BC EST #D219/98
Reconsideration of BC EST #D480/97

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration pursuant to section 116 of the *Employment Standards Act* R.S.B.C. 1996, c. 113

- by -

The Director of Employment Standards
(the "Director")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

RECONSIDERATION PANEL:	Geoffrey Crampton Casey McCabe Sherry Mackoff
FILE N0.:	98/92
DATE OF DECISION:	May 27, 1998

DECISION

OVERVIEW AND FACTS

This is an application by the Director of Employment Standards (the "Director") pursuant to section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of a decision of the Employment Standards Tribunal, BC EST No. D480/97, dated October 22, 1997.

The complainant, Mr. Keenan Leigh Moses, supports the Director's application for reconsideration.

The Tribunal did not receive any submissions from the employer, the Delta Whistler Resort (the "Delta"), concerning the Director's application for reconsideration.

The Director's reconsideration application, dated February 3, 1998, raises a narrow issue. The Director submits that the adjudicator erred when he stated the following:

> ... In my view for constructive dismissal to be proven, the intent of the alteration in the terms and conditions of employment must be to encourage the employee to leave the employment. ...

The background to this reconsideration application can be described as follows. On October 10, 1997 the adjudicator held an oral hearing to hear an appeal brought by Mr. Moses, pursuant to section 112 of the *Act*, from a Determination, dated July 24, 1997, issued by a delegate of the Director of Employment Standards. In his decision the adjudicator set out the issues that he had to decide in this way. First, was Mr. Moses entitled to additional vacation pay? Second, was he entitled to additional statutory holiday pay? Third, was Mr. Moses constructively dismissed by the employer?

The adjudicator found that Mr. Moses was entitled to additional wages for the pay periods ending January 11, 1997 and January 25, 1997, additional statutory holiday pay for November 11, 1996 and January 1, 1997 and some additional vacation pay. However, the adjudicator decided that there was no entitlement to compensation for length of service. On that issue, the adjudicator said this:

> With respect to Moses' claim for compensation for length of service, I conclude, based on the evidence provided and on the balance of probabilities, that Moses is not entitled to compensation for length of service. The unilateral change in wage rate established by the employer, in

> and of itself, does not constitute constructive dismissal. In my view for constructive dismissal to be proven, the intent of the alteration in the terms and conditions of employment must be to encourage the employee to leave the employment. The evidence provided does not support such a conclusion. (at page 8)

The facts as found by the adjudicator are as follows. Mr. Moses began employment with the Delta in August, 1996 as a temporary driver at a pay rate of $10.00 per hour. In October, 1996 he worked in Delta's accounting department, again at the rate of $10.00 per hour. In mid-October, 1996 Delta received the contract to operate the Whistler Conference Centre and Mr. Moses "was among the first staff to be hired for this location." For his work at the Conference Centre Mr. Moses "was paid at the rate of $10.00 per hour for each pay period until the rate was adjusted to $8.00 per hour on the January 11, 1997 paycheque." The adjudicator noted that Mr. Moses testified that he first became aware of the reduction in pay "when he received the pay statement dated January 11, 1997 on January 18, 1997."

We note from copies of pay statements on the file that while he worked at the Whistler Conference Centre, Mr. Moses was paid an hourly rate plus gratuities.

Ms. Bell, the Human Resources Director for Delta, testified that Mr. Moses "was incorrectly paid $10.00 per hour from November 1, 1996 until the beginning of January because of a clerical error" and that his "rate was adjusted as soon as the error came to light".

The adjudicator found that Mr. Moses and human resources personnel of Delta had intermittent discussions about the change in pay rate. At page 3 of his decision the adjudicator stated:

> Moses handed Bell a hand-written letter dated Feb 7, 1997 which states "By mutual agreement, my employment will end as soon as you acknowledge receipt and reconfirm contents of this letter and pay my back dues."
>
> Approximately 2 or 3 weeks after this meeting, Moses filed a complaint with the Employment Standards Branch alleging he was owed vacation pay, statutory holiday pay and compensation for length of service.

Ms. Bell testified that after reading the letter she assumed that Mr. Moses had quit.

Mr. Moses testified that the letter was "a negotiating tool and not a letter of resignation". He stated that the employer "had his schedule cleared and his name removed" and as a result compensation for length of service is due.

The adjudicator came to the following conclusions:

> I am not satisfied that the evidence supports Moses being made aware that his wage rate would be $8.00 an hour until the January 11th pay statement. An employer who chooses to change the terms and conditions of employment for an employee is, in my view, obligated to ensure that appropriate notice of such a change is provided to the affected employee. Delta's argument that this was simply a "clerical error" does not relieve them of their obligation to provide adequate notice for a change in terms and conditions of Moses' employment.
>
> It would have been appropriate for Delta to have provided one week notice of the change in the terms and conditions of employment. This notice should have been provided to Moses **prior** to the change of his wage rate.
>
> I conclude, based on the evidence and on the balance of probabilities, that Moses was not aware that the wage rate for his position at the Whistler Conference Centre was $8.00 per hour. I am satisfied that Delta did not deliberately set out to mislead Moses in regard to the wage rate for his position at WCC, merely that as a result of the disorganization and confusion in existence around this time, Delta failed to advise Moses that the rate would be $8.00 per hour. I further conclude that Moses is entitled to be paid at the rate of $10.00 up to January 25, 1997, which is one week after he was first notified that his was [sic] wage had been dropped.
>
> I further conclude that the vacation pay and statutory holiday pay should be recalculated to reflect the rate of $10.00 per hour. (at page 7)

We note here that we consider this to be an appropriate case for reconsideration because it involves a question of law under the *Act* and, therefore, it meets one of the criteria for reconsideration set out in the decision of the Tribunal in *The Director of Employment Standards*, BC EST #D479/97.

This reconsideration has proceeded by way of written submissions.

ANALYSIS

The narrow issue before us on this reconsideration application is whether the adjudicator erred in law by concluding that there can be no constructive dismissal unless the employer

intends, by altering the conditions of employment, to encourage the employee to leave the employment.

In essence, the Director submits that neither section 66 of the *Act* nor the common law of constructive dismissal require that the employer intend to encourage the employee to quit.

We agree with the Director that the adjudicator erred by stating that "... for constructive dismissal to be proven, the intent of the alteration in the terms and conditions of employment must be to encourage the employee to leave the employment. ... "

Our reasons for coming to this conclusion are as follows. First, section 66 of the *Act* states nothing about the employer's motivation for making a substantial alteration to a condition

of employment. Section 66 reads:

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

We note that in the predecessor legislation to the current *Act*, the comparable section was worded very differently. Section 48 of the *Employment Standards Act*, S.B.C. 1980, c. 10, as amended, read as follows:

> *Officer may declare employer's actions constitute termination*
>
> *Where*
> *(a) an employer has substantially altered a condition of employment, and*
>
> *(b)* ***an officer is satisfied that the purpose of the alteration is to discourage the employee from continuing in the employment,***
>
> *the officer may declare that the employer has terminated the employee.*
> (emphasis added)

It is significant that the wording of section 48(b) of the former *Act* has been omitted from section 66 of the current *Act*. The Director may now decide that the employment of an employee has been terminated *"(i)f a condition of employment is substantially altered"*.

Section 66, unlike section 48, does **not** require that the purpose of the alteration be to discourage the employee from continuing in the employer's employ.

In our view, the language of section 66 reflects the fact that reasons, other than a desire to force an employee to quit, can motivate an employer to substantially alter conditions of employment. A business reorganization or a financial downturn might cause an employer to unilaterally make a substantial alteration to important terms of employment. In those types of situations, even though there may be no intent on the part of the employer to encourage an employee to quit, the Director may determine that employment has been terminated and that the employee is entitled to compensation for length of service.

Whether unilateral changes made by the employer to the employment contract amount to constructive dismissal at common law does not depend on a finding that the changes were made to encourage the employee to leave the employment. [See: *Greaves v. Ontario Municipal Employees Retirement Board* (1995), 15 C.C.E.L. (2d) 94 (Ontario Gen. Div.) and *Cox v. Royal Trust Corp. of Canada* (1989), 26 C.C.E.L. 203 (Ont. C.A.); leave to appeal to the S.C.C. refused (1989), 33 C.C.E.L. 224n.]

We note the following from Christie and others, *Employment Law in Canada*, [(2nd edition), Toronto, Butterworths, 1993] at page 548:

> ... at common law the pursuit of efficiency does not justify management making unilateral changes to the employment contract; rather, any amendment to the contract that is "fundamental" in nature may give rise to a "constructive dismissal", notwithstanding that it may be prompted by legitimate business concerns. ...

In *Greaves v. Ontario Municipal Employees Retirement Board*, *supra*, Mr. Justice Cumming of the Ontario Court of Justice (General Division) found that the plaintiff was constructively dismissed when he was demoted and his responsibilities diminished as a result of a *bona fide* business reorganization. In that case Cumming J. accepted the evidence of the employer's witnesses that they wanted the plaintiff to stay with the employer "... albeit in a lesser, but still important, role. ..." (at page 111).

At page 106 Cumming J. stated:

> The fact that the employer's motives are benign and that it may act "with genuine concern both for the company and the plaintiff" is one factor to consider but it does not necessarily change the conclusion of constructive dismissal if there has been a fundamental change in the plaintiff's position:

> *Cox v. Royal Trust Corp. of Canada* (1989), 26 C.C.E.L. 203 (Ont. C.A.), at p. 208, per Carthy J.A.
>
> **...**
>
> A demotion, or a reduction in job responsibilities, can constitute a constructive dismissal: see *Davidson v. Allelix Inc.* (1991), 7 O.R. (3d) 581 (C.A.), at p. 588, per Blair J.A. This is generally true even if there was a legitimate business justification for the reorganization of the business, which is the reason for the demotion and reduction in responsibilities.

In *Cayen v. Woodwards Stores Ltd*. (1993), 45 C.C.E.L. 264 (B.C.C.A.), McEachern C.J.B.C. stated:

> ... motive or subjective questions have little importance in these matters. The question is whether the proposed transfer was a fundamental breach of contract. If it was not, then subjective views on how the transfer might have been effected differently are not legally significant. (at page 273)

Finally, in *Farber v. Royal Trust Company* (1997), 145 D.L.R. (4th) 1 (S.C.C.) Gonthier J., for the unanimous Court, noted the following in his discussion of constructive dismissal in the Canadian common law provinces:

> In an article entitled "Constructive Dismissal" in Brian D. Bruce, ed., *Work, Unemployment and Justice* (Montreal:Themis, 1994), 127, Justice Nicholas W. Sherstobitoff of the Saskatchewan Court of Appeal defined the concept of constructive dismissal as follows at p. 129:
>
> > A constructive dismissal occurs when an employer makes a unilateral and fundamental change to a term or condition of an employment contract without providing reasonable notice of that change to the employee. Such action amounts to a repudiation of the contract of employment by the employer **whether or not he intended to continue the employment relationship.** Therefore, the employee can treat the contract as wrongfully terminated and resign which, in turn, gives rise to an obligation on the employer's part to provide damages in lieu of reasonable notice. (at page 13; emphasis added)

In summary, although an intent to encourage or force an employee to leave employment is often present in cases of constructive dismissal, such an intent is not required for a finding of constructive dismissal.

Based on the foregoing analysis, it is our conclusion that the adjudicator erred by holding that "... the intent of the alteration in the terms and conditions of employment must be to encourage the employee to leave the employment."

ISSUES ARISING FROM THE ANALYSIS

Having reached this conclusion on the point raised by the Director, the issue of whether Mr. Moses is entitled to compensation for length of service remains to be decided.

Did the employer by unilaterally reducing the hourly component of the wage from $10.00 per hour to $8.00 per hour terminate Mr. Moses' employment? (See: section 66 of the *Act.*)

In our view, reducing the fixed hourly wage by twenty percent is a substantial alteration to a very important condition of employment, even if the decrease in the hourly wage is accompanied by the ability to earn gratuities.

If an employer wishes to make such a change, then the employer is obliged to give the employee written notice as provided by section 63 of the *Act.* If the employer does not give the employee the requisite written notice, then the employer is liable to pay the employee compensation for length of service.

An employee is entitled to clear, written notice. In our view, Mr. Moses never received written notice that the hourly rate was to be reduced. The fact that Mr. Moses became aware of the rate reduction when he received the pay statement of January 11, 1997 does not mean that he received the written notice mandated by the *Act.*

Accordingly, Mr. Moses is entitled to one week's wages as compensation for length of service. This amount is to be calculated in accordance with section 63(4) of the *Act.* We refer the calculation of the wages owing back to the adjudicator.

ORDER

Pursuant to section 116(1)(b) of the *Act*, we order that the Decision, dated October 22, 1997, (BC EST #D480/97) be varied in accordance with these reasons. The calculation of the wages owing is referred back to the adjudicator.

Geoffrey Crampton
Chair

Casey McCabe
Adjudicator

Sherry Mackoff
Adjudicator