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 -

Collingwood Neighbourhood House Society
("Collingwood House" or the "employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No: 2000/014

DATE OF HEARING: February 29, 2000

DATE OF DECISION: March 10, 2000

DECISION

APPEARANCES:

Chris Beaton &
Oscar Allueva — for Collingwood Neighbourhood House Society

Ivy Chung — on her own behalf

No appearance — for the Director of Employment Standards

OVERVIEW

This is an appeal filed by Chris Beaton, on behalf of Collingwood Neighbourhood House Society ("Collingwood House" or the "employer"), pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on December 15th, 1999 under file number ER 027-551 (the "Determination").

The Director's delegate determined that Collingwood House did not have just cause to terminate its former employee, Ivy Chung ("Chung"), and accordingly awarded Ms. Chung termination pay in the amount of $1,096.67 reflecting two weeks' wages (section 63) and interest (section 88). Further, by way of the Determination, a $0 penalty was levied pursuant to section 98 of the *Act* and section 29 of the *Employment Standards Regulation.*

The employer's appeal was heard at the Tribunal's offices in Vancouver on February 29th, 2000 at which time I heard the testimony of Mr. Beaton (Director of Operations) and Mr. Oscar Allueva (Director of Community Services) on behalf of Collingwood House; Ms. Chung was the sole witness on her own behalf. The Director was not represented at the appeal hearing.

ISSUE TO BE DECIDED

Collingwood House acknowledges that Ms. Chung's is entitled to two week's wages (as calculated by the delegate) representing compensation for length of service if it did not have just cause to terminate her employment. However, Collingwood House says that Ms. Chung is not entitled to any compensation--and that the Determination should thus be cancelled--because it had just cause to terminate Ms. Chung's employment [see section 63(3)(c) of the *Act*].

FACTS AND ANALYSIS

Collingwood House is a nonprofit society that operates a number of childcare facilities. Ms. Chung, who holds a provincial Early Childhood Education License, was formerly employed as a childcare worker at Collingwood House's Joyce Street (Vancouver) childcare facility. Ms. Chung worked with young children up to kindergarten age. Collingwood House terminated

Chung on July 30th, 1998 as a result of certain events that occurred the previous day. The relevant portion of the employer's termination letter reads as follows:

> "Please be advised that effective immediately, your employment with Collingwood Neighbourhood House is terminated.
>
> Your supervisors have raised concerns about your approach with children on a number of occasions and most recently in a written warning issued to you on March 19, 1998. Your actions yesterday with one of the children was clearly against our agencies [sic] policies and procedures and against licensing regulations."

Collingwood House did not produce any internal work rules or policies at the hearing and thus I am unable to determine whether or not Ms. Chung, in fact, violated any particular work rule or internal policy. The particular "licensing regulation" referred to in the termination letter is, I understand, section 27 of the *Child Care Regulation* issued under the *Community Care Facility Act.* Section 27 provides as follows:

> **Discipline**
>
> 27. The licensee shall
>
> > (a) provide the staff of a facility and parents with a written statement of the facility's policy on discipline, and
> >
> > (b) ensure that no child enrolled in a facility is, while under the care or supervision of the licensee,
> >
> > > (i) subjected to shoving, hitting, shaking, spanking or any other form of corporal punishment,
> > >
> > > (ii) subjected to harsh, belittling or degrading treatment, whether verbal, emotional or physical, that would humiliate the child or undermine the child's self respect,
> > >
> > > (iii) as a form of punishment, confined, physically restrained or kept, without adult supervision, apart from other children, and
> > >
> > > (iv) as a form of punishment, deprived of meals, snacks, rest or necessary use of a toilet.

On July 29th, 1998, at about 12:45 P.M., a particular 3-year old child arrived at the daycare facility in the company of her regular babysitter. This particular child was relatively new to the facility and was experiencing what might be termed "separation anxiety". The child's parents had instructed the babysitter to ensure that the child stayed at the centre for the afternoon (she would be picked up at 3 P.M. by her father) and these instructions were, in turn, communicated to Ms. Chung by the babysitter. The babysitter stayed with the child (and Ms. Chung) for about 15 minutes without incident; when the babysitter was leaving, however, the child became upset and began to cry--she obviously wanted to go home with her sitter.

According to Ms. Chung, she kneeled down, and placed her arms around the child's waist so that she was restrained from running to her sitter. At the same time, Ms. Chung endeavoured to explain to the child that the sitter had to leave, that the child would have a pleasant afternoon at the centre and that her father would be coming to pick her up later on in the day. According to Ms. Chung (and her evidence is wholly uncontradicted on this point), after a brief time, the child calmed down and had an entirely uneventful, even enjoyable, afternoon without any further incident of crying or other upset.

Neither Mr. Beaton nor Mr. Allueva--the *only* employer representatives who testified before me--actually witnessed the events in question. Apparently, two other childcare workers thought that Ms. Chung had not dealt with the child in an appropriate manner and raised their concerns with the employer's senior manager on site. Both employees seemingly felt that the restraint exercised by Ms. Chung might have hurt the child. Neither of these two (current) employees testified before me; I do not give their respective written (and unsworn) statements any evidentiary value. First, such statements, being hearsay, lack probative value; second, one of the statements does not name the child in question but an entirely different child; third, not only are these two statements quite inconsistent with Ms. Chung's testimony but they are also totally inconsistent with the *sworn* statement provided by two parents who witnessed the entire chain of events. This latter statement (a single 2-page statement sworn by both parents) indicates that the child was crying "uncontrollably" and that Ms. Chung was instructed by the sitter to "watch the child" while the sitter left the premises. The statement continues:

> "[Ms. Chung] kneeled down and tried to console [the child]. She spoke softly in Cantonese and gently put her arms around her waist to prevent her from falling and running away from the PreSchool. Ivy did not use any excessive force at all, neither was she rude, aggressive or abusive. She is an excellent teacher who is kind, gentle, and caring. She did not drag or pull [the child]."

There is no evidence before me that anyone from the employer ever spoke with the parents of the child involved to ascertain their views about Ms. Chung's behaviour; nor did anyone from the employer ever speak with the sitter. I might also note that no person in authority spoke with Ms. Chung on the afternoon of the incident (her shift ended at 4 P.M., some three hours after the incident), nor was she reprimanded in any fashion on July 29th. If this incident was sufficiently serious to justify her immediate termination, without notice, I would have thought a supervisor would have spoken with Ms. Chung forthwith--on that same afternoon--and would have suspended her from any further interaction with any of the children in her charge. Of course, nothing of the kind took place and it was not until the next day that Ms. Chung was called into a meeting at which time a termination letter was given to her.

Based on the evidence before me, I cannot conclude that Ms. Chung breached any of the provisions of section 27 of the *Child Care Regulation.* Indeed, in a booklet provided to all childcare workers by the Ministry of Health, childcare workers are specifically directed as follows:

> **D. Guidance Strategies: Intervention...**

> **2. Use Proximity and Touch**
> In situations where children may be losing self-control, the closeness of an adult can often help them re-establish it. Simply moving close to a child, *putting an arm around a child,* or holding a child on the caregiver's lap can serve as an effective guidance and intervention... (my *italics*)

It is clear that both Messrs. Beaton and Allueva believe that Ms. Chung ought not to have physically restrained the child when the sitter was leaving. They both suggested that Ms. Chung ought to have sent the child home with the babysitter even though such action would have directly contravened the child's parents' instructions (as communicated to Ms. Chung through the child's sitter). Messrs. Beaton and Allueva believe that, at least in some respects, they have a better idea about what is in the best interests of a child than does his or her parents. That may be so but there is no evidence before me that Ms. Chung was under any instruction to ignore the parents' wishes and send the child home should she begin to cry when her sitter was leaving. Further, the parents had communicated to Ms. Chung perfectly rational reasons as to why they wished their child to stay at the centre for three 2-hour sessions each week, namely, to assist in the child's social development and to help the child learn english.

If I was satisfied that Ms. Chung used "excessive force" in dealing with a child, I would not hesitate in finding in favour of the employer. However, given the evidence before me, I have absolutely no hesitation in concluding that the employer has *not* met its evidentiary burden of proving that it had just cause for termination. Indeed, in persisting (despite the Determination and an earlier Board of Referees' decision that Ms. Chung had not committed any act of "misconduct" that would disentitle her to employment insurance) with what I believe to be an unfounded allegation that Ms. Chung used "excessive force" in dealing with a child, I am of the view that the employer has demonstrated "bad faith" as that term was defined by the Supreme Court of Canada in *Wallace v. United Grain Growers Limited* [1997] 3 S.C.R. 701. However, unlike the courts, I do not have the authority to extend the notice entitlement on the basis of the employer's bad faith; all I can do is simply confirm the delegate's award.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **$1096.67** together with whatever further interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance. It follows that the $0 penalty is similarly confirmed.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal