Employment Standards TRIBUNAL

An appeal

- by -

Michael Desjarlais

- 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: John M. Orr

FILE No.: 2001/481

DATE OF HEARING: October 1, 2001

DATE OF DECISION: October 17, 2001

DECISION

APPEARANCES:

Michael Desjarlais	On his own behalf
Elizabeth Cook	On behalf of Victoria Native Friendship Centre

OVERVIEW

This is an appeal by Michael Desjarlais ("Desjarlais") pursuant to Section 112 of the Employment Standards Act (the *"Act"*) from a Determination dated June 01, 2001 by the Director of Employment Standards (the "Director").

Desjarlais was interviewed and offered a position at the Victoria Native Friendship Centre ("the Centre"). He worked for approximately 6 months until he was released on August 8th, 2001. Desjarlais accepted the position on his understanding that he would be paid $16.81 per hour with a $1.00 raise after three months to $17.81 per hour. Desjarlais moved from Kamloops to Victoria to take up the position. Upon commencement of his employment he was advised that he would be on probation for the first 3 months and that he would be earning $15.47 during that time with a raise to $16.47 after successful completion of his probationary period. He protested but was told that those were the terms of employment. He continued to work although he said it was "under protest". He made a complaint to the Director claiming that the Centre should be held to their promise.

The Director determined that there should not have been a reduced rate of pay during the probationary period and awarded certain amounts to Desjarlais that have since been paid by the Centre. However the Director determined that the rate of pay throughout the period of employment should be $16.47 and not the $17.81 claimed by Desjarlais.

ISSUES

The issue in this case is whether the employer had agreed to a higher wage rate than found by the Director and whether the employee could hold the employer to a wage rate discussed during the interview process but corrected on commencement of employment.

FACTS AND ANALYSIS

There is not much dispute about the facts in this case but there is disagreement on certain significant facts. Desjarlais attended an interview with Elizabeth Cook ("Cook") and Bea Carpentier ("Carpentier") during which there was a discussion about the wage rate that he would be paid. Desjarlais says that he was told that he would be paid $16.80 per hour with $1.00 raise

after three months. He claims that there was no mention of a probationary period. Cook agrees that there was no mention of the probation but says that she was unfamiliar with the wage scales and in fact said that the wage would be approximately $16.80.

Desjarlais moved from Kamloops to Victoria to take up the position. Shortly after commencing his duties Desjarlais discovered that the policy manual, given to him on the first day, provided for a three-month probationary period and that his wage rate would be reduced to $15.47 per hour during that three-month period. Upon successful completion of the probationary period his wage rate would be $16.47 per hour.

There is no doubt that these conditions of his employment were significantly different than the terms Desjarlais says that he was originally offered at the interview. The Director considered this aspect of the complaint and considered the provisions of Section 8 of the *Act* which reads 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 determined that Cook had made an unintentional error about the wage rate and that this was corrected at the earliest opportunity and that Cook apologised for the error. The Director determined that this was a mistake meaning that there was an unintentional act or error. She determined that there was no intent to deceive or mislead and that there was no intentional misrepresentation. There was also an unintentional omission in regard to the period of probation. Cook says that she assumed that all employees would understand that the first three months of employment would be a probationary period. Desjarlais claims that he had never worked in a probationary situation and was therefore unaware of this term of his employment.

Whatever happened at the interview, it is clear that Desjarlais was fully aware of the terms of his employment within the first couple of days of commencing the job. He made his concerns known but he was told that the wage rates were not flexible because they were set in accordance with government funding and B.C.G.S.E.U. collective agreement rates.

I note that this workplace was certified by the B.C.G.S.E.U. but the first collective agreement has not yet been reached. Nevertheless, the employer was paying and the government was funding wage rates in accordance with the general contract for similar workplaces.

Essentially, Desjarlais was told to "take it or leave it". It was made clear that these were the terms of his employment. Desjarlais decided not to accept either option but to take the job and try to enforce the representations made during the interview. I am not persuaded that the findings of the Director were wrong. The finding that the discussion about wage rates was general in nature and that the mistake was an innocent one seems to be a reasonable conclusion based on the evidence and submissions by the parties. I heard nothing during the hearing that would persuade me that the employer intentionally induced, influenced or persuaded Desjarlais to become an employee by intentionally misrepresenting any of the conditions of employment or the wages.

Likewise, I am not persuaded that there was a "meeting of the minds" in regard to the ultimate wage rate including the $1.00 raise, which Desjarlais claims he was promised after his first three months of employment. I am not persuaded that there was an enforceable contract to pay Desjarlais $17.81 per hour as I accept Cook's evidence that the rates were set in accordance with the union scale and that this rate would have been higher than scale.

Overall, I am satisfied that the Director's delegate analysed the evidence carefully and fairly and came to reasonable conclusions of fact. I am also satisfied that the Director's delegate properly interpreted and applied the provisions of the *Act*. I am not satisfied that the appellant has met the onus of persuading me that the determination was wrong and therefore the determination will be confirmed.

ORDER

I order, under section 115 of the *Act,* that the Determination dated June 1, 2001 is confirmed.

John M. Orr
Adjudicator
Employment Standards Tribunal