

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 -

Quang Ky Kho
("Kho")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 97/353

DATE OF HEARING: July 17, 1997

DATE OF DECISION: September 4, 1997

DECISION

APPEARANCES

Colin Fortes	on behalf of Quang Ky Kho
Paul Houweling	on behalf of Houweling Nurseries Ltd. and HNL Bradner Nurseries Ltd.

OVERVIEW

This is an appeal by Quang Ky Kho (“Kho”) under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination which was issued on April 18, 1997 by a delegate of the Director of Employment Standards (the “Director”). The Determination found that Kho was not entitled to compensation for length of service under Section 63(3)(c) of the Act. Kho’s employer alleges that it had just cause to terminate his employment due to a complaint of sexual harassment by a female co-worker, April Baker.

“Houweling Nurseries” (sic) is identified in the Determination as the other party. A copy of the Determination was sent to Houwelling Nurseries Ltd. (sic). In a letter dated July 8, 1997 Paul Houweling informed the Tribunal that “ ... the company involved where Kho was employed is the HNL Bradner Nurseries Ltd. and not Houweling Nurseries Ltd.” As a result, I have decided that Mr. Kho’s employer, for the purposes of this proceeding, is HNL Bradner Nurseries Ltd. associated with Houweling Nurseries Ltd. (“the Employer”). Depending on the time of year, the Employer employs between 100 and 200 employees at three different locations in the Fraser Valley.

A hearing was held at the Tribunal’s offices on July 17, 1997 at which time evidence was given under oath by April Baker, Jason Hand and Quang Ky Kho. Robert Lee interpreted the proceedings at the hearing. Jason Hand was excused from the hearing room while Ms. Baker gave her evidence concerning what happened after she left work February 3, 1997.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether there was just cause to terminate Quang Ky Kho’s employment as a result of a complaint of sexual harassment which was made by April Baker.

PRELIMINARY MATTERS

The Determination

The Determination against which this appeal has been made is reproduced below:

Dear Mr. Kho:

Re: Complaint made under the *Employment Standards Act*

I have now completed my investigation of your *Employment Standards Act* complaint against Houwelling Nurseries.

Allegations

In your complaint you alleged you were not given compensation for length of service upon the termination of your employment.

I have completed my investigation into these allegations. These are my findings:

The employer's obligation to pay compensation for length of service has been discharged pursuant to Section 63(3)(c) of the *Employment Standards Act*.

The employer claimed to have just cause for your termination of employment and gave as evidence the statement of Ms. April Baker who complained of sexual harassment by you.

Your complaint will now be closed on our file.

It can be seen from the text of the Determination that it describes the allegation made against Mr. Kho and contains a finding that "...The employer's obligation to pay... has been discharged..." However, it does not contain reasons for that finding. The requirement for a determination to include reasons is set out in Section 81(1)(a) of the *Act* which states as follows:

81. (1) *On making a determination under this Act, the director must serve any person named in the determination with a copy of the determination that includes the following:*

(a) *the reasons for the determination*

On its face, the Determination under appeal does not meet the requirements of Section 81(1)(a) because no reasons are given for the finding made by the Director's delegate. Neither party raised this matter, but I believe it is important for the Tribunal to recognize

this fundamental flaw in the document which the Director's delegate sent to Mr. Kho. I did not cancel the Determination due to the absence of reasons. Rather, I concluded, given the disclosure of documents by the Tribunal and the exchange of submissions prior to the hearing, it would be neither fair nor efficient to cancel the Determination at this stage of the appeal process.

One of the purposes of the *Act*, as set out in Section 2, is to "...promote fair treatment of employees and employers." Another purpose is to "...provide fair and efficient procedures for resolving disputes..." I find it difficult to imagine how either of these statutory purposes could be achieved in the absence of reasons being included in a determination.

In this case, the Determination refers to "...a statement of Ms. April Baker who complained of sexual harassment by you." There is no indication in the Determination whether Mr. Kho was made aware of the allegation which was made against him before his employment was terminated. Furthermore, the Determination does not reveal whether the Director's delegate or Mr. Kho's employer gave him an opportunity to respond to Ms. Baker's accusations. Ms. Baker's statement was disclosed by the Tribunal to Mr. Kho and to his representative (Mr. Fortes) on June 4, 1997. Mr. Fortes responded in writing on behalf of Mr. Kho on June 25, 1997. Mr. Paul Houweling replied in writing on July 8, 1997 and made reference to allegations of "past instances involving Kho" involving two male co-workers and a "respected female supervisor." This submission by Mr. Houweling was disclosed to the interested parties on July 10, 1997. The relevance and admissibility of these allegations are addressed later in this Decision.

Associated Corporations

In a letter dated July 8, 1997 Paul Houweling informed the Tribunal that "...the company involved where Kho was employed is HNL Bradner Nurseries Ltd. and not Houweling Nurseries Ltd." At the hearing, Colin Fortes provided the Tribunal with a copy of a "B.C. On Line: Companies - Corporate Search" report for Houweling Nurseries Ltd. and HNL Bradner Nurseries Ltd. Paul Houweling acknowledged that the two corporations were associated. With the parties' consent I ordered that the Determination should be amended to recognize that association for purposes of Section 95 of the *Act*.

EVIDENCE

April Baker's evidence

April Baker's written statement concerning her complaint of sexual harassment by Mr. Kho was given by her to Paul Houweling and Randy Meows when they met for coffee at the ABC Restaurant on Saturday February 15, 1997. Ms. Baker's spouse, Jason Hand, was also present. The complete text of her written statement on which the Director's delegate relied to issue the Determination, is reproduced (without any corrections) below:

On mon. FEB 3, 97, I went to work at 8:00 am. and my boss Irene Toka was not in. I found out she wasn't coming in that day so Daljit would be my boss that day. Daljit told me to go get Kho garden mum tags, for she didn't get them earlier for him. As I went to get the tags, Kho had followed me in the room. Kho and I were looking for the tags, found some and put them on a motor bike seat that was in the room. We looked for more and couldn't find any more so I went to one side of the bike and started to read the ones we had found. Kho came up behind me and started to massage my shoulders and then my neck. I said "that's enough", and then he said "in a minute", in a low whisper. His hands were on both sides of my neck, squeezing it, not too hard but not too nice either. Then, I felt his lower part of his body rub my buttocks. I said "don't", then his left hand reached around and garbed my left breast. That's when I yelled "That's enough Kho", he finally backed up so I could slide away (sideways) from him. I fumbled with the tags, trying to get out of the room, when he took the tags and said "I like you", and touched my shoulder. I moved away from him. When we were back in the greenhouse, he went the left way and I went to the right, back to my department. I was trying to work, where Daljit had sent me. but that is where Kho was picking up garden mums. I started to feel real ill again and nervous, so I moved to a different bay(bay #7). I was then out on a different job, but I was still shaking so much I was scared I would cut my hand. 9:15 - 9:30 am. I went to talk to Randy our manager but he was outside somewhere, so I tried to work some more. 10:00 am. On my break, I had phoned Jason Hand, my boyfriend, and asked him to come and get me. Jason had to drop the kids off at day care and find a ride out to Brander. I was too shaky to drive and too scared to tell anyone until Jason got there. I just wanted to go home. 11:45 - 12:00am p.m. Kho came up to me and offered me candy I said "no", the seconds later he offered me some gum. I was so ill, frightened, nervous and my back hurt, I just wanted to go home. 15min. seemed like forever, that's when Jason showed up; 12:15pm. I walked into Randy's office with Jason and then told him what had happen. I didn't know what to do and neither did Randy.

There has been problems in the past with Kho, not with me, but with others. Andy, a supervisor was told about an complaint some time ago. I have lost a lot of hours of not working, due to stress, fear, anxiety and many other things.

At the hearing on July 17, 1997 Ms. Baker gave the following evidence, under oath, concerning the events which transpired at her workplace on the morning of February 3, 1997:

- My supervisor, Daljit, sent me to get tags for Kho.
- Kho followed me to the tag room.
- There was a motorbike in front of the tags.
- Kho came behind me and started massaging my neck.
- I told him to stop; he said: "Just a minute."

- I was very afraid and yelled: “No, Kho. Stop! No!”
- Kho then reached around, and touched my left breast and pressed himself against my buttocks. His penis was hard. I felt it touching my buttocks.
- I tried to get away. He stopped touching me, grabbed his tags and walked out of the tag room.
- I walked back to my work station and tried to work.
- Everywhere I went, Kho was there.
- I was shaking. I went to do some cuttings at 9:30 a.m., but I was shaking too much.
- I phoned Jason and told him to come get me. I was upset. I couldn’t drive. I went back to my work station and waited for Jason.
- At approximately 11:00 a.m. I went to see Randy Meows, my manager, and told him “I want to go home” three or more times. I asked him “how to go about this” and asked him if he needed a name. Randy was unsure how to proceed and asked me to wait, then I went home.

Ms. Baker also gave evidence about the circumstances under which she told her spouse, Jason Hand, about the incident. According to her evidence, Ms. Baker did not tell Mr. Hand why she wanted him to drive her home from work until they were in the car, “half way down the road.” Ms. Baker testified that she and Jason “... drove around for about 1 hour” during which time she told him “ exactly what happened.”

Ms. Baker did not return to work after February 3, 1997. She resigned her employment on April 18, 1997. She had had a full - time position with the Employer and, in addition, held a part - time position at the local Superstore. She resigned from her part-time position in April, 1997 and subsequently enrolled in a course of study which allowed her to complete the requirements for Grade 12 graduation. Ms. Baker testified that she prepared her written statement about “2 or 3 days” after the incident. She wrote it by hand initially and typed it later, she testified. Ms Baker also testified that she went to the library to “find out what to do” and also went to see a counselor and a lawyer. She testified that it was on their advice she prepared her written statement.

Under cross examination, Ms. Baker could not recall when she had spoken to her lawyer but acknowledged that she had not given him any instructions concerning what action should be taken. Also, she has not reported the incident to the police despite being advised to do so by Randy Meows and by a friend. She did not offer any explanation for deciding not to report the incident to the police. Ms. Baker could not recall the name of the counselor she consulted, nor could she remember the dates on which she consulted the counselor. Her explanation for not reporting the incident to Randy Meows immediately was that she was “ ... confused and didn’t know what to do” and “ ... thought that it would go away.” She testified that she tried to work in the cutting room but could not so she went to another work station. Soon afterward, she testified “ ... Kho came up behind me again. He walked behind me. I was at the cutting place. I got really bad shakes. I couldn’t work.”

When asked why she did not include this in her written statement or her evidence in chief, Ms. Baker testified that she didn't think it was relevant.

Jason Hand's evidence

Jason Hand is a full - time employee of the Employer. On occasion he is designated as a supervisor at the workplace. He gave evidence about two issues: the events of February 3, 1997 and other workplace incidents involving Mr. Kho and his co-workers (including Mr. Hand).

February 3, 1997

Mr. Hand testified that he received a telephone call from Ms. Baker between 9:30 a.m. and 10:00 a.m. in which she seemed to be upset and asked him to drive her home from work. He testified that he "hopped in the car" immediately drove to the nursery arriving at the nursery at approximately 10:00 a.m. When he arrived at the nursery, he testified, he saw April and she was "really upset." "She didn't tell me anything at the time," he testified, but they went to Randy Meow's office. Once inside the office, Ms. Baker told Mr. Moews that someone had touched her in the tag room, but she did not say who had touched her. According to Mr. Hand "...Randy asked us to give him a couple of days" to decide what he should do. He and Ms. Baker left at that point and drove home. About "half-way home," according to Mr. Hand's evidence, Ms. Baker described what happened, as follows, without identifying who touched her:

- April went to the tag room;
- He followed her and started massaging her;
- She told him to stop and started to cry;
- He reached around and grabbed her breast, making her feel sick;
- She was stuck between him and the door and was scared;
- He grabbed the tags and left the tag room.

Later, before they arrived home, Mr. Hand testified that Ms. Baker told him that it was Kho who had touched her and, he testified, while he had "guessed who it was at that time," he was angry anyway.

Other workplace incidents

Paul Houweling's letter of July 8, 1997 contains the following statements:

When the present problem arose, different people did speak up and based on all of the evidence; we had to terminate Kho immediately. We had spoken with two young males, Ross Duxbury and Devron Paul about past instances involving Kho. They alleged that they had to get mad at Kho and tell him to get lost because he had poked his finger into their pants and

giggled. Kho had grabbed another respected female supervisor, and she ran away. Unfortunately, she is uncomfortable about her name being mentioned.

Paul Houweling did not give evidence at the hearing. April Baker and Jason Hand were the only witnesses who were called by the Employer. Under cross examination, Mr. Hand testified that "...there were incidents almost everyday" which, he said, involved various kinds of "rude gestures, sexual gestures" or "workplace frolicking." Mr. Hand also testified that one of his supervisors, Andy Toka, spoke to Mr. Kho "a few times" and told him such incidents must stop. As an example of a "sexual gesture," Mr. Hand described an incident in which Devron Paul was at work, had a hole in the seat of his pants, and Mr. Kho put his finger into the hole. According to Mr. Hand, other incidents involved Carl VanderBirch and Mike VanderHoech. He testified that such incidents were "more of a joke" and that he and his co-workers would "deal with it personally" or "laugh it off."

Mr. Hand testified, under cross examination, that he had read Ms. Baker's written statement several times and has discussed it with her several times since she wrote it. However, he also testified that he and Ms. Baker did not discuss the details of the incident. Rather, they discussed her feelings.

Quang Ky Kho's evidence

Quang Ky Kho was employed by the Employer from January 14, 1987. He was employed initially as a general labourer and was given additional duties over time. He was promoted to a supervisory position in 1990. He did not receive any compensation based on length of service when his employment was terminated on February 17, 1997. At the time of his dismissal he earned \$12.00 per hour and worked 45 hours per week.

Mr. Kho testified that shortly after he began working on February 3, 1997 he went to the tag room to collect some tags. He admitted that he massaged Ms. Baker's neck, but denied touching her breast and denied rubbing the lower part of his body against her. Mr. Kho gave the following evidence about what happened in the tag room on February 3, 1997:

- Ms. Baker said that she was tired. I tried to make it better. I massaged her neck.
- She said "enough, enough...nice"
- I said "Just a little more ...couple of minutes" then I took the tags and went out.

Mr. Kho also testified that he saw Ms. Baker later in the morning at the "B dock" because he went there to get more flowers. At that time, he testified, he said, "Hi!" He denies that he offered her gum or candy.

Mr. Kho testified that prior to his dismissal he had never been reprimanded for harassment, had never seen or been made aware of a policy prohibiting harassment, and had never been told by the Employer that one or more employees had complained about his behaviour. He

denied that he made sexual or rude gestures on a daily basis as had been described in Jason Hand's evidence. He also denied that he poked his finger into a hole in Devron Paul's pants. Mr. Kho's recollection of the "sexual gestures" involving Karl, Mike and Jason, was that it was no more than "workplace fun" in which "...they would come by me and hit me on the head and shoulder ...I would hit them back."

Mr. Kho's employment was terminated on February 17, 1997 at which time he was given a cheque for any hours he had worked since his previous paycheque, plus vacation pay. He was dismissed, he testified, following a brief discussion when he was summoned to the office to meet with Paul Houweling and two managers (Randy Moews and Rob Fransen). In the discussion, Kho testified, Paul Houweling told him that "you had a problem ...trouble with another woman supervisor," and Randy Moews told him "...you have touched where you cannot touch." Mr. Kho denied these allegations and testified that he replied: "Boss, you check into this." At this point he was given an envelope by Paul Houweling and was told that he could pay April Baker \$700.00 (to compensate for two week's loss of income) and apologize to her. Kho said that he was innocent and declined to make the payment which Mr. Houweling had suggested.

ANALYSIS

Section 63 of the *Act* establishes a statutory liability on an employer to pay "compensation for length of service" to an employee upon termination of employment. That statutory liability may be discharged by the employer giving the appropriate notice to the employee, by providing a combination of notice and payment in lieu of notice to the employee or by paying the employee wages equivalent to the period of notice to which the employee is entitled under the *Act*.

The employer may be discharged from this statutory liability by the conduct of the employee where the employee terminates the employment, retires or is dismissed for just cause. A single act of misconduct by an employee may be sufficiently serious to justify dismissal without any warning. In such circumstances, the Tribunal has been guided by the common law in deciding whether the facts adduced by the employer support a finding of just cause.

I described earlier (at pages 3 and 4) the fundamental flaws which exist in the Determination which gave rise to this appeal. Therefore, I must decide this appeal on the evidence which was put before me at the hearing on July 17, 1997.

The Supreme Court of Canada has described sexual harassment as having three components: unwelcome conduct of a sexual nature which detrimentally affects the work environment or leads to adverse job-related consequences for the victims of harassment [*Janzen v. Platy Enterprises Ltd.* (1989) 59 D.L.R. (4th) 352 (S.C.C.)]. Thus, the term "sexual harassment" can include a broad range of conduct or behaviour. The term also connotes an element of subjectivity - the subjective effect of the conduct or behaviour on the recipient.

The Employer must establish just cause for its decision to terminate Mr. Kho's employment or it must pay him compensation for length of service as required by Section 63 of the *Act*. I must subject the evidence to the common law test - the balance of probabilities. However, this standard of proof requires me to account for the seriousness of the allegation and the gravity of the consequences which flow from the Employer's allegations. While I must make findings of fact on the balance of probabilities, when the allegations are as serious as those made in this appeal, I must assess and weigh the evidence to determine whether I am reasonably satisfied that the allegations made by the Employer against Mr. Kho have been proved by a preponderance of the evidence which was put before me at the hearing. In deciding whether I am reasonably satisfied, I must consider "...the totality of the circumstances...including the gravity of the consequences of the finding." I cannot rely on "inexact proofs", "indefinite testimony" or "indirect inferences" [*Smith v. Smith & Snedman* (1952), S.C.R. 312 @ pp. 331-2)].

The evidence given by Jason Hand concerning the various kinds of "rude" or "sexual" gestures which he attributed to Mr. Kho does not meet the test I have just described and, therefore, I cannot rely on that evidence. Similarly, the allegations contained in Mr. Houweling's letter of July 8, 1997 cannot be relied on to establish just cause for terminating Mr. Kho's employment. I note the complete absence of any evidence to establish that the Employer took any disciplinary action against Mr. Kho as a result of those behaviours or gestures. Given that lack of disciplinary action or any clear warnings that such gestures could result in dismissal, I find that the Employer condoned the behaviour it now seeks to rely on as a ground for dismissal.

No explanation was given to me for the complete absence of any evidence by Paul Houweling, Randy Moews, Andy Toka, Ross Duxbury, Devron Paul, Carl VanderBirch, Mike VanderHoech or Daljit (Ms. Baker's supervisor). The reason given by Mr. Houweling to explain the lack of evidence from the "...respected female supervisor," while understandable, does nothing to assist the Employer to prove its case.

In the absence of a fundamental breach of the employment relationship, the concept of just cause requires an employer to inform an employee, clearly and unequivocally, that his or her performance is unacceptable and that failure to meet the employer's standards will result in 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 his or her work performance is acceptable to the employer. I noted earlier that there is no evidence to establish that the Employer ever warned Mr. Kho that certain gestures attributed to him by Mr. Hand could result in his dismissal. I also note that there is no evidence to refute Mr. Kho's testimony that he had never seen a policy concerning workplace harassment, that nobody had ever told him about a harassment policy and that there had never been a discussion about workplace harassment at the weekly supervisory meetings which he attended. The absence of a policy which states clearly the Employer's prohibition of workplace harassment and the consequences of contravening that policy make it difficult for the Employer to establish that Mr. Kho was aware of the consequences

of behaviour about which Ms. Baker complained and for which his employment was terminated.

Another aspect of this appeal which concerns me is the complete lack of corroborating evidence by co-workers or supervisors who may have observed Mr. Kho and Ms. Baker at work on the morning of February 3, 1997 either before or after they were in the tag room. I am particularly troubled by the fact that Daljit was not called to give evidence about what she may have observed on that day.

Certain aspects of Ms. Baker's oral testimony are also of concern, particularly where it departs from her written statement or where it is inconsistent with Mr. Hand's testimony. In her written statement, Jason Hand arrived at the workplace at 12:15 and it was then that he and Ms. Baker walked to Randy Moews' office and told him what happened. In her oral testimony, that discussion took place at approximately 11:00 a.m. but Mr. Hand's testimony had him arriving at approximately 10:00 a.m. and speaking with Randy Moews immediately thereafter.

In Ms. Baker's written statement she stated that she telephoned Jason Hand during her coffee break, at approximately 10:00 a.m., but she did not mention her coffee break in her oral testimony. Jason Hand testified that when Ms. Baker telephoned him, he "hopped in the car immediately" and drove to the nursery, arriving at approximately 10:00 a.m. Ms. Baker's written statement states: "Jason had to drop the kids off at day care and find a ride out to Bradner." Another difference in Ms. Baker's evidence is that in her oral testimony she did not make any mention of Mr. Kho offering her candy or gum between the time of her break and the time she spoke to Randy Moews (upon Jason Hand's arrival). Furthermore, unlike her oral testimony Ms. Baker's written statement makes no reference to her having felt an erect penis touching her buttocks. I also note Ms. Baker's inability to recall in her oral testimony the names of the lawyer and the counsellor whom she testified that she consulted in early February. She was also unable to recall the approximate dates on which those consultations may have occurred.

To test the credibility of the conflicting evidence which was put before me , I must decide what evidence is in "...harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions..." [Farnya v. Chorny (1952) 2 D.L.R. 354 (BCCA) @ pp.356-357].

When I consider all of the evidence which was put before me at the hearing I find that the Employer has not established that there was just cause to terminate Mr. Kho's employment. That is, I am not reasonably satisfied, on the preponderance of the evidence, that Mr. Kho's actions on the morning of February 3, 1997 gave the Employer just cause to terminate his employment. I find that Mr. Kho massaged Ms. Baker's neck and, when told by her to stop doing so, he stopped. This conduct, while unwelcome, was not sexual in nature. I also find that I am not sufficiently satisfied that the critical events of February 3, 1997 occurred in the way in which Ms. Baker has come to believe that they occurred. In making this finding I have considered both the seriousness of the allegations made against Mr. Kho and the consequences which flow from my finding. An allegation of sexual harassment is a

serious allegation which, depending on the nature of the behaviour alleged to have occurred, may result in criminal charges being laid or may result in a complaint under the *Human Rights Act*. The consequences of a finding that sexual harassment occurred would be very grave. The evidence shows that Mr. Kho had been employed by the Employer for ten years (since he first came to Canada) and had progressed from a general labourer to a supervisory position - a position which he had held for seven years prior to his dismissal. There is no evidence that he had been disciplined or warned at any time during his employment by his employer that his work performance or his behaviour was unsatisfactory.

ORDER

I order, under Section 115 of the *Act*, that the Determination be cancelled. I also order that the Employer pay to Mr. Kho eight weeks' wages (\$4,320.00) as compensation for length of service as required under Section 63 of the *Act*.

Geoffrey Crampton
Chair,
Employment Standards Tribunal