the testimony of Dr. Stanley Looby who testified on behalf of Ms. Arciaga. No one appeared at the appeal hearing on behalf of the Director. In addition to the witnesses’ testimony, I have also considered the various documents and submissions submitted by the parties to the Tribunal.

THE DETERMINATION

As noted above, the Determination was issued pursuant to section 8 of the *Act* which 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.

The Director’s delegate made the following findings (at pp. 3-4 of the Determination):

The Employer [Tam] induced, influenced, persuaded the Complainant [Arciaga] to become an employee, or to work, or to be available for work...The Complainant quit her full time position in order to commence working for the Employer.

There was a misrepresentation regarding the availability of the position. The Employer informed the Complainant that her start date would be November 1, 2001. On November 1, 2001 the Employer informed the Complainant that the clinic was not ready and that her start date would be moved back to December 1, 2001 but that she would be paid for the month of November 2001.

On November 10, 2001 the Complainant was informed that her position was terminated as the Employer was not sure whether he would be proceeding with the opening of the clinic.

FINDINGS AND ANALYSIS

Dr. Tam's principal argument is that there was no misrepresentation about the availability of the position and thus the Determination should be cancelled. I agree.

The uncontradicted evidence before me is that both Dr. Tam and Ms. Arciaga were working at a "walk-in" clinic in the late fall of 2001. Dr. Tam, who had recently completed a specialist residency was planning to open his own medical office in Surrey, B.C. To that end, in early October 2001, he entered into a lease for vacant premises in a medical arts building and thereafter arranged for the requisite leasehold improvements which included plumbing, electrical, carpeting, cabinets, painting and wallpapering.

It was Dr. Tam's expectation that his clinic (which would be staffed only by Dr. Tam and a medical office assistant) would open on November 1st, 2001. On or about October 12th, 2001--during a dinner meeting--Dr. Tam and Ms. Arciaga finalized the terms and conditions of her employment. On that evening, she signed a form of employment agreement and they agreed that Ms. Arciaga would be paid a monthly salary and that her employment would formally commence on November 1st when the clinic opened.

It should be noted that the employment agreement contained a specific provision whereby Ms. Arciaga was to be on probation for a period of six months and that her employment could be terminated at any time with written notice--the amount of notice specified in the agreement tracked that provided for in section 63 of the *Act*. It is clear that Ms. Arciaga was not being offered a fixed-term contract nor a "permanent" position although both parties expected that their employment relationship would prove to be to their mutual benefit.

In any event, the renovation of Dr. Tam's premises did not proceed smoothly. The carpeting that had been ordered was not immediately available nor were the cabinets; subcontractors were not moving as quickly with their tasks as Dr. Tam had initially been promised. During the latter part of October, Dr. Tam was in constant telephone contact with Ms. Arciaga and, as she testified, Dr. Tam always had "bad news". Dr. Tam informed Ms. Arciaga that the clinic would not open on November 1st as planned but rather he was now targeting a December 1st opening. However, Dr. Tam also informed Ms. Arciaga that he would pay her full salary for the month of November--and, in fact, did so--even though Ms. Arciaga would not have to report for work during that month.

During the early part of November Dr. Tam became uneasy with his decision to hire Ms. Arciaga. He had originally promised that he would give her a 2-week paid vacation in December but Ms. Arciaga was now asking for a longer period since she would be travelling to the Philippines. On November 7th, Dr. Tam requested Ms. Arciaga to attend at the premises to await the arrival of a telephone installation serviceman but she said she was not available and thus Dr. Tam hired another person to sit in the clinic for the day. Ms. Arciaga denies both assertions but, on balance, I find the evidence of Dr. Tam to be the more credible. Why would Dr. Tam hire a second person to sit in the clinic on November 7th when he was already paying Ms. Arciaga for the entire month? Second, the evidence shows that Ms. Arciaga did, in fact, take a 3 1/2 week holiday to the Philippines commencing in mid-December.

On or about November 10th, Dr. Tam telephoned Ms. Arciaga and indicated that he did not wish to have her continue in his employ. Dr. Tam did not express the real reason for his decision--namely, his uneasiness with Ms. Arciaga's attitude and initiative--perhaps because he found the matter somewhat unpleasant and did not want to be confrontational. In any event, he provided written notice of termination by way of a confirming letter dated and mailed November 10th, 2001. Ms. Arciaga acknowledges having received verbal notice of termination but denies having received Dr. Tam's November 10th letter. Although I accept that the letter was *sent*, I need not determine if written notice was actually *received* by Ms. Arciaga since, given her tenure, she was not entitled to *any* written notice of termination under section 63(1) of the *Act*.

As previously noted, Ms. Arciaga was advised by Dr. Tam on November 10th (Ms. Arciaga says it was the 12th) that her employment was terminated and that she would be paid her salary in full for the month of November. After terminating Ms. Arciaga, Dr. Tam interviewed one person and, on either November 15th or 16th, offered her the job. His clinic opened on December 6th and this new employee has been employed by Dr. Tam continuously since his office opened.

The delegate proceeded on the assumption that, in the language of section 8(a) of the *Act*, "there was a misrepresentation regarding the availability of the position". The evidence before me clearly shows that there was no representation regarding the *availability* of a position. There was--and continues to be--an available position (which is currently filled) in Dr. Tam's office for a medical office assistant. Dr. Tam concluded that Ms. Arciaga--who was a probationary employee at the point of termination--would not be *suitable* for the available position (see *Jadot v. Concert Industries Ltd.*, October 23rd, 1997, B.C.C.A.) and, accordingly, terminated her employment and hired a replacement.

Undoubtedly, Ms. Arciaga regrets having given up her former position in order to take up a new position with Dr. Tam. However, there were no pre-hire representations made to Ms. Arciaga regarding her security of tenure and the terms of her written agreement clearly indicate that no such security was being offered to her (*i.e.*, she was hired subject to a 6-month probationary period and, during her first year of employment, could be terminated with as little as 1 week's notice and only after having completed 3 months' service). Dr. Tam, in paying Ms. Arciaga for the entire month of November has, if anything, gone well beyond his obligations to Ms. Arciaga under either the employment contract or the *Act*.

Clearly, Dr. Tam had some, in his mind, *bona fide* concerns about Ms. Arciaga after he had offered the medical office assistant position to her. I do not suggest that these concerns gave him just cause for termination. Nevertheless, under the *Act* an employer has the right to terminate an employee even though there may not be any cause (provided proper compensation is paid or proper notice given in lieu of compensation) and, as I have previously noted, Dr. Tam has given Ms. Tam a measure of compensation above and beyond that mandated by either the *Act* or the actual employment contract. As for any *misrepresentation* (*i.e.*, a false statement about an existing state of affairs) as to the *availability* of a *position*, the uncontradicted evidence before me is that Dr. Tam never falsely stated that a position existed when that was not the case. There was, and always has been, an available position. Dr. Tam simply concluded, as was his right, that Ms. Arciaga would not be *suitable* for the position.

Accordingly, the appeal is allowed.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be cancelled.

I understand that the full amount payable by Dr. Tam under the Determination was previously forwarded to the Director and is presently on deposit in the Director's trust account. In light of my decision, those funds should be remitted to Dr. Tam forthwith.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal