

**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 -

Kym Spencer  
("Ms. Spencer")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

<b>ADJUDICATOR:</b>	John M. Orr
<b>FILE NO.:</b>	97/225
<b>DATE OF HEARING:</b>	June 25, 1997
<b>DATE OF DECISION:</b>	June 26, 1997

**DECISION**

**APPEARANCES:**

Kym Spencer for herself

Marion Holland for Ocean Pointe Resort Hotel Ltd (Ocean Pointe)

**OVERVIEW**

This is an appeal by Kym Spencer pursuant to Section 112 of the *Employment Standards Act* (the "Act") from a Determination dated March 13, 1997 by the Director of Employment Standards (the "Director").

The Determination found that Ocean Pointe had not contravened Section 63 of the *Act* in terminating Ms. Spencer without notice or cause and without compensation for length of service because Ocean Pointe had offered reasonable alternative employment which Ms. Spencer declined. Ms. Spencer appeals on the grounds that the Director wrongly concluded on the evidence that the employment offer was reasonable. She claims that she had a stress leave of absence and that she was entitled to her original job back when she returned. By offering a different position that was not reasonable alternative employment she claims that Ocean Pointe constructively dismissed her without cause.

**ISSUE TO BE DECIDED**

The issue to be decided in this case is whether Ocean Pointe offered reasonable alternative employment when they were unable to reinstate Ms. Spencer in the position she held before her leave of absence.

**FACTS**

Ms. Spencer commenced employment with Ocean Pointe, who operates a resort hotel in Victoria, on June 19, 1995 as a switchboard operator earning \$7.50 per hour. This was a term appointment to October 31, 1995, being the time of year when most summer appointments are terminated. Ms. Spencer's contract was renewed November 01, 1995 through to March 31, 1996 and her pay was increased to \$8.50 per hour. In March 1996 she was given a different position as reservation agent with a pay scale of \$10.25 per hour. The employment letter stipulates that work schedules would be according to the requirements of the Reservations Department and she would be on a three month probationary period. Subject to this probationary period, the new position was considered a permanent position as there was no end date on the contract of employment.

It is an important factor in this case that the nature of the hospitality industry is subject to seasonal fluctuations. At Ocean Pointe the Reservations Agents are scheduled to work certain shifts based on a schedule that is set-up every two weeks. The amount of actual shifts worked depend on seasonal variations so that in the slower winter months the agent may in fact get very little work even though the position is considered a permanent position. During the early summer when Ms. Spencer was working as a Reservations Agent she was being scheduled on a full time basis as the Hotel was very busy. Reservations work tends to slow down 4-5 weeks prior to any actual slow-down in the Hotel itself. Therefore reservations work is beginning to slow down by the beginning of September. The busiest times for reservation agents are in the spring and summer months.

On June 10, 1996 Ms. Spencer met with her direct supervisor to discuss some health and stress problems and raised the issue of stress leave. She wanted to take the leave at the end of July and into August. Coincidentally this stress leave was timed to fit with a planned trip to Bermuda. This concept of pre-planning a stress leave naturally gave the supervisor some difficulty as the leave was being planned during the hotel's busiest season. There were a number of meetings and concerns over the issue but it was resolved when Ocean Pointe received a fax from a physician indicating that Ms. Spencer was suffering from stress and should not work from July 23 until August 07, 1996. The matter was mutually agreed by a letter dated (perhaps wrongly) July 22, 1996 and signed by Ocean Pointe and Ms. Spencer. This letter confirmed a stress leave from July 23 to August 8, 1996.

This letter also confirms the following terms of agreement:

We ask that you notify us of your intent to return to work a minimum of 48 hours in advance of your scheduled return date. Should you not contact us, and fail to return to your next scheduled shift, we will assume that you have resigned from your position with Ocean Pointe Resort Hotel and Spa.

Because of the earlier conflict over the leave Ms. Spencer's supervisor contacted her on July 31st and apologised for any misunderstandings and agreed to extend the leave as might be required. He also sent a letter to all the staff confirming that Ms. Spencer was on medical leave and would be returning when she was cleared by her doctor. The leave was extended to an indefinite date whenever the doctor authorised return to work.

At Ms. Spencer's request all her holiday pay was paid out to her and a record of employment (ROE) sent to *Employment Insurance* indicating that she was on leave.

On September 4, 1996 the Physician sent a note to Ocean Pointe indicating that Ms. Spencer would be fit to return to work on September 9th. Ms. Spencer called the Hotel on September 9th but was told that she was not scheduled for any shifts at that time. I heard in evidence that the reason was that the schedule was prepared for two weeks in advance and therefore she could not have been included at that time. Also it was coming into the time of year when shifts for Reservation Agents were beginning to be cut back.

The Human Resources office and Ms. Spencer's supervisor were cognisant of her pending return and being aware that a full time position was required at the switchboard position in the Hotel arranged for the switchboard supervisor to call her before the job was posted. Ms. Spencer was qualified for the position as it was what she had done for 9 of the 13 months that she had worked at Ocean Pointe before her leave. The position was paid at a rate of \$8.50 per hour as opposed to the \$10.25 Ms. Spencer was earning just before her leave. However Ocean Pointe believed it to be a good offer because the position was full time with a guaranteed 40 hour week with regular weekday hours. Although the rate per hour might be lower the overall result would be equivalent or better for Ms. Spencer.

Ms. Spencer told the switchboard supervisor that she didn't want the job because it paid less money and that she was better-off on unemployment insurance. She says that she understood the offer at the switchboard to be only "part-time" and that she felt that a part-time lower paid position was not an equivalent position. She confirms that she had applied for unemployment insurance on September 9, 1996 and had in fact gone to Penticton to work for a short period of time. She was actively seeking other employment and collecting benefits from unemployment insurance.

When Ms. Spencer declined the switchboard position Ocean Pointe posted the job as a full-time position and it was filled in-house. Ocean Pointe took Ms. Spencer's refusal as a termination of the employment relationship and issued a final ROE.

## **ANALYSIS**

Ms. Spencer testified that what upset her most about the whole situation was that the final ROE, by indicating that she had refused reasonable alternative employment, caused her to be cut off employment insurance benefits for five weeks and that she had received advice that this was maliciously done by Ocean Pointe. I can find no reason to accept this view of the events.

After the initial and admitted bad feelings over what was believed to be a conveniently "planned" stress leave taken to coincide with a trip to Bermuda, I find that the management of Ocean Pointe acted very reasonably, apologised and took steps to ensure that all the staff knew that Ms. Spencer was still "part of the team" and would be returning as soon as she was able. The witnesses that testified appeared to hold no bad feelings toward Ms. Spencer and seemed to have gone out of their way to accommodate her situation. I find that the offer made to Ms. Spencer on September 26, 1996 was for a full-time switchboard position. Bearing in mind that the burden of persuasion is on the appellant I am not persuaded that the switchboard supervisor only offered a part-time position. It was clear from all the witnesses that the Hotel was quite desperate for a full-time person in that position immediately and did in fact post and fill the position full-time. It would make no sense for the supervisor only to have offered a part-time position to Ms. Spencer.

I find that Ms. Spencer believed that she should have been given her full-time reservation agent job back and felt that the switchboard was a demotion. Also she had commenced receiving unemployment

insurance benefits and did not want to somehow mess-up this claim. I find that the Ocean Pointe staff were genuine and sincere in their efforts to accommodate Ms. Spencer and that the full-time switchboard position with its guaranteed regular hours, and despite its lower hourly rate, was reasonable alternative employment to the higher paid position with declining and uncertain hours.

It was also clear that there was no real heirarchy between these two positions as all staff were treated as part of the team and many of these jobs were performed interchangeably from time to time as required. I find that Ms. Spencer refused reasonable alternative employment offered by the employer and that therefore pursuant to S.65(f) of the *Act* Section 63 does not apply and no compensation is required.

**ORDER**

I order, under Section 115 of the *Act*, that the Determination is confirmed.

**John M. Orr**  
**Adjudicator**  
**Employment Standards Tribunal**