BC EST #D187/97

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act S.B.C. 1995, C. 38

- by -

Windsor Holdings Ltd.

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Lorna Pawluk
FILE NO.:	97/18
DATE OF HEARING:	May 2, 1997
DATE OF DECISION:	May 16, 1997

DECISION

APPEARANCES

Carroll Gregson	For Herself
John Dale	For Windsor Holdings Ltd.
Julie Brassington	For the Director

OVERVIEW

This is an appeal by Windsor Holdings Ltd. ("Windsor Holdings") pursuant to Section 112 of the Employment Standards Act (the "*Act*") against a Determination dated December 23, 1996 ("Determination") of the Director of Employment Standards (the "Director"). In this appeal, the employer claims that he did not receive a request for family responsibility leave under the *Act* and thus was not obliged under section 52 to grant leave to Carroll Gregson.

ISSUE TO BE DECIDED

The issue is whether Windsor Holdings was required under Section 52 of the *Act* to grant family responsibility leave to Carroll Gregson.

FACTS

Gregson was employed as a kitchen worker for Windsor Holdings which operates industrial cafeterias in Richmond. It employs 5 employees. John Dale ('Dale') is the manager and part owner. Gregson is the only employee working the afternoon shift (1-7 p.m.) at a soup and sandwich operation for Gray Beverages. The individual normally working the morning shift, Gloria Guy, from 5 a.m. to 1:30 p.m., was on stress leave; her replacement's name was Jenny.

On August 7, 1996, Gregson spoke to Mrs. Dale and said that when her daughter went into labour, she would like to go with her. It is common ground between the parties that one day's leave was approved for this purpose. Gregson's daughter went into labour on the evening of Sunday August 18 and at 8 a.m. Monday August 19, Gregson phoned her place of employment to advise her co-worker Jenny that her daughter had gone into labour and that she would need the day off work. Gregson said that she knew that Dale visited the cafeteria every day at 10 a.m. so that he would get her message. The baby was not born until Tuesday and again on Tuesday morning Gregson phoned work to say she would not be in for the rest of the week. She said that on Tuesday evening when she got home, there was a message on her answering machine from Dale asking her to return her keys as they were needed by another employee. Gregson said she was the only one available to care for her

daughter, a single parent, and the baby. Her daughter had not recovered from a difficult birth but was nonetheless sent home from hospital on Wednesday. Gregson called the employer on Wednesday morning (August 21st) about the keys and took them in on Thursday August 24 at 10 a.m. On Saturday morning (August 24) Dale called Gregson to advise that her employment was being terminated and that she would receive a letter of termination and her pay in the mail. Dale said he was able to continue operating the cafeteria as he found a replacement for Gregson when he visited a local pub where he met a woman with experience in making soup and sandwiches.

In the letter of termination dated August 21, 1996, Dale described Gregson's absence from work as a "flagrant breach of the conditions of . . . employment which is, as a result, summarily terminated."

In his Notice of Appeal, Dale claims that he was not given an opportunity to present his case to the Employment Standards Officer. Dale argues that because the Board of Referees of the Employment and Immigration Department of the federal government found that he was justified in dismissing Gregson, this matter has been "fully dealt with". He submits that the federal tribunal was aware of relevant provincial legislation and that his business should not be presented "with two completely opposite decisions, one from our Federal Government, the other from the Province." He enclosed a copy of the "unanimous" reasons of that tribunal which state in part:

> The issue before the Board is Misconduct under Sections 29(A)(B) and 30(1), of the Employment Insurance Act. . . .
>
> Evidence from the employer shows that the claimant was fired on August 21, 1996 because she was absent from work without authorization or justification. She was granted a day-off to be with her daughter during her delivery. The claimant subsequently called the employer and told the employer's wife that she was taking the rest of the week off despite the fact that the claimant was aware that all absences from work must be discussed with the owner directly.
>
> The claimant states that she called a co-worker and told her to inform the employer that she would not be at work for the rest of the week.
>
> The Commission concluded that the facts supported a finding of misconduct and imposed a disqualification. . . .

> Based on the above the Board finds the claimant made a personal choice to take the unauthorized week off work and by doing so lost her job by reason of her own misconduct pursuant to Subsections 29(a) and 30(1) of the E.I. Act.

Dale also argued that Gregson had 5 different phone numbers where he could be reached and that she should have asked him personally for the time off. This constituted just cause as it:

> . . . placed our ability to keep open the Gray cafeteria . . . and this, in turn, placed us at risk of losing our contract to operate that facility. We feel the situation was further aggravated by her knowledge that we were already in a difficult position by virtue of the absence of her 'opposite number' Gloria Guy.

He says that the Determination is "seriously flawed" because it claims that she had asked for time off and was not granted it: "Carroll had asked for one day and had been granted it. The remaining four days she did not 'ask for' - she left a message with a third party that she was taking it."

ANALYSIS

Section 52 of the *Act* entitles employees to time off without pay to meet certain personal obligations:

> 52. *An employee is entitled up to 5 days of unpaid leave during each employment year to meet responsibilities related to*
>
> (a) *the care, health or education of a child in the employee's care, or*
>
> (b) *the care or health of any other member of the employee's immediate family.*

Dale concedes that Gregson was absent from work for a purpose covered by Section 52(b), that is to meet responsibilities relating to the care of a member of the immediate family. However, he says that the section does not require him to grant leave unless the request is made to him personally.

Section 52 says only that an employee is entitled to 5 days unpaid leave to meet certain family responsibilities, but is silent with respect to procedure which must be followed to comply with that provision. The Thompson Report, Rights and Responsibilities In A Changing Workplace, reviewed employment standards regulation in this province. While this report does not necessarily reflect the intention of the legislature in passing Section 52, it is nonetheless useful in understanding the background to the provision. The report

recommended that workers be entitled to 5 days per year of unpaid leave to meet responsibilities related to the care, health or education of children or other members of the immediate family:

> The changing circumstances of the provincial labour force has created pressures for other categories of leave, in particular family responsibility leave. The Commission received numerous requests to recognize the special problems of workers who combine their jobs and family responsibilities. The overwhelming majority of these are women. They are faced with their own illnesses, plus the requirements of child care. The growing proportion of women with children in the labour force has increased the number of workers facing these tensions. As the labour force ages, more workers also carry resonsibilities connected with the care of aging parents.

Section 2(f) of the *Act* recognizes that one of the purposes of the *Act* is to "contribute in assisting employees to meet work and family responsibilities". Thus section 52 must also be read on the understanding that one of the purposes of the legislation is to assist employees to meet their family responsibilites. While section 52 is silent on the procedure to be followed where family leave is required, section 54, which outlines the duties of an employer in granting leave under various provisions of the *Act* envisages a request by the employee:

> 54(1) *An employer must give an employee who requests leave under this Part the leave to which the employee is entitled.*

The *Act* does not state that a request must be in writing, or made personally to an employer (indeed where the employer is a corporation, such a requirement could not be fulfilled), only that the request be made by the employee. It is also silent as to whether the request can be made orally or in writing. In the absence of explicit requirements in the *Act*, I find that the type of request which triggers section 52 leave requests will depend on what is reasonable in the circumstances. In these circumstances, I find that Gregson acted reasonably in leaving a message with a co-worker and that this request triggered her rights under section 52. She knew that Dale visited the cafeteria every morning at 10 a.m. and that he would receive the message three hours in advance of her shift. Given the unusual circumstances in which Gregson found herself -- she was attending the birth of her grandchild and her daugher was a single parent without anyone else to look after her -- it was not reasonable to expect her to personally contact Dale. There may be circumstances in which a personal request is necessary under Section 52, but this is not such a case.

While I can appreciate the considerable pressures on someone operating a number of small businesses, I cannot agree that it was necessary for Dale to be personally contacted in this case. Dale knew of the absence in advance of Gregson's shift and did not explain how a personal request would have placed him in a better position. Moreover, he was able to continue operating the cafeteria with relief help that he met at a local pub. Under the circumstances, it is difficult to find that Dale was prejudiced in any way by Gregson's actions; while he may have been inconvenienced, he was not prejudiced.

Mr. Dale argues that he should not be faced with contradictory decisions from two levels of government and that this contradiction is an unreasonable restriction on his ability to carry on his business. There are several reasons why I am not going to follow the decision of the Board of Referees. First, I do not consider the decisions to be "contradictory" as the issue before these two tribunals is different. Whereas they considered whether Gregson's behavior constituted "misconduct" under certain provisions of the Employment Insurance Act, I am called upon to determine whether the worker was wrongly refused family responsibility leave under section 52 of this *Act.* Second, I do not know what they are required to consider in making their Decision and no considerations are outlined in the Decision; thus it is difficult to be persuaded by their reasoning. Third, contrary to Mr. Dale's submissions on this point, they do not seem to consider section 52 of this province's legislation, or indeed to even be aware of it, as the decision does not mention the leave provisions under consideration here. Fourth, I am not bound by their decision by any provision of the *Act.*

Given my conclusion on this point, it follows that Gregson was dismissed without just cause and is thus entitled to appropriate compensation under the *Act*.

ORDER

Pursuant to Section 115 of the *Act*, I hereby confirm the Determination dated December 23, 1996.

Lorna Pawluk
Adjudicator
Employment Standards Tribunal