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 -

Raymonde Hill operating as
Tigger's Playcenter

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: April D. Katz

FILE No.: 2000/153

DATE OF HEARING: June 23, 2000

DATE OF DECISION: July 26, 2000

DECISION

APPEARANCES:

For the Employer	Raymonde Hill, Andrea Denman, Rebecca Peterson, Sue Flynn, Jean Johnston
For the Employee	Jennifer Dwyer, Bill Dwyer and Joan Chevrier
For the Director	No one appeared

OVERVIEW

The Employer, Raymonde Hill, appealed Determination ER #:093734 on the basis that the Delegate of the Director of Employment Standards (the "Director") erred in concluding

1. that the Employee, Jennifer Dwyer, was not a "manager" as defined in the *Employment Standards Regulation*; and

2. that the Employer lacked just cause for terminating the Employee's employment on October 9, 1998.

DETERMINATION

The Director issued the Determination on February 16, 2000 in which she found that the Employee was entitled to $142.18 compensation for hours of overtime worked and $1510.08 for 3 weeks salary in lieu of written notice for a total of $1652.26 plus interest.

FACTS

Most of the facts are not in dispute. The evidence presented during the hearing was consistent with the findings of fact in the Determination. The parties and their witnesses were candid and helpful in the evidence provided.

The Employer is the owner/operator of Tigger's Playcenter. In 1998 the Playcenter had three programs operating, a day care center, a preschool program and a before and after school program. The day care and preschool were on the upper floor of the building and operated under the supervision of the day care supervisor. The before and after school program was on the lower floor and was under the supervision of its own supervisor who would consult occasionally with the day care supervisor.

The Employee was the supervisor of the day care center and was paid $12.10 per hour. She worked at Tigger's from September 1995 until October 9, 1998. As the Supervisor she welcomed children and parents, directed part time staff and acted as on site supervisor of all of the programs. The Supervisor decided on the daily activities and the break times, working as a

team with the assistant supervisor in the day care. Most often there were only two people working in the day care center and one or two people in the before and after school program. The busy times were lunch and breaks when staff would shift around to provide extra supervision.

The Employer hired staff, set hours of work schedules in consultation with each employee, set rates of pay and paid staff. The Employer provided the Supervisors with a list of casual employees to be called in as needed. All the staff accepted payments from parents, which were left for the Employer to pick up.

When some of the staff was hired, they had not completed the required hours of practical experience to be qualified as early childhood educators. They completed their qualifications during their employment at Tigger's under the Employee's supervision. The Employee did not hire or fire any staff. The Employee did not discipline staff but would caution and correct staff who forgot safety and other procedures. She spent most of her time supervising children.

From December 1997 to June 1998 the Employee was on maternity leave. When she returned staff were talking about a rumor that the Landlord of the building was not going to renew the lease at the end of the year because the President of the Landlord's Association had plans to open a new day care. Various staff members including the two supervisors and their assistants were approached about working for this new daycare during the summer of 1998. The Employer was told that the lease would not be renewed in the first week of October 1998.

When she was approached, the Employee's response to the Landlord was that she was not sure she was interested in the position but she would think about it. The Landlord's representatives were on the property preparing for other functions in the building on Fridays and other occasions when evening functions were planned in the building. The President also did repairs when asked by the staff or the Employer of Tigger's.

On October 7, 1998 when the parents were picking up their children the person planning the new day care center handed out a letter to the parents and answered questions in the parking lot. The letter disclosed that Tigger's lease would not be renewed but that a new daycare was opening at the same location. The Landlord sought the parents support in coming to the new daycare. The letter stated that Jennifer Dwyer and other staff would " be staying on with the daycare. Jennifer Dwyer will also be managing the operation of our behalf."

One parent spoke to the before and after school supervisor about the letter. There was a Tigger's Playcenter parents' meeting on October 8, 1998 and the supervisor suggested that the parent speak to the Employer after the meeting. This supervisor told the Employer that this parent wished to speak to her after the meeting. The parent gave the Employer the letter and expressed concern that there appeared to be no plan for the preschool program.

That night the Employer spoke to the before and after school supervisor, who confirmed that each of the employees had been approached about working for the new daycare. She told the Employer that all the employees had known for months that the lease would not be renewed. This supervisor's evidence was that she thought that the Landlord had lost interest in her as an employee by the time the letter was distributed.

On October 9, 1998 in the morning the Employee saw a copy of the letter to parents dated October 7, 1998 for the first time. A parent showed the letter to her. The Employee was very upset and told the parent she did not know anything about the letter. The Employee told the parent that she should not go to the Employer immediately. She had all her children to care for that day and planned to deal with the letter after work. She knew that the person who signed the letter would arrive for her usual Friday preparations late in the day and she could speak to her then. She promised the parent that she would check into it. She was upset that her name had been used without her consent or knowledge and before she made any commitment to the new daycare.

Understandably the Employer was very upset. She consulted the Employment Standards Branch and her lawyer on October 9, 1998. The Employer had her son's birthday party to coordinate that day and did not get to Tigger's until late in the day. She asked to speak with the Employee privately. She asked the Employee if she had seen the letter and she confirmed that she had.

When the Employer confronted the Employee about the letter the Employer had concluded that the Employee was disloyal and had conspired with the Landlord's agents to steal her business. She came with a letter terminating the Employee's employment effective immediately. She had prepared a cheque for work performed until the afternoon of October 9, 1998.

The Employer did not pay any additional compensation under section 63 for years of service or in lieu of notice.

LAW AND ANALYSIS

Manager

The Employer argued that the Employee was a manager as defined under the *Act* and the *Regulation* and was therefore not entitled to overtime for working in excess of 8 hours per day. The fact that the Employee did work in excess of 8 hours per day on occasion and could not leave the site for breaks was not disputed.

The Employer believed that the regulation defining 'manager' had changed during the Employee's employment but it has not. The current regulation, which is quoted in the Determination is the same as the one quoted in *429485 B.C. Ltd. (c.o.b. Amelia Street Bistro)* BC EST #D170/97 ("*Amelia Street*") which related to an employee who started work in 1994.

Amelia Street is quoted often as a leading case on the meaning of 'manager'. In *Amelia Street* the complainant, an employee, was a cook in a restaurant. His duties were described in the decision as having:

1. designed new menus;

2. kept the inventory and performed food cost duties;

3. ordered supplies and dealt with suppliers;

4. supervised staff including hiring, firing, scheduling and training;

5. maintained computer records but did not do the payroll;

6. dealt with customers and the public; and

7. performed cooking and kitchen duties with clean up as required.

He was considered by employees to be the manager."

The decision goes on to the quote *Employment Standards Regulation* as follows:

> "Section 1(1) of the Regulation to the Act defines, among other things, "manager":
>
> *1. (1) In this Regulation:*
>
> *"manager" means*
>
> *(a) a person whose primary employment duties consist of supervising and directing other employees, or*
>
> *(b) a person employed in an executive capacity.*
>
> There is no issue in this reconsideration that Telemans was considered to be a person employed in an executive capacity."

Amelia Street went before an Adjudicator and was reconsidered by three Adjudicators (BC EST #D479/97) on the meaning of "manager". They discussed a number of cases and concluded as follows.

> "The task of determining if a person is a manager must address the definition of manager in the *Regulation*. If there are no duties consisting of supervising and directing other employees, and there is no issue that the person is employed in an executive capacity, then the person is not a manager, regardless of the importance of their employment duties to the operation of the business. That point was made by the Tribunal in *Anducci's Pasta Bar Ltd*.:
>
> > Many of the duties to which the employer pointed as evidence of Lum's managerial status did not address the definition of manager in the Regulation. Handling of cash, custody of a key, responsibility for checking purchases and the like are all responsible duties, but they are not connected with the supervision or direction of employees.
>
> Any conclusion about whether the primary employment duties of a person consist of supervising and directing employees depends upon a total characterization of that person's duties, and will include consideration of the **amount of time spent supervising and directing other employees, the nature of the person's other (non-supervising) employment duties, the degree to which the person exercises the kind of power and authority typical of a manager, to what**

> **elements of supervision and direction that power and authority applies, the reason for the employment and the nature and size of the business**. It is irrelevant to the conclusion that the person is described by the employer or identified by other employees as a "manager". That would be putting form over substance. The person's status will be determined by law, not by the title chosen by the employer or understood by some third party.
>
> We also accept that in determining whether a person is a manger the remedial nature of the *Act* and the purposes of the *Act* are proper considerations. The Director raises a concern that an interpretation of manager which does not accept the limited scope of exclusion from the minimum standards of the *Act* could have serious consequences for persons in positions such as foreman and first line supervisor who spend a significant amount of time supervising and directing other employees but frequently do not exhibit a power and authority typical of a manager. As we stated above, the degree to which some power and authority typical of a manger is present and is exercised by an employee are necessary considerations to reaching a conclusion about the total characterization of the primary employment duties of that employee.
>
> **Typically, a manger has a power of independent action, autonomy and discretion; he or she has the authority to make final decisions, not simply recommendations, relating to supervising and directing employees or to the conduct of the business. Making final judgments about such matters as hiring, firing, disciplining, authorizing overtime, time off or leaves of absence, calling employees in to work or laying them off, altering work processes, establishing or altering work schedules and training employees is typical of the responsibility and discretion accorded a manager**. We do not say that the employee must have a responsibility and discretion about all of these matters. It is a question of degree, keeping in mind the object is to reach a conclusion about whether the employee has and is exercising a power and authority typical of a manager. It is not sufficient simply to say a person has that authority. It must be shown to have been exercised by that person."
>
> *(Emphasis added)*

I have highlighted the comments which are most relevant to the facts in Tigger's Playcenter. The Tigger's Playcenter daycare supervisor does not have the power to make final decisions relating to directing employees or the conduct of the business. She does not make final decisions, set fees, waive arrears of fees or hire or fire employees. She does not set any work schedules other than being able to call in help from a defined list of people, when someone is sick or does not arrive. At Tigger's Playcenter the Employer/owner fulfils the role of manager as contemplated by the *Act* and *Regulation.*

I find on all the evidence that the Director did not error in finding that Jennifer Dwyer was not a manager within the meaning of the *Act* and *Regulation.*

Just Cause

The second basis of appeal is the Employer's argument that she had just cause to end the Employee's employment on October 9, 1998. The Employer had evidence that the Landlord's agents were trying to attract her staff and customer/parents to their business and away from her daycare. The Employer believed that the Employee had conspired with the Landlords to undermine her business or at least have been negligent in allowing the Landlords access to the parents. After she learned that the Employee did not know what the Landlord's agents were doing, she still felt she was justified because the Employee allowed the agents on the property to speak to staff and parents.

In a recent decision, *Benoit (c.o.b. Academy of Learning)* BC EST #D137/00, Adjudicator Stevenson considered an appeal from an employer found to have terminated an employee without just cause. He addressed the standards to apply to this type of appeal.

> "Section 63 is part of the legislative scheme to "ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment ".... subsection 63(1) and paragraph 63(3)(c) of the *Act*, which state:
>
> *63. (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one weeks' wages as compensation for length of service. . .*
>
> *(3) The liability is deemed to be discharged if the employee*
>
> *(c) terminates the employment, retires from employment, or is dismissed for just cause.*
>
> The Determination correctly and succinctly notes one of the purposes for length of service compensation:
>
> Considering the intent of Part 8 of the *Employment Standards Act* (Termination of Employment), it becomes evident that the legislation is not designed to interfere in management's right to manage, staffing whom they wish to do the job the way they want it done. Rather, it is intended to provide the courtesy of notice, as we all have financial commitments and are dependent on our income to meet those commitments.
>
> Length of service compensation should not be equated with common law damages for wrongful dismissal. The main objective of the common law is to adjudicate a breach of contract and to provide appropriate relief for that breach, depending on the Court's view of the circumstances and factors in each case. . . .
>
> The objective of Section 63 of the *Act* is different. It is intended to provide an employee with brief period, at a time when that employee's loss of employment is imminent, which the employee can use to seek alternative employment and make adjustments to their personal and financial circumstances unaffected by the immediate financial consequences of unemployment. This period can be provided

by giving notice, by paying compensation equivalent to the required notice or by some combination of those two. As the Determination notes, it is in many respects an enforced courtesy.

Section 2 sets out the purposes of the *Act*:

2. The purposes of this *Act* are to

(a) ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment,

(b) promote the fair treatment of employees and employers,

(c) encourage open communication between employers and their employees,

(d) provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act,

(e) foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia, and

(f) contribute in assisting employees to meet work and family responsibilities."

In *L.J.B. Foods Ltd. (c.o.b. McDonalds)* BC EST #D133/98, Adjudicator G. Crampton considered whether there was just cause for terminating the employment of an employee believed to have committed theft. The employee did not deny taking $25 worth of Macdonald's toys home without paying for them but stated she intended to pay for them. She had worked for the employer for 7 years without any prior need for discipline.

"The Tribunal has addressed the question of dismissal for "just cause" on many occasions. The following principles may be gleaned from those decisions (see, for example, *Kenneth Kreuger* BC EST #D003/97):

1. The burden of proving the conduct of the employee justifies dismissal is on the employer;

2. Most employment offences are minor instances of misconduct by the employee not sufficient on their own to justify dismissal. Where the employer seeks to rely on what are in fact instances of minor misconduct, it must show:

    1. A reasonable standard of performance was established and communicated to the employee;

2. The employee was given a sufficient period of time to meet the required standard of performance and had demonstrated they were unwilling to do so;

3. The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and

4. The employee continued to be unwilling to meet the standard.

. . . .

4. In exceptional circumstances, a single act of misconduct by an employee may be sufficiently serious to justify summary dismissal without the requirement of a warning and in such circumstances the Tribunal has been guided by the common law on the question of whether the established facts justify such a dismissal.

. . . .

As noted above, to justify dismissal on the basis of a single act, the employee must have acted willfully or deliberately. **Thus, an employee who honestly believes that he or she was acting within acceptable or permissible limits cannot be dismissed for "just cause"** [Petit v. I.C.B.C. (1995), 13 CCEL (2d) 62 (B.C.S.C.)]."

I have highlighted the relevant conclusion from the decision.

The onus is on the employer to show that she had just cause to end the Employee's employment. In this situation, the Employer did not have all the relevant facts about the Employee's conduct or her relationship with the author of the letter when she terminated her employment. The Employer is expected to ensure that the information on which she is relying is accurate. In McDonald's above, for example, the employee was sent home for two weeks while an investigation was conducted. The Employer did not allow herself enough time to find out what was happening. Jennifer Dwyer was the last employee to hear the rumor about the lease ending. All the employees had been approached about new employment opportunities. There does not appear to be any reason for Jennifer Dwyer to lose her employment while all the other employees remained employed.

In addition, employees are not obligated to disclose to their current employer if they are looking for new employment. There was no breach of duty of the Employee to the Employer.

Normally discipline of employees is progressive with termination of employment being the last step after other measures have failed. The employer is expected to make the employee aware of any misconduct that warrants discipline and give the employee an opportunity to correct the misconduct. The exception is when the conduct is so grave that it is a repudiation of the employment contract as set out in *Kenneth Kreuger* BC EST #D003/97.

I find that there was no grave misconduct by the Employee in this instance. The Employer acted on a mistake of fact. There was no just cause for the termination of the Employee's employment based on the evidence before me or available to the Director's Delegate.

There is no evidence to support setting aside the findings of fact in the Determination. The Determination is confirmed.

ORDER

The appeal of Raymonde Hill operating as Tigger's Playcenter is denied and the Determination is confirmed pursuant to section 115 (1)(a) of the *Act*.

The effect of this decision is to confirm the Determination of February 16, 2000. Raymonde Hill operating as Tigger's Playcenter is required to pay Jennifer Dwyer $1,689.56 plus any additional interest due from the date of the Determination under Section 88 of the *Act*.

April D. Katz
Adjudicator
Employment Standards Tribunal