**BC EST #D323/99**

**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 -

Young Adventurers Daycare Inc.
(the "Employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

**ADJUDICATOR:** Mark Thompson

**FILE NO.:** 1999/281

**DATE OF DECISION:** August 5, 1999

# DECISION

## OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by Young Adventurers Daycare Inc. (the "Employer") against a Determination issued by a delegate of the Director of Employment Standards (the "Director") on April 19, 1999. In the Determination, the delegate found that the Employer had violated Section 79 of the *Act* with respect to the termination of Wendy Tully ("Tully") and ordered the Employer to pay Tully $427.21 for compensation for length of service, minimum daily pay, associated vacation pay and interest.

Young Adventurers Daycare Inc. appealed the Determination on the grounds that it had just cause to dismiss Tully for insubordination.

## ISSUE TO BE DECIDED

The issue to be decided in this case is whether the Employer had just cause to dismiss Tully.

## FACTS

Tully was employed by the Employer in its daycare facility from October 1, 1997 until November 5, 1998. No evidence was produced on her performance, so the obvious inference is that her work was at least satisfactory. Tully submitted statements from two other former employees of the Employer and the mother of a child in the facility praising her work. In October or early November 1998, Kevin Jones ("Jones"), the owner of the Employer, informed employees that their telephone calls would be monitored. The rationale for this decision was Jones's concern about staff telephone manners and the amount of time some individuals were talking on the telephone. Jones told employees that they were free to make personal calls "provided they were important and not too long in duration." According to Jones, he also told employees that they were free to raise any problems they had with this policy with him.

Jones provided employees with form stating that an individual was aware that his or her "phone transactions" would be monitored. Apparently, each employee was asked to sign the statement. At least two other employees signed the form and added comments that they were signing under duress and feared loss of employment. A third declined to sign the form and stated that she would have calls re-directed to her voice mail at home. Tully refused to sign the form and added a note to it protesting the Employer's action as an invasion of her privacy. The Employer did not present any evidence that Tully was warned that her failure to sign the form could result in her dismissal. Apparently Jones took offense at Tully's statement that his concerns were "petty." He stated that he

contacted the Employment Standards Branch and was told that an employee who stated that his concerns were petty could be dismissed.

Jones gave Tully a written statement of termination effective November 5, 1998 for insubordination. The Employer did not argue that it provided any advance notice of termination to Tully. Tully's Record of Employment stated that her last day of employment was November 4, 1998

The Director's delegate concluded that Tully's note constituted insubordination and that the Employer's only response was termination. No management representative spoke to Tully or asked for an explanation for her actions prior to her dismissal. The delegate further found that Tully's action was not a repudiation of the employment contract. Therefore, the delegate concluded that the Employer did not have just cause to terminate Tully.

## ANALYSIS

Section 61 of the *Act* states that an employer is liable to pay an employee an amount equal to one week's wages as compensation for length for service. Section 63(3)(c) of the *Act* states that an employer can discharge this liability of the employee is "dismissed for just cause." It is an accepted principle of employment law that the employer bears the burden of proof for establishing that just cause exists.

The Tribunal has addressed the issue of what constitutes just cause on many occasions. The adjudicator in *Re Silverline Security Locksmith Ltd.* BC EST #D207/96, the adjudicator stated that just cause:

> Can include fundamental breaches of the employment relationship such as criminal acts, gross incompetence, willful misconduct or a significant breach of the workplace policy.

In other words, a single action by an employee must be extremely serious to constitute just cause for dismissal. When an employee commits a less substantial offense, the employer must give notice to the employee that his or her employment is in jeopardy. The adjudicator in *Re Hall Pontiac Buick*, BC EST #D07/96, stated the principle as follows:

> The concept of 'just cause' requires an employer to inform an employee, clearly and unequivocal (sic) that his or her performance is unacceptable and that failure to meet the employer's standards will result in their dismissal. The principal reason for requiring a clear and unequivocal warning is to avoid any misunderstanding, thereby giving an employee a false sense of security that their work performance is acceptable to the employer.

In this case, Tully did not receive any notice that her conduct might result in her dismissal. Isolated acts of insubordination do not warrant dismissal unless the

employee's action undermines the essential conditions of her employment or that her conduct was inconsistent with the continuation of her employment. Neither condition was present in this case. Agreeing to have her telephone calls monitored was not essential to Tully's employment. Nor was her refusal to sign the waiver and her comment about Jones's concern necessarily inconsistent with her continued employment. Tully did not act in a manner that was inconsistent with the continuation of her employment.

Apart from the merits of the appellant's arguments, it appears that the Employer did not present any evidence to the Tribunal that was not available to the Director's delegate. Absent a serious error of law or fact in a determination, the Tribunal normally holds that an appellant cannot re-argue a case already before the delegate through an appeal.

Tully arrived at work on November 5, 1998 and was terminated on that day. Under Section 34(2)(a) of the *Act,* she is entitled to four hours pay for that day.

**ORDER**

For these reasons, the Determination of April 19, 1999 is confirmed. Tully is entitled to compensation for length of service, minimum daily pay, vacation pay and interest for a total of $427.21, plus any additional interest that accrued under Section 88 of the *Act* since the date of the Determination.

**Mark Thompson**
**Adjudicator**
**Employment Standards Tribunal**