DECISION OF ADJUDICATOR
IN THE MATTER OF A HEARING
PURSUANT TO s.s. 62.1 and 62.2 OF
THE LABOUR STANDARDS ACT, R.S.S. 1978, c. L-1
(as amended)

COMPLAINANT:	Michelle Linklater Self-Represented
RESPONDENT:	Director of Labour Standards Ministry of Labour Relations and Workplace Safety
DATE OF HEARING:	May 21, 2014
PLACE OF HEARING:	Conference #9.1, 9th Floor 122, Third Avenue North Saskatoon, Saskatchewan

1. INTRODUCTION

This is an appeal by Michelle Linklater with respect to a Wage Assessment issued by the Respondent, the Director, Labour Standards Branch, Ministry of Labour Relations and Workplace Safety, on September 5, 2013. The Wage Assessment required the Appellant to pay Bernadith Yanyang the sum of $800.00 representing pay in lieu of notice. The Wage Assessment was prepared pursuant to s. 60 of *The Labour Standards Act*, R.S.S. 1978, Chapter L-1 (as amended).

This matter was heard before me on the above date. The Appellant, Michelle Linklater, represented herself. Two witnesses were called by the Appellant – the Appellant herself and Dalton Hubred. Representing the Labour Standards Branch was Annemarie Chernesky. The employee, Bernadith Yanyang was the only witness called by the Respondent.

After evidence was heard, the Hearing was then adjourned pending written submissions from the Appellant, which were twice delayed. All references to legislation in this decision are with respect to the *The Labour Standards Act* [the 'Act'].

II. PRELIMINARY OBJECTIONS

Present at the Hearing were the Employer, Michelle Linklater, and the Employee, Bernadith Yanyang, as well as Labour Officer, Annemarie Chernesky. An interpreter as well as other witnesses and support people were present. For a brief period of time, Jennica Linklater, the Employer's daughter was present. Present also were representatives from three media outlets (CBC, CTV and Bell Media).

The first issue was whether the Hearing was open to the public, as the Employer had arranged for multiple journalists to be present, to report on the Hearing. All parties were given a voice on this issue. The three media outlets believed that it was important for the public to hear about Labour Standards issues. Ms. Linklater advised that she wanted the media to hear the entire story, not just her side. Ms. Yanyang indicated that media coverage heightened her anxiety to the point that she almost considered abandoning her claim, however, she chose to continue with the Hearing. In the end, there was no reason to exclude the public, and therefore the media, although I ruled that none of the proceedings could be recorded in any way.

Otherwise, there were no preliminary objections on constitutional or jurisdictional grounds. The Employer readily agreed that should I find in favour of the Department, the amount of the Wage Assessment was correct.

III. THE DISPUTE

The sole issue in this Appeal was whether the Appellant, Michelle Linklater, had just cause to discharge the employee, Bernadith Yanyang, without pay in lieu of notice.

IV. FACTS

Ms. Linklater hired Ms. Yanyang to be her live-in nanny and housekeeper on January 31, 2011. Ms. Yanyang worked for her Employer for almost 19 months prior to the incident which resulted in her termination. The child requiring care was Ms. Linklater's sixteen year old disabled daughter, Jennica Linklater. Jennica is severely autistic, has a pervasive developmental disorder, epilepsy, is unable to speak, needs to be tube fed and has the functioning level of a two or three year old. By all accounts, up until the incident resulting in her termination, Ms. Yanyang was a satisfactory employee. There was one prior incident where she made a potentially hazardous mistake with respect to Jennica's feeding tube, but that was discussed and corrected and everyone moved on. The incident itself took place on August 22, 2012, during Jennica's daily bath.

At issue was whether the interaction between Ms. Yanyang and Jennica was so egregious as to result in the immediate termination of Ms. Yanyang as Jennica's nanny.

i. EVIDENCE OF EMPLOYEE

Ms. Yanyang moved to Canada from the Philippines to work here as a caregiver. She commenced working for Ms. Linklater on January 31, 2011, after responding to an ad on Kijiji. Initially, Ms. Yanyang commuted to work, but soon moved into the suite at the Linklater residence. Overall, her duties were as caregiver and housekeeper. She looked after Jennica and her younger sister, Maegan and she cleaned the house, purchased groceries, cooked and did laundry. Her shifts varied with the household's needs. By all accounts she was satisfied with her employment.

On August 22, 2012, she started work at 3:00 p.m. There was a note left by Ms. Linklater listing the chores she wished her to complete. Ms. Yanyang cooked and ate supper with the family. Next, it was Jennica's bath time. Ms. Yanyang testified that Jennica's bath started at around 8:00 p.m., but the time is not really pertinent. Ms. Yanyang was in the process of washing Jennica's hair; she had already shampooed it and was trying to rinse out the cream rinse. Jennica did not like to have her hair washed. As she was rinsing Jennica's hair, she was also combing it. Ms. Yanyang testified that during the bath, Jennica wanted her non-bath toys in the tub and tried to stand up and get out, presumably to get these toys. It was in this context while Jennica was screaming and crying, that Ms. Linklater walked into the bathroom. Jennica is taller than Ms. Yanyang and as Jennica was getting out of the tub, Ms. Yanyang was still pulling the comb. Ms. Linklater yelled at Ms. Yanyang and took over the situation. Jennica calmed down as soon as her mother came into the room and the rest of the evening was uneventful.

Ms. Yanyang testified that when Ms. Linklater asked her: "Why did you pull Jennica's hair", she replied: "I was just combing her hair and she was being unhappy because she didn't have her toys" and that Jennica was screaming and crying because of the toys, not because of the hair. The next day, Ms. Yanyang was fired over the phone. Ms. Linklater offered to let her stay in the suite until the end of September, 2012, but she moved out at the end of August. Ms. Yanyang testified that she was reluctant to contradict Ms. Linklater as, in her culture, that would be considered disrespectful.

ii. EVIDENCE OF EMPLOYER

On August 22, 2012, Ms. Linklater was at home in the evening and around 6:30 or 7:00 p.m., she asked Ms. Yanyang to give Jennica her bath. A bit later, Ms. Linklater heard Jennica screaming in the bathroom. As she arrived at the bathroom, she saw Jennica and Ms. Yanyang both standing. Ms. Yanyang was holding a handful of Jennica's hair with her left hand and with her right hand, Ms. Yanyang was pulling a wide tooth comb through Jennica's hair with such force that it appeared Jennica was crying out in pain. As Ms. Yanyang yanked the comb, Jennica's head was bobbing. Jennica was screaming and crying. Ms. Linklater immediately intervened by grabbing Jennica, comforting her and rubbing her head. Jennica sat back down in the tub, smiled and Ms. Linklater told Ms. Yanyang to leave the room and she would finish Jennica's bath. Conversation between Ms. Yanyang and Ms. Linklater was limited, as Jennica was the focus of attention. However, Ms. Yanyang said she was sorry and it would not happen again.

Ms. Linklater was very upset and afterward, reprimanded Ms. Yanyang saying: "Why did you do that? Do you have anything to say for yourself?" Ms. Yanyang did not say anything. Ms. Yanyang finished her chores and went to bed. The next morning, Ms. Linklater phoned Ms. Yanyang in an attempt to discuss what had happened. Ms. Yanyang explained that Jennica was trying to get out of the tub to get a toy, but in

response to the question from Ms. Linklater: " Why were you pulling her hair?", Ms. Yanyang had little response and she was terminated. Ms. Linklater also sent Ms. Yanyang text messages detailing her observations and indicating that she felt she had little choice but to terminate Ms. Yanyang due to Ms. Yanyang's lack of response to her. Again, Ms. Yanyang apologized: "I am very, very sorry for what I've done and I [had] no [intention] of doing it. I want to talk to you but I can't speak, I am very scared." It should be noted that Ms. Linklater told Ms. Yanyang that she could live in the nanny suite until the end of September, 2012, as she did not want to put her out without a place to live. However, Ms. Yanyang moved out within a week or two.

iii. EVIDENCE OF OTHERS

The Appellant also called as a witness Dalton Hubred, Jennica's current nanny. Mr. Hubred testified that Jennica enjoys her bath time, hates to have her hair washed or combed out and that therefore both of those actions need to be done gently. He also testified that Jennica rarely cried. His evidence was of some assistance in understanding Jennica's limitations and disabilities.

