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 -

A.J. Leisure Group Inc. operating as Beachcomber Home Leisure
("A.J. Leisure" or the "Employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Ib S. Petersen
FILE NO.:	97/728
DATE OF HEARING:	December 5, 1997
DATE OF DECISION:	January 22, 1998

DECISION

APPEARANCES

Mr. Jeff Owen
Ms. Polly Basi — on behalf of A.J. Leisure Group Inc.

Ms. Jeannie Fuson
Ms. Barb Fuson — on behalf of the complainant

OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director of Employment Standards (the "Director") issued on September 18, 1997 . In the Determination, the Director's Delegate found that Ms. Jeannie Fuson was constructively dismissed from her employment and entitled to compensation pay for length of service. The Employer denies that Ms. Fuson was constructively dismissed.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether Ms. Fuson was constructively dismissed.

FACTS

There was no dispute with respect to the essential facts of this matter. The following provides a brief summary of the facts.

Ms. Fuson was employed by A.J. Leisure from June 13, 1994 until July 28, 1997. She worked as a quality control technician in the manufacturing division of the company and her earnings were $12.00 per hour. As a quality control technician she was responsible for ensuring the quality of the hot tubs produced by the Employer before they left the plant. Her position, therefore, is an important one.

Under the Employer's compensation system, the hourly rate is--in principle--based employees obtaining certain skills. In addition to the current starting wage of $7.50 per hour, employees receive between $.40 and $.50 for each skill or qualification they acquire. The employees may be moved around the production facility and perform different functions for which they are qualified, as required. However, once an employee qualifies as a technician, and works in that capacity for

three months, the $12.00 hourly rate is retained by the employee regardless of the specific job functions subsequently performed by the employee.

The Employer's witness, Mr. Owen, explained that the basis for the compensation system was to provide the employees with opportunity to learn at their own pace, recognize achievement, and earn income at the employee's own pace.

Mr. Owen candidly acknowledged that Ms. Fuson was an excellent employee who had received several increases during her employment. He acknowledged that she had received increases based on achieving skills, based on the system described above, but also based on performance, from $6.50 to $12.00 during the course of her employment. In October of 1996 she qualified as a technician. As well, the payroll records indicated, for example, that Ms. Fuson was qualified to do "heat shrinking." While Ms. Fuson was compensated for having achieved certain skills, she testified, and the Employer did not dispute this at the hearing, that she could not do "heat shrinking" and "pressure washing" because she did not have experience in fork lift driving, which was a part of those functions.

On June 24, 1997, Ms. Fuson went on sick leave. She testified that this was due to work related stress. Mr. Owen testified that Ms. Fuson's leaving work caused him concern because her important role in the production process. This caused some friction between Ms. Fuson and Mr. Owen.

When Ms. Fuson was ready to return to work, she contacted A.J. Leisure. She was told that she would have to meet with Mr. Owen before starting. She met with Mr. Owen on July 15, 1997. Her evidence was that Mr. Owen told her that she could not return to her work as a quality control technician and that she would be earning less than her hourly rate of $12.00, namely $7.50 plus $.50 per skill, or approximately $9.50 per hour. The work the Employer offered included "heat shrinking" and "pressure washing." After the meeting Ms. Fuson was sent home with pay. By letter dated July 18, 1997, Ms. Fuson rejected this offer.

There was a subsequent meeting between Ms. Fuson and Mr. Owen on July 18, 1997. At that time, she was told again that she would have to work at a lower rate and in another function than as a quality control technician. Mr. Owen did not dispute this. On July 28, 1997 Ms. Fuson wrote to Mr. Owen that she considered the employment contract had been breached and requested severance pay. On August 1, 1997, Mr. Owen wrote to Ms. Fuson stating that he considered that she had voluntarily left the company's employ. He then offered her to return to work at the rate of $12.00 within her current skill level.

Subsequently Ms. Fuson filed a complaint with the Employment Standards Branch.

ANALYSIS

Section 66 of the *Act* provides:

> If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated.

"Conditions of employment" are broadly defined in Section 1 of the *Act* to mean "all matters and circumstances that in any way affect the employment relationship of employers and employees." Clearly it is not all changes that will constitute constructive dismissal. Under the statute, the change must be "substantial." The change "must be sufficiently material that it could be described as being a fundamental change in the employment relationship" (*Helliker*, BCEST #D347/97, reconsideration of BCEST #D357/96). The test is an objective one to ascertain whether a substantial change has occurred. I agree with the my colleague in *Helliker*, above, that such a test includes an analysis of the nature of the employment relationship, the conditions of employment, the alterations which have been made, the legitimate expectations of the parties, and whether there are any express or implied agreements or understandings.

In this case, Ms. Fuson was not offered a return to her previous position as a quality control technician. The Employer offered that she could return to work which she was not qualified to do. Under the company's system of remuneration, employees are paid for the skills and qualifications they acquire. In my view, it follows that employees may be requested to perform the work for which they have qualified and are being paid for. The evidence was that employees are moved between different work functions. Ms. Fuson candidly agreed that she would perform other work if asked. She agreed that she had done so in the past. In my view, absent a substantial change or alteration in the conditions of employment, it does not in itself constitute constructive dismissal to offer an employee work that is different from the work the usually, or regularly, performed by the employee.

In this case the Employer offered work that Ms. Fuson was not qualified for, including "heat shrinking" and "pressure washing." While she had worked in other functions during her employment, since October of 1996, most of her work was as a quality control technician. Viewed in light of the fact that Ms. Fuson was offered to return to work at wages that were almost 20 per cent lower, I agree that Ms. Fuson was constructively dismissed. Wages are one of the fundamental aspects of the employment relationship. This, however, does not mean that any change or alteration in wages constitutes constructive dismissal under the *Act.* The change must be substantial. Where, as here, the Employer's practice is to keep employees who, like Ms. Fuson, have qualified as technicians, and worked as such for three months, at the $12.00 level, even if they perform other work, such practice becomes a part of the emp loyee's employment contract. As

such, the employer cannot unilaterally and substantially reduce the wages of an Employee without giving notice. This is what the Employer did in this case.

In this case, the Employer offered to return her to work at the $12.00 level on August 1, 1997. This occurred after two meetings and a letter, dated July 18, 1997, from Ms. Fuson where she made it clear that she was not accepting the Employer's offer and, finally, the July 28, 1997 letter where she concluded that her contract of employment had been breached and requested severance pay. In these circumstances, in my view, the Employer's offer came too late. The Employer made the offer only after Ms. Fuson had told the Employer that she considered that it had breached her contract of employment. Moreover, in my view, the Employer had sufficient time to consider the terms of Ms. Fuson's return to work. Because of the meetings and correspondence, the Employer clearly knew Ms. Fuson's concerns with work offered.

In short, I find that Ms. Fuson was constructively dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated September 18, 1997 be confirmed in the amount of $1,506.76 together with such interest as may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal