

An appeal

- by -

Judith Schneider  
("Schneider")

- 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:** Carol L. Roberts

**FILE No.:** 2001/576

**DATE OF DECISION:** October 25, 2001

## DECISION

This is a decision based on written submissions by Judith Schneider, and Rod Bianchini for the Director of Employment Standards.

### OVERVIEW

Ms. Schneider worked as an aquatic leader/instructor/lifeguard at the Cheam Pool from January 1998 to September 14, 1999. Leisure assumed management of the facility on August 1999. Between September 1 and 17, the pool was shut down for maintenance. On September 15, 1999, Ms. Schneider tendered her resignation effective September 30.

Ms. Schneider filed a complaint with the director alleging that her job duties and conditions were significantly altered after she gave Leisure Aquatics Incorporated ("Leisure") two weeks notice of resignation, and that this alteration to her conditions of employment constituted constructive dismissal.

On May 3, 2001, following an investigation of the complaint, a delegate of Director of Employment Standards ("the Director") determined that the Act had not been contravened. He concluded that the alteration of work took place after Ms. Schneider tendered her resignation. He found that Ms. Schneider could not produce her life guard certificate when asked, and as a result, could only teach lessons or perform maintenance duties. The only duties available to her were the on-call roster and maintenance and custodial work. Further, Leisure could not offer her teaching classes, since the lessons extended past the last day of her employment. The delegate concluded that Leisure provided sufficient evidence to demonstrate that it accommodated Ms. Schneider as far as possible, given her inability to produce a valid life guard certificate. The delegate dismissed the complaint, and closed the file.

On June 12, 2001, the Tribunal received an appeal letter from Ms. Schneider, contending that the Determination was in error because it was based on incorrect and misleading information. Ms. Schneider's application for an extension of time to file an appeal was allowed (BC EST #D423/01).

### ISSUE TO BE DECIDED

Whether Leisure World substantially altered Schneider's job conditions after she had given notice, constituting constructive dismissal.

## ARGUMENT

Ms. Schneider disputes several comments made by the delegate in the Determination that are not necessary to address, since they do not relate to the issue of whether her conditions of employment were substantially altered after she tendered her resignation.

The delegate found as a fact that Ms. Schneider was placed on-call due to her inability to complete lessons that extended past her resignation date. Ms. Schneider disputes that conclusion. She also disputes the finding that she could not produce a life guard certificate when asked for it. There is no evidence to support Ms. Schneider's argument. She merely repeats the submissions she made to the delegate on this point. The fact is, however, Ms. Schneider did not produce a life guard certificate when asked for it. Ms. Schneider provided no evidence that she was qualified to life guard. There is also no evidence that the delegate erred in concluding that, because she could not complete a full set of lessons given the date of her termination, she was not offered teaching duties.

Ms. Schneider argues that the material filed in support of her complaint demonstrates that Leisure was leaving her off the instruction schedule before she offered her resignation. This does not address the issue of whether her job duties were significantly altered after she tendered her resignation. Ms. Schneider acknowledges, however, that her dissatisfaction with Leisure's scheduling was one of the reasons she tendered her resignation. Leisure does not dispute that it left Ms. Schneider off the work schedule. It contends that it did so because she could not produce a valid life guard certificate, and that there were an insufficient number of lesson hours to instruct and, at the same time, meet the four hour minimum work day. Ms. Schneider does not deny this, but contends that an instructor would "stay to clean change rooms to fill a 4 hour shift then go home." She further asserts that she "could have taught lessons, and then done maintenance, mechanical and/or office work to make 4-8 hour shift". Leisure states that many of these additional duties had been done by Ms. Schneider on a temporary basis, and were taken over by the new manager in August.

Ms. Schneider also contends that Leisure's assertion that life guarding was the bulk of work at the centre is untrue. She alleges that, of the 40 hours per week that she worked, only 12-15 of those were spent life guarding. The balance, she asserts, was spent supervising, instructing, cleaning and maintenance, and doing office work. Leisure disputed this, submitting that the bulk of the work at the pool was indeed life guarding. It states that the new pool manager was doing the supervising, office work, accounting, and pool maintenance, and that accounting was never part of Ms. Schneider's job duties.

Ms. Schneider appears to suggest that the new manager's assumption of some of her former duties establishes her claim. She alleges that, with no notice, she was "locked out of the office...and had my hours reduced from full-time, to on-call." Although Ms. Schneider does not expressly state as much, it appears, based on her letter of resignation, that she was unhappy with the style of the new management. She states, in part, "I can understand downsizing, and the

changing of workers' responsibilities,...I have found the management team to be rude, short-tempered, cold, militant, unpleasant to the public, and in general, absolutely undesirable to work with."

Ms. Schneider also argued that she was not offered work after she tendered her resignation. Leisure stated that Ms. Schneider was on an on-call status, and that because she did not have a valid life guard certificate, no four hour shift came available during the tenure of her notice.

Finally, Ms. Schneider alleges that the delegate failed to address her complaint that she was not paid for Thanksgiving 1998.

## **ANALYSIS**

The burden of establishing that the Determination is incorrect rests with an Appellant. Having reviewed the submissions of the parties, I am not persuaded that the Director erred.

At issue is whether the Director may determine that there is a material change in an employee's working conditions when an employer is unable to meet wage obligations. By operation of Section 66, the material change constitutes termination.

Section 66 provides as follows:

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

"Conditions of employment" is defined in Section 1 as "all matters and circumstances that in any way affect the employment relationship of employers and employees"

The test to ascertain whether a substantial change has occurred is an objective one (see Task Force Building Services Inc. v. British Columbia, (Director of Employment Standards) [1998] BC EST # D047/98) In determining whether a condition of employment has been substantially altered, the director will have regard to the nature of the employment relationship, and may consider factors such as a change of working location, hours of work, a reduction of wages or a change in responsibilities.

There is no evidence of a change of working location or reduction of wages. There is an allegation that Leisure changed Ms. Schneider's hours of work and responsibilities after she gave her notice to resign. On the evidence presented, I find that Ms. Schneider has failed to demonstrate that the delegate erred in concluding that the conditions of her employment had not been substantially altered. Ms. Schneider acknowledges that she was unhappy with the new management, which established new procedures for the operation of the pool. Ms. Schneider was asked to produce a valid life guard certificate, which she was unable to do. Consequently, the duties she could be assigned were limited. Many of the tasks she had done previously, and on a temporary basis, were performed by the new pool manager. There is no evidence that Ms.

Schneider was ever responsible for accounting duties, or in fact, qualified to do so. As a consequence, Leisure was limited in the work it could offer her. I do not find that the delegate's conclusion that Ms. Schneider was accommodated, was unreasonable or in error, and the appeal in this respect is denied.

I agree with Ms. Schneider that the delegate failed to address the issue of statutory holiday pay for Thanksgiving 1998, and that this matter should be remitted back for consideration.

### **ORDER**

I Order, pursuant to Section 115 of the Act, that the Determination, dated May 3, 2001 be confirmed in part. I allow that part of the appeal with respect to Ms. Schneider's allegation that she was not paid statutory holiday pay for Thanksgiving, 1998. That issue is referred back to the delegate for a Determination.

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**Carol L. Roberts**  
**Adjudicator**  
**Employment Standards Tribunal**