V. DECISION

Section 43 of the Act provides for the amount of notice an employee must receive on termination. This notice is required unless there is just cause for the dismissal. The length of the notice directly relates to the period of employment. If an employee is not provided an opportunity to work until the end of the time period of the notice, then that employee must receive pay in lieu of notice. Just cause is a common law concept and each case is different; just cause can be found only in exceptional circumstances where the misconduct of the employee is so grievous that it cannot be addressed or corrected in any other manner.

While the case of *McKinley v. BC Tel* [2001] 2 S.C.R. 161, dealt with employee dishonesty, its tenets hold true in other employee situations. In paragraphs 51-54....

> [51] . . .I conclude that a contextual approach to assessing whether an employee's dishonesty provides just cause for dismissal emerges from the case law on point. In certain contexts, applying this approach might lead to a strict outcome. Where theft, misappropriation or serious fraud is found, the decisions considered here establish that cause for termination exists. This is consistent with this Court's reasoning in *Lake Ontario Portland Cement Co. v. Groner*, [1961] S.C.R. 553, where this Court found that cause for dismissal on the basis of dishonesty exists where an employee act <u>fraudulently</u> with respect to his employer. This principle necessarily rests on an examination of the nature and circumstances of the misconduct. Absent such an analysis, it would be impossible for a court to conclude that the dishonesty was severely fraudulent in nature and thus, that is sufficed to justify dismissal without notice.
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> [52] This is not to say that there cannot be lesser sanctions for less serious types of misconduct. For example, an employer may be justified in docking an employee's pay for any loss incurred by a minor misuse of company property. This is one of several disciplinary measures an employer may take in these circumstances.

> [53] Underlying the approach I propose is the principle of proportionality. An effective balance must be struck between the severity of an employee's misconduct and the sanction imposed. The importance of this balance is better understood by considering the sense of identity and self-worth individuals frequently derive from their employment, a concept that was explored in *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, where Dickson C.J. (writing in dissent) stated at p. 368:
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> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.
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> This passage was subsequently cited with approval by this Court in *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 1002, . . .
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> [54] Given this recognition of the integral nature of work to the lives and identities of individuals in our society, care must be taken in fashioning rules and principles of law which would enable the employment relationship to be terminated without notice. The importance of this is underscored by the power imbalance that this Court has recognized as ingrained in most facets of the employment relationship. In *Wallace*, both the majority and dissenting opinions recognized that such relationships are typically characterized by unequal bargaining power, which places employees in a vulnerable position *vis-à-vis* their employers. It was further acknowledged that such vulnerability remains in place, and becomes especially acute, at the time of dismissal.

Both Ms. Yanyang and Ms. Linklater were honest and straightforward in their accounts of what happened in the bathroom. While no two individuals will ever give identical accounts of the same event, the two stories provided here can each be reconciled with the other and provide an overall consistent view of events. Ms. Yanyang was trying to complete the task of hair washing as quickly as possible as Jennica does not like her hair washed or combed. Ms. Yanyang was still combing Jennica's hair when Jennica tried to try to get out the bath. As Ms. Yanyang was struggling with Jennica and the comb was still in her hair, Ms. Linklater walked in. It is very possible that Ms. Yanyang's left hand was on one side of Jennica's head and she was pulling on the comb with her right hand. Ms. Yanyang was probably a bit off balance and, as a result, would be pulling on the comb. Jennica was no doubt upset and crying. The immediate soothing presence of her mother calmed down Jennica right away. However, there was nothing malicious in Ms. Yanyang's actions. Had Ms. Yanyang permitted Jennica to get out of the bath, soaking wet, with a comb hanging from her hair, she would have felt that she was not doing her job properly. She was trying to complete the task and her mistake was in hurrying when she should have been more patient. There was no overt act on her part to hurt or harm Jennica. It was one of those situations which got out of hand in a matter of seconds and Jennica was upset as a result. Ms. Linklater thought she saw Ms. Yanyang being overly forceful with her special needs child and was understandably upset. Ms. Yanyang felt she had done nothing wrong but was afraid to tell her employer that for fear of seeming disrespectful.

The situation called for a calm discussion between Ms. Linklater and Ms. Yanyang. It is understandable that, at the time, Ms. Linklater did not have this perspective; she thought that Ms. Yanyang had been mean and deliberately harmed her child. I accept that was not the case. In an employment relationship, the employer is in a position of power compared to the employee. The employer must provide training and instructions, and also be proactive in dealing with any discipline issues. In this situation, it was incumbent on the Employer to create an

opportunity to have a discussion with her employee, despite the fact the Employee was reticent about discussing it with her. Rather than deal with the issue by phone or text message, the Employer should have scheduled a one-on-one private meeting to review the incident, hear her Employee's side of the story and then discuss how to handle such situations in the future. However, where the Employee is caring for a child of the Employer, it can be very difficult for the Employer to again trust that Employee. If that was the case here, then Ms. Linklater could simply have ended Ms. Yanyang's employment with the necessary notice or pay in lieu of notice. The actions of Ms. Yanyang were not so egregious as to warrant her immediate firing for cause.

VI. CONCLUSION

The appeal is dismissed and the Wage Assessment is hereby upheld.

Dated at Saskatoon, in the Province of Saskatchewan, this 2nd day of September, 2014.

Leslie T.K. Sullivan, Q.C.
Adjudicator

The Parties are hereby notified of their right to appeal this decision pursuant to Sections 4-8, 4-9 and 4-10 of *The Saskatchewan Employment Act* (the "Act").

The information below has been modified and is applicable only to Part II and Part IV of the Act. To view the entire sections of the legislation, the Act can be accessed at www.saskatchewan.ca.

Right to appeal adjudicator's decision to board

4-8(1) An employer, employee or corporate director who is directly affected by a decision of an adjudicator on an appeal or hearing pursuant to Part II may appeal the decision to the board on a question of law.

(3) A person who intends to appeal pursuant to this section shall:

(a) file a notice of appeal with the board within 15 business days after the date of service of the decision of the adjudicator; and

(b) serve the notice of appeal on all persons mentioned in clause 4-4(1)(b) who received the notice setting the appeal or hearing.

(4) The record of an appeal is to consist of the following:

(a) in the case of an appeal pursuant to Part II, the wage assessment or the notice of hearing;

(c) the notice of appeal filed with the director of employment standards pursuant to Part II;

(d) any exhibits filed before the adjudicator;

(e) the written decision of the adjudicator;

(f) the notice of appeal to the board;

(g) any other material that the board may require to properly consider the appeal.

(5) The commencement of an appeal pursuant to this section does not stay the effect of the decision or order being appealed unless the board orders otherwise.

(6) The board may:

(a) affirm, amend or cancel the decision or order of the adjudicator; or

(b) remit the matter back to the adjudicator for amendment of the adjudicator's decision or order with any directions that the board

Appeal to Court of Appeal

4-9(1) With leave of a judge of the Court of Appeal, an appeal may be made to the Court of Appeal from a decision of the board pursuant to section 4-8 on a question of law.

(2) A person, including the director of employment standards, intending to make an appeal to the Court of Appeal shall apply for leave to appeal within 15 business days after the date of service of the decision of the board.

(3) Unless a judge of the Court of Appeal orders otherwise, an appeal to the Court of Appeal does not stay the effect of the decision being appealed.

Right of director to appeal

4-10 The director of employment standards has the right:

(a) to appear and make representations on:

(i) any appeal or hearing heard by an adjudicator; and

(ii) any appeal of an adjudicator's decision before the board or the Court of Appeal; and

(b) to appeal any decision of an adjudicator or the board.

Appendix A

Michelle Linklater
APPELLANT

and

Director of Labour Standards
RESPONDENT

Exhibit List

Employer Exhibit	Item	Employee Exhibit	Item
ER 1	Screenshots of text messages from Employer dated August 23, 2012 – September 1, 2012	EE 1	Live-In Caregiver Employer/Employee Contract dated January 13, 2011
ER 2	Employer Summation, undated	EE2	Opening Statement, undated
		EE3	Screenshots of text messages by Employee dated August 23, 2012 – September 1, 2012
		EE4	Employee Summation, undated