BC EST # D495/97
Reconsideration of BC EST # D187/97

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration pursuant to Section 116 of the

Employment Standards Act, R.S.B.C. 1996, c. 113

-by-

John Dale and Fiona C. Dale, a partnership doing
business under the firm name "Windsor Holdings"
("Windsor Holdings")

-of a Decision issued by-

The Employment Standards Tribunal

(the "Tribunal")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE NO.:	97/557
DATE OF DECISION:	October 22, 1997

DECISION

OVERVIEW

This is an application filed by John Dale on behalf of himself and Fiona C. Dale, who together operate a business in partnership under the firm name "Windsor Holdings" ("Windsor Holdings"), pursuant to section 116 of the *Employment Standards Act* (the *"Act"*). The instant application is for reconsideration of an adjudicator's decision issued on May 16th, 1997 under decision number D187/97. Following an oral hearing held on May 2nd, 1997, the adjudicator confirmed a Determination issued by the Director of Employment Standards (the "Director") on December 23rd, 1997 under File No. ER#207394 (the "Determination").

The Director held that a former Windsor Holdings employee, Carroll Gregson ("Gregson") was terminated without just cause and was, therefore, entitled to the sum of $449.36 representing two weeks' wages (and interest) as compensation for length of service under section 63(2)(a) of the *Act.*

Windsor Holdings' request for reconsideration is contained in a letter to the Tribunal dated July 21st, 1997. The Determination, the appeal of the Determination and the present application for reconsideration all involve a consideration of the "family responsibility leave" provision set out in section 52 of the *Act.*

FACTS

The essential facts are not in dispute. Windsor Holdings operates "in-house" cafeterias for particular firms in the lower mainland area. At the time of her dismissal, Gregson worked in a cafeteria located at the Gray Beverage plant in Delta. This particular operation was open from 5:30 A.M. to 7:00 P.M. each workday. The cafeteria was staffed by two individuals, one working a "morning shift" and the other an "afternoon shift". Gregson usually worked the afternoon shift, commencing at 1:30 P.M. each day.

Gregson, who was employed as a cafeteria worker with Windsor Holdings since June 19th, 1995, had previously sought and obtained permission to be absent from work on Monday, August 19th, 1996 in order to attend the birth of her granddaughter. At the time, Gregson's daughter was a single parent and had only her mother to assist her during and after the birth.

The daughter went into labour on Sunday evening, August 18th. On the Monday morning at 8:00 A.M., as previously arranged, Gregson telephoned her place of employment and spoke with a co-worker stating that her (Gregson's) daughter had gone into labour and that she (Gregson) would not be reporting for work that day. In fact, the baby was not born until Tuesday morning at which time

Gregson again called her place of employment and told her co-worker that she (Gregson) would not be reporting to work for the balance of the week.

Obviously, this latter information was received by the employer because, on Tuesday evening, John Dale left a voice mail message on Gregson's telephone answering machine asking her to return her work keys as they were now needed by another employee--the keys were delivered on Thursday morning at about 10:00 A.M. On Saturday, August 24th, John Dale telephoned Gregson to tell her that her employment was terminated. Subsequently, Gregson received a letter dated August 21st, 1996 (*i.e.,* the previous Wednesday) which states, in part:

> "On the 19th of August you advised us of your intention to absent yourself from your place of employment...with insufficient notice to enable us to find a replacement.
>
> You have further chosen to absent yourself for the 20th, 21st, 22nd, and 23rd of August, again without adequate notice and without adequate cause.
>
> ...we consider your actions a flagrant breach of the conditions of your employment which is, as a result, summarily terminated."

ANALYSIS

Section 52 of the *Act* states that "an employee is entitled to up to 5 days of unpaid leave during each employment year to meet responsibilities related to" caring for a child or a member of the employee's immediate family. There is no question but that the leave taken by Gregson was authorized by this provision.

It is to be noted that the family responsibility leave is an employee *entitlement,* not something that may or may not be granted at the discretion of the employer. The employer conceded before the adjudicator that the time off on the Monday was authorized. The adjudicator made a finding of fact that the employer's agent--that is, the co-worker--was advised on Tuesday that Gregson would be taking the balance of the week off to attend to her daughter's and granddaughter's needs. This message was received by the employer as evidenced by the Tuesday evening telephone message from Dale to Gregson. Indeed, the employer's letter of termination does not say that it did not receive notification, only that the notification received was somehow not "adequate".

In my view, the evidence is overwhelming that Gregson advised the employer, and that this message was received by the employer, that she would be taking four additional family responsibility leave days (unpaid) from Tuesday to Friday. In short, the employer's appeal borders on the frivolous.

The one substantial argument advanced on the appeal, and on the reconsideration, concerns a three-person Board of Referees Decision, dated October 17th, 1996, to deny Gregson employment insurance coverage based on her "misconduct", namely, an unauthorized absence from work. However, I entirely agree with the adjudicator that the Board of Referees decision in no way creates a binding precedent under the provincial *Employment Standards Act.*

The most glaring omission contained in the Board of Referees' decision is the failure to refer to section 52 of the *Act.* The Board of Referees appears to have proceeded on the assumption that Gregson was somehow obliged to obtain the employer's permission to be absent from work--that position, of course, is entirely contrary to the express wording of section 52. Accordingly, the issue before the adjudicator was not the same issue that was before the Board of Referees and, thus, there is no proper basis for applying the legal doctrine known as *res judicata* or its derivative, *issue estoppel.*

ORDER

The application to vary or cancel the decision of the adjudicator in this matter is dismissed except, as noted by the appellant John Dale in his July 21st, 1997 submission to the Tribunal, the Determination should be varied as to the name of the employer.

Accordingly, the Determination and Tribunal Decision No. D187/97 are both varied so that the employer is designated as **John Dale and Fiona C. Dale, a partnership operating under the firm name "Windsor Holdings"** and that designation is hereby substituted for the name **Windsor Holdings Ltd.** wherever the latter may appear in either the Determination or the adjudicator's decision.

_____

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal