

**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 -

Muni Esmail and Emtias Esmail  
operating as  
Futurekids Daycare Centre  
(“Employer”)

- of a Determination issued by -

The Director Of Employment Standards  
(the “Director”)

**ADJUDICATOR:** Richard S. Longpre  
**FILE NO.:** 97/15  
**DATE OF HEARING:** April 30, 1997  
**DATE OF DECISION:** May 12, 1997

**DECISION**

**APPEARANCES**

The Employer	by written submission
Ms. Michelle Phillips	for herself
Ms. Pat Cook	for the Director

**OVERVIEW**

This is an appeal by Muni Esmail and Emtias Esmail operating as Futurekids Daycare Centre (“the Employer”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) of Determination #CDET 04983. The Determination, issued by the Delegate of the Director of Employment Standards (the “Director”), found that the Employer owed Michelle Phillips (“Phillips”) \$1,584.51 in wages, vacation pay and interest.

Michelle Phillips commenced employment with the Employer in 1993. On September 10, 1997 Phillips’ employment with the Employer ceased. Phillips says that she was terminated by the Employer without cause. The Employer says that Phillips decided to quit. The Employer also states that it had just cause to terminate Phillips.

I note at the outset that the Employer did not attend at the hearing. It relied on its appeal submission.

**ISSUES**

The issue is whether Phillips terminated her employment or whether she was terminated by the Employer. If Phillips was terminated by the Employer, was it done with just cause.

**FACTS**

Wage rates for employees working at the Centre were subsidized by a Provincial Government enhancement fund. The Employer's wages to each of its employees were subsidized by approximately \$3.00 per hour. On September 10, 1996, the day Phillips allegedly terminated her employment, the Employer informed Phillips that the wage subsidy had not yet been confirmed for the coming year. The wage rates of all employees, including Phillips, would be dropped from \$12.50 per hour to \$9.50 per hour pending the Employer's application for assistance. Phillips was upset. There is a dispute over what happened next.

The Employer says that Phillips told another staff member that she was terminating her employment. She demonstrated the point by leaving her key to the Centre with the other staff member. Phillips then left the Centre. The Employer says that later Phillips changed her mind. She returned to the Centre and picked up the key. The Employer called Phillips at home that evening stating, in effect, that it had accepted her termination. It would not accept Phillips' change of mind.

Phillips says that she was upset when she was told her wage rate was being dropped from \$12.50 per hour to \$9.50 per hour. She agrees that she left the key to the Centre on a bulletin board near another employee. She told that employee that she "might" quit. Phillips did not talk to the Employer.

Phillips explained that she went outside and supervised the children for a short period of time. She then returned inside, picked up her key and requested that another employee cover her for the remaining part of her shift. Phillips says that during her evening telephone conversation with the Employer, he insisted that she not return to work the next day. She was terminated.

The Determination acknowledges that an employer does not have a liability for length of service when an employee resigns. The Determination also notes that an employer does not have any liability when an employee is terminated for just cause.

The Determination sets out the evidence the Delegate obtained from both parties. The Delegate concluded that Phillips had not formed an intention to quit and then followed through on that intention. Phillips left the keys with the other employee for a short period of time. She worked during this short period. Phillips told the Employer prior to leaving the Centre on September 10 that she would be attending work the next day.

The Determination also notes that the Employer gave Phillips a letter dated April 30, 1996 that raised its concern over her work performance. The Determination states that there was no further documentation in the last months of Phillips' employment and "no actions on September 10, 1996 as outlined by the Employer to warrant dismissal for cause" (p.3). The Determination set out the basis on which she made her decision.

## **ANALYSIS**

The Employer's failure to attend the hearing was not to its benefit. In its appeal, the Employer states: "Surely, the Director cannot take one party's word against the other without properly investigating the case." I agree. However, the "proper investigation" in the appeal was the formal hearing scheduled for 9:00 a.m., April 30, 1997. The Employer chose not to participate in that hearing. In its appeal submission the Employer relies upon a letter from Phillips' former co-worker. However, it chose not to call her as a witness and subject her evidence to cross-examination.

In the hearing, I requested Phillips to address all of the allegations that were made by the Employer in its appeal submission. Phillips addressed each point. She raised a number of points that called the credibility of the Employer into doubt. The Employer was unable to respond to Phillips' response nor to her questions. Similarly, the Delegate explained the rationale for the decision. She answered my questions on specific details.

One final point. The Employer argued that Phillips' lost wages should be based on what she would have been owed had she continued to work for the Employer. Section 63(4) provides that the amount owed by the Employer is based on the wage rate paid to Phillips over the last eight weeks of her employment. On the evidence before me, it was determined that, based on the last eight weeks of her employment, the amount owing Phillips was \$1282.50. With vacation pay and interest the total amount owing is \$1354.76.

**ORDER**

Muni Esmail and Emtias Esmain, operating as Futurekids Daycare Centre owe Michelle Phillips \$1,354.76.

Pursuant to Section 115 of the *Employment Standards Act*, Determination #CDET 04983 is varied accordingly.

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**Richard S. Longpre**  
**Adjudicator**  
**Employment Standards Tribunal**