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 -

Kim D. Alexander
("Alexander")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	John M. Orr
FILE NO.:	97/498
DATE OF HEARING:	September 15, 1997
DATE OF DECISION:	September 23, 1997

DECISION

APPEARANCES:

Tyna A. Mason	Counsel for Kim D. Alexander
James A. S. Legh	Counsel for M.B. Laboratories Ltd

OVERVIEW

This is an appeal by Kim D. Alexander ("Alexander") pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination (File No. 082160) dated June 10, 1997 by the Director of Employment Standards (the "Director").

The Determination found that Alexander terminated her own employment with M.B. Laboratories Ltd. and pursuant to S.63(3)(c) of the *Act* the liability of the employer to pay compensation for length of service was discharged. The Determination also considered whether S. 66 of the *Act* should be applied to determine that Alexander was "constructively dismissed" by a substantial alteration in a condition of her employment. The Director found that there was not a "substantial alteration" in a condition of employment and that therefore there was not a constructive dismissal.

Alexander has appealed on the basis that the Director's Delegate should have found that S. 66 did apply and that there was a "constructive dismissal" because of a change in circumstances when a new supervisor was hired and changed some of the practices and procedures in the workplace which Alexander disagreed with and felt were improper and unsafe.

There was some new evidence tendered at the Appeal but such evidence was available at the time of the investigation and the new evidence did not substantially differ from the evidence considered by the Director's Delegate.

ISSUE TO BE DECIDED

The issues to be decided in this case are:

1. Whether the Tribunal should review by way of Appeal the Determination of the Director where there is no substantial new evidence and where the Director's Delegate has considered and applied the provisions of the *Act* properly;

2. Whether new evidence should be admitted when such evidence was available at the time of the investigation;

3. Whether evidence by way of affidavit should be admitted;

4. Whether all of the evidence submitted met the onus of establishing that the Determination was wrong in finding that a condition of employment was not substantially altered.

FACTS

Alexander filed a complaint with the Director of Employment Standards on January 22, 1997 in relation to the termination of her employment with M.B. Laboratories Ltd ("the Company") on August 27, 1996. She provided 34 pages of notes, office procedures, job descriptions, and letters of support. The Director's Delegate delivered a determination dated June 10, 1997 in which he refers to S.66 of the *Act* which provides as follows:

> **Director may determine employment has been terminated**
>
> **66.** If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated.

The Director's Delegate stated in the Determination that he had carefully reviewed the information provided by Alexander and her employer and was unable to find that there was a "substantial alteration" in a condition of employment.

At the hearing Counsel for the Appellant wished to introduce new evidence by way of affidavit. The first document was an affidavit of Melanie Sawyer, a former employee of the Company. This document had been sent to the Tribunal but apparently not shared with Counsel for the Company prior to the hearing. Ms Sawyer was not in attendance at the hearing, was not under subpoena, and was apparently unavailable because of a family emergency. The second document was an affidavit of Evelyn Neal, a former employee of the Company and Alexander's supervisor for 5 months in 1995. This document was not previously submitted to the Tribunal and was not delivered to counsel for the Company prior to the Hearing. Ms Neal was present.

Counsel for the Appellant also wished to have Ms Alexander give oral evidence at the Hearing in support of her appeal.

Counsel for the Company objected to the admissibility of the affidavits and the introduction of "new" evidence that was available at the time of the investigation.

ANALYSIS

I advised counsel that an Appeal under S.112 of the *Act* was not a trial *de novo* but that the process was intended to be flexible to ensure fairness and efficiency. I decided to reserve on the issues of admissibility of the "Neal" affidavit and the new evidence until I had heard the evidence being led on behalf of the appellant.

I decided that the affidavit of Ms Sawyer was not admissible without the consent of Counsel for the Company because there was no opportunity for cross-examination and there had been no advance notice of the intent to rely on the affidavit.

I heard evidence from Ms Neal that she had provided a letter for Alexander for use during the investigation. She had also provided her name and address and was at all times available to provide further documentation if requested to do so. The documents provided by Ms Neal, although giving some more detail, did not substantially alter the evidence that was available to the Director's Delegate.

Although the affidavit of Ms Neal should have been delivered to Counsel for the Company reasonably in advance of the hearing, I would have allowed the affidavit of Ms Neal to be admitted as evidence as she was present for cross examination and the written, organised means of presenting the evidence is helpful to me as a decision maker.

However, in my opinion the evidence which Counsel sought to introduce through Ms Neal existed at the time of the investigation and ought to have been presented at that time. The Tribunal will generally not allow to be introduced new evidence that existed at the time of the original determination and which ought to have been introduced at that time: *Jhalli v. British Columbia (Director of Employment Standards)* [1997] BC EST No. D159/97; *BWI Business World Inc.* BC EST No. D050/96

I also heard the oral evidence of Ms Alexander, subject to the objection raised by Counsel for the Company that this evidence was either the same as was before the Director's Delegate or was available at that time. It is my conclusion that there was no substantially new evidence led on the appeal that was not before the Director's Delegate and clearly considered by him and where there was any evidence that was "new" it should have been presented at the time of the investigation.

Although I have found that the "new" evidence is not admissible I also find that, even if it were, I would have confirmed the determination of the Director. I would have found that Alexander was clearly an excellent, experienced and conscientious employee who had difficulty accepting her new supervisor. She disagreed with what she alleged were less than safe work practices introduced or condoned by the new supervisor and the relationship between them deteriorated over the following year until Alexander decided to resign. She resigned because of her concerns about these practices and not because there had been a substantial alteration in her own conditions of employment.

The purpose of the appeal process is not to substitute the opinion of the Tribunal for that of the Director. The onus is on the appellant to show that the Determination is wrong either in its analysis of the facts or its application of the legislation. I find that the facts found by the Director's Delegate were substantially correct and that he considered and applied correctly the provisions of S.66 of the *Act*. Even considering all of the evidence before me I am not persuaded that the Determination is wrong.

ORDER

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

John M. Orr
Adjudicator
Employment Standards Tribunal