

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

Capital Mental Health Association
(the “CMHA”)

- of a Decision issued by -

The Director or Employment Standards
(the “Director”)

ADJUDICATOR: Niki Buchan

FILE NO.: 98/176

DATE OF HEARING: May 20,1998

DATE OF DECISION: June 18, 1998

DECISION

APPEARANCES

Doug Thompson	Advocate for Capital Mental Health Association
Gail Simpson	Witness
Charles Nixon	For Himself
Dr. Bruce Turbin	Observer
David Oliver	For the Director
Shauna Bunt	Witness

OVERVIEW

This is an appeal by Capital Mental Health Association (“CMHA”), pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of a delegate of the Director of Employment Standards (the “Director”) issued on March 4, 1998. The Determination findings are that CMHA terminated Charles Nixon (“Nixon”) without just cause and awarded him \$2404.37 as compensation for length of service, plus vacation pay and interest.

CMHA appeal documents state that the Determination should be allowed and the Order set-aside on the following grounds:

- The Determination is wrong because it is founded on a finding that “the limit of the harassment was to leave a message saying what a nice name the victim had” and that “as it stands, this cannot be regarded as serious sexual harassment.”
- The findings set out in the Determination in no way accord with the victim’s version of the harassment.
- The investigation of the Director did not include interviewing the victim and the findings of the Director as to the seriousness of the harassment are based on an incomplete investigation.

This decision is based on the submissions to the Tribunal, sworn evidence and arguments taken at an oral hearing.

ISSUE TO BE DECIDED

Whether the CMHA terminated Charles Nixon without just cause?

FACTS

The Capital Mental Health Association is a non-profit association that provides support to mentally handicapped persons during their rehabilitation.

Nixon was employed by CMHA as a Life Skills Worker from April 5, 1993 until his termination on June 3, 1997.

CMHA appraisals reveal that during the four years of his employment Nixon was an excellent employee who exceeded expectations. His manner with clients was considered to be very compassionate and he was considered to be a great asset to the team. Gail Simpson ("Simpson"), the executive director of CMHA, confirms in her evidence that Nixon was an excellent employee until the events causing the termination.

On May 1, 1997, Nixon went to the McGill and Orme Pharmacy on Fort Street in Victoria to fill a prescription for a client. While he was there he overheard an employee of the pharmacy giving out her own telephone number to someone she was speaking with on the telephone. He went to a pay telephone and made two calls to that number, but left no messages on the answering machine. Later, at 1:42 PM, he called again from a pay phone and said the word "Hello" which was recorded on the answering machine. Later that day, at 4:35 PM, he called the number again from a pay phone. He left a message on the answering service saying something to the effect of "Shawna, that's a pretty name. I wonder what I could do for you?"

In response to a complaint of sexual harassment, the police conducted an investigation. Nixon was identified as the person who filled the prescription and was questioned by the police. He denied the allegations but was warned that he would be regarded as a suspect if the calls continued. No charges were laid and there is no proof to confirm allegations that Nixon made further calls.

In early May, Simpson received a call from the Oak Bay Police requesting an updated phone number and address for Charles Nixon. She confirmed after checking with a supervisor that Nixon had picked up a prescription from the pharmacy on May 1, 1997. The police did not inform her the reason for the investigation. Nothing else was heard from the police regarding the matter.

Later in May, McGill and Orme advised CMHA, that the pharmacy would not fill prescriptions for them. At a meeting to investigate the reason for the refusal to supply service to CMHA, Simpson was informed of the sexual harassment complaint and referred to the victim of Nixon's phone calls. She interviewed the victim on May 29, 1997.

On May 29, 1997, Simpson also interviewed Nixon about the alleged sexual harassment complaint. He denied knowledge of the phone calls and was suspended with pay until an investigation was completed. CMHA notified Nixon by letter dated June 3, 1997 that it concluded that the allegation was "probably true." The allegation was considered very serious and Nixon's employment was terminated. A cheque was attached to his

termination letter to cover wages owing including vacation pay, but no compensation for length of service.

Nixon met with Simpson on June 5, 1997 when he admitted that he made the phone calls on May 1, 1997. At this meeting he reported a pre-existing health problem informing Simpson that he had moved to Victoria to continue therapy under the care of Dr. Tobin.

Simpson says that she considered the harassment “more as power harassment” than sexual harassment. She found it impossible to say to what extent the termination resulted from the harassment complaint as opposed to the fact that he originally did not admit to making the phone calls. She stated that she would have expected him to admit he made the calls and there could have been a different result if he had made an admission at the time. He was not reinstated nor did he receive compensation for length of service following this admission.

Out of compassion, Simpson wrote to Employment Insurance stating she had received information indicating that Nixon’s behavior could have been related to a pre-existing health problem of which she had been unaware. She requested a review of Nixon’s situation regarding possible Medical Employment Insurance. The Employment Insurance claim was later approved because the reasons for Nixon losing his employment did not constitute misconduct under the Employment Insurance Act. CMHA did not appeal that ruling.

Following requests from Nixon’s priest and Dr. Tobin, the President and Executive Director of CMHA met with them to discuss reinstating Nixon so that he would be eligible for Long Term Disability benefits. It was agreed that the matter would be brought before the CMHA Board. The Board rejected the request for reinstatement and confirmed the dismissal without compensation for length of service.

During the investigation of the complaint the investigating officer was denied an opportunity to interview the victim of the telephone calls. None of the parties including the police was willing to reveal the name of the victim. However, the police did interview the victim and made their report available to the officer by telephone. The evidence of Nixon, the victim and the police is essentially the same as to the telephone calls and the recorded messages or lack thereof.

ANALYSIS

At the beginning of the oral hearing counsel for CMHA indicated he intended to call the victim of the telephone calls to give evidence. He argues that the essence of the Appeal is that she had not been heard. He says that the nature of the sexual harassment and its impact on the victim must be taken into account in considering whether the sexual harassment was of a serious nature. Also the nature of the employment with CMHA and why it differs from other employment results in an inability to tolerate lower levels of trust in the working relationship with an employee should be considered.

The Director objected to the calling of this witness in that the Appeal process is not a hearing *de novo* but a rehearing of a Determination already made. He objects to new evidence being presented stating that he was refused access to the victim at the time of the investigation. None of the parties would reveal the name of the victim to him; therefore, he took the evidence from the police about their investigation of the complaint.

As well, in an undated written submission received by the Tribunal in response to the CMHA appeal submission of 6 April 1998, the Director objected to the new evidence regarding sexual harassment set out by CMHA. It contained notes from an interview with the victim conducted on March 30, 1998 after the March 4, 1998 Determination. Those notes purport to be a review of an interview with the victim that Simpson conducted on May 29, 1997. They outline the surrounding circumstances, the telephone calls and the impact on the victim.

I decided to take evidence from the victim and to later determine whether all or part of that evidence should be disallowed because it was new evidence that had not been provided at the time of the investigation. I am satisfied that the factual evidence surrounding the phone calls can be considered. It is the best evidence available and essentially confirms that put before the Tribunal submitted by Nixon and the police investigation report. The investigator considered these facts before making the Determination.

As for the evidence concerning the impact on the victim revealed in the CMHA submission, dated 6 April 1998, and that evidence given by the victim at the hearing, I rule it inadmissible. I rely on previous Tribunal Decisions including *Tri-West Tractor Ltd.*, BC EST No. D268/96. In that case, Adjudicator Stevenson states at p.3:

“This Tribunal will not allow appellants to “sit in the weeds”, failing or refusing to cooperate with the delegate in providing reasons for the termination of an employee and later filing appeals of the Determination when they disagree with it. An appeal under Section 112 of the *Act* is not a complete re-examination of the complaint. It is an appeal of a decision already made for the purpose of determining whether that decision was correct in the context of the facts and the statutory provisions and policies. The Tribunal will not necessarily foreclose any party to an appeal from bringing forward evidence in support of their case, but we will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative process”

In this instance, CMHA cannot use previously undisclosed information about the impact on the victim to justify its opinion that the sexual harassment complaint was of such a serious nature that the Determination should be canceled.

Pursuant to S. 63 of the *Act* an employer is required to pay compensation for length of service when terminating an employee without notice unless the employee terminated the employment, retires from employment, or is dismissed for just cause. The Tribunal has

addressed just cause for dismissal on numerous occasions. In *Kenneth Kruger*, BC EST D003/97: The burden of establishing just cause is on the employer. Most offences are minor incidents of misconduct and are not sufficient on their own to justify dismissal. Where the employer seeks to rely on minor instances of misconduct, it must show that:

- (a) a reasonable standard of performance was established and communicated to the employee;
- (b) the employee was given a sufficient period of time to meet the required standard of performance and had demonstrated that he or she was unwilling to do so;
- (c) the employee was adequately notified that his or her employment was in jeopardy by a continuing failure to meet the standard; and
- (d) the employee continued to be unwilling to meet the standard.

Where the dismissal is related to the inability of the employee to meet the requirements of the job and not to any misconduct, the tribunal will also look at the efforts made by the employer to train and instruct the employee and whether the employer considered other options (such as transfer). In exceptional circumstances, a single act of misconduct by an employee may sufficiently serious to justify summary dismissal without the requirement of a warning.

CMHA claims that it had just cause for dismissing Nixon because his behavior constituted serious sexual harassment. Counsel argues that the effect on the victim is paramount in determining the nature of the harassment. The Director argues that determining the nature of the harassment depends on an objective analysis of all the available relevant evidence; it does not depend on the victim's interpretation of events. The Director points out that this is not a Human Rights case. The issue is whether there was just cause to terminate Nixon pursuant to the *Act*. Nixon's actions cannot be judged to be serious sexual harassment but more of a nuisance complaint. The evidence of the police, an independent enforcement agency, merely issued a warning without laying charges.

The Determination reveals that the investigator consulted an authority on when sexual harassment is cause for summary dismissal. He quotes from Howard Levitt, in "The Law of Dismissal in Canada" 2nd. Edition:

"Sexual Harassment may justify summary dismissal of the offending employee since it interferes with the proper operations of the employer's business. If it is not very serious, it requires a warning before it justifies termination."

He then applied the facts of evidence from his investigation stating:

"The employee made four telephone calls. He did not speak directly to the victim. The limit of his harassment was to leave a message saying what a nice name the victim had. As it stands, this cannot be regarded as serious harassment. The police were content to issue a warning. He heeded the

warning given to him by the police. He would have heeded a warning from the employer.

Mr. Nixon served the employer well for four years. According to his appraisals, he was a model employee who repeatedly operated above expectations. There is no evidence of any incident in those four years that caused any concern to the employer.”

The evidence from Simpson reveals that she did not consider the telephone calls as serious sexual harassment. She thought of them more as power harassment.

In my opinion, the investigator carried out a proper investigation by obtaining the facts, considering the “Act” and the authorities. His findings were not based on an incomplete investigation as suggested by CMHA. He made a reasonable decision when he concluded that Nixon’s behavior did not constitute serious sexual harassment and was not cause for discharge.

Counsel for CMHA also relies on the fact that Nixon did not admit to his involvement in the harassment on May 29, 1997 when Simpson interviewed him. It submits that its clients have very serious mental illness; therefore, a very high level of trust must be placed on employees who deal with these clients. CMHA sees a clear obligation to protect the vulnerable clients from poor judgment or inappropriate behaviors by staff members.

Counsel argues that the issue is what is tolerable behavior for an employee working with vulnerable clients. The nature of the employment requires a higher level of trust than would be required in other employment situations. Given the nature of the employment it would be inexcusable not to terminate Nixon. The consequences of not terminating him could put clients at serious risk if the behavior continued. It would also dilute any message to other employees that CMHA is not willing to tolerate harassment and dishonesty.

The Director argues that by agreeing to have the termination reviewed by the Personnel Committee of the Board CMHA opened the door for reinstatement. The committee was aware that Nixon had remedied his mistake on June 5, 1997 by admitting his involvement in the telephone calls. The Determination states “Clearly the employee was not dishonest, in the sense of a disposition to lie, cheat or steal. He was a man attempting to come to terms with his problem. After four years of exemplary service he made a mistake. He denied his mistake, then he admitted it.” Further, the letter written to Employment Insurance suggesting Nixon’s behavior may have been for health reasons is inconsistent with the position that he was sufficiently untrustworthy to give just cause for dismissal.

The CMHA evidence does not show that there would be a serious risk to clients. The arguments that a higher level of trust is required for employees of CMHA than would be required in other employment situations is not helpful. Even if that is the case there must be just cause for termination before the liability to pay compensation for length of service under the act is discharged.

The investigating officer considered all of these facts. His decision that there was not just cause for dismissal is not an unreasonable one. This is a case where the misconduct by Nixon was not sufficiently serious to justify summary dismissal without the requirement of a warning. CMHA has not satisfied the onus to prove just cause for termination of Nixon.

ORDER

Pursuant to Section 115 of the “*Act*”, I order that the Determination, dated March 4, 1998 be confirmed in the amount of \$2,404.37 together with whatever further interest that may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

Niki Buchan
Adjudicator
Employment Standards Tribunal