

**EMPLOYMENT STANDARDS TRIBUNAL**  
In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act S.B.C. 1996, C.113*

- by -

Paul B. Miner  
("Miner")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**Adjudicator:** Hans Suhr

**File No.:** 97/627

**Date of Hearing:** October 6, 1997

**Date of Decision:** October 24, 1997

**DECISION**

**APPEARANCES**

Paul B. Miner            on his own behalf  
Richard Barton        counsel for Paul B. Miner

**OVERVIEW**

This is an appeal by Paul B. Miner (“Miner”), under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination dated July 23, 1997 issued by a delegate of the Director of Employment Standards (the “Director”). Miner alleges that the delegate of the Director erred in the Determination by concluding that Miner was terminated for just cause and therefore not entitled to compensation for length of service.

**ISSUE TO BE DECIDED**

The issue to be decided in this appeal is whether Miner is entitled to compensation for length of service ?

**FACTS**

Miner was employed by Securiguard Services Limited (“Securiguard”) as a security officer from August 18, 1995 to January 27, 1997.

Miner’s employment was terminated by Securiguard on January 27, 1997 as a result of an allegation of sexual harassment from a co-worker, Evelyn Dionicio (“Dionicio”).

Miner was responsible for providing on the job training to Dionicio on January 23, 1997 during the period of midnight to 4:00 a.m.

Dionicio reported to another co-worker, Kofi Brenya (“Brenya”) on January 24, 1997 that while being trained by Miner, he had “made some inappropriate sexual behaviour towards her including comments and touching”. Dionicio also advised Brenya that she was afraid of Miner and did not want Brenya to forward this information to the office.

Brenya felt that this was a serious matter, wrote a report on his conversation with Dionicio and forwarded it to the office of Securiguard.

Securiguard interviewed both Dionicio and Brenya and then requested Miner appear for a meeting at 10:00 a.m. on January 27, 1997.

Securiguard advised Miner at the outset of the meeting that there had been allegations of sexual harassment received from Dionicio.

Miner further states that at the meeting with Securiguard he acknowledged “we had a fair amount of flirtation with girls - don’t see her having a problem with it - she’s only 20 - don’t see her having a problem”. he further acknowledged that “some conduct sexual in nature” and further that the “extent of touch completely mutual - she was responsible for this contact” he further acknowledged that he “admitted to being aroused at various times”.

During the course of the meeting, Securiguard decided to terminated Miner’s employment effective immediately. The meeting lasted approximately 15 minutes.

Miner filed a complaint alleging that he had been terminated without just cause and was entitled to compensation for length of service.

The delegate of the Director investigated the complaint and issued the Determination dated July 23, 1997 in which the delegate of the Director concluded “Having met with all the relevant parties, I prefer Ms. Dionicio’s version and, hence, on the balance of probabilities, find Securiguard Services Limited was justified in its termination of Mr. Miner. He willfully violated a company policy and was terminated for doing so.”

## **EVIDENCE**

Miner testified on his own behalf as well as providing substantial written submissions. I will only recapitulate the evidence that is, in my view, relevant.

Miner states that Securiguard never told him prior to the meeting what the allegations against him were therefore, he was not able to prepare a proper defense.

Miner further states that Securiguard did not properly investigate the allegations as they were “happy that they felt they now had cause to fire me.”

Miner further states that the delegate of the Director did not properly investigate the circumstances with respect to the alleged sexual harassment as there is no evidence the delegate of the Director ever interviewed Securiguard’s mobile patrol or other persons who were at the worksite during the time in question.

Miner further states that the delegate of the Director had not read his written submission dated May 16, 1997 at the time of the May 22, 1997 meeting with him..

Miner further states that the delegate of the Director did not ask him any questions with respect to his written submissions, nor did the delegate of the Director offer him the opportunity to verbally explain his submissions.

Miner further states that the delegate of the Director exhibited bias toward him as she advised him that she had had previous dealings with Securiguard.

Miner further states that the bias of the delegate of the Director is further confirmed by the fact that the letter from Securiguard contains the salutation “Dear Nupur”.

Miner further states that he felt uncomfortable at Dionicio’s offer to teach him to swear in Spanish.

Miner further states that when he and Dionicio sat at the desk, their knees were touching and because of her previous offer to teach him to swear in Spanish, he felt comfortable at maintaining this contact.

Miner further states that during the conversation, Dionicio caressed his thigh on a couple of occasions.

Miner further states that Dionicio offered her hand to him to inspect her fingernails.

Miner further states that while on patrol with Dionicio, she stayed very close to him to make use of the umbrella he had although, he claims she was aware that there were a sufficient number of umbrellas available at the worksite for her to have one of her own.

Miner further states that he did not “rub his erect penis against Dionicio” at any time during the time in question.

Counsel for Miner encouraged me to consider an earlier Tribunal decision with regard to allegations of sexual harassment *re: Kho*, BC EST No. D327/97 which he feels is on all fours with the case before me.

Counsel for Miner argues that the Determination should be cancelled or, alternatively, referred back to the Director for further investigation.

## **ANALYSIS**

The burden of establishing that the delegate of the Director erred in the Determination rests with Miner.

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 for a number of reasons, among which is when the employee is dismissed for just cause.

The Determination issued by the delegate of the Director indicates that she interviewed Miner, Dionicio and representatives of Securiguard during the course of the investigation.

The delegate of the Director had in fact, received 2 written submissions from Miner and met with him on 3 separate occasions.

The delegate of the Director states in the Determination that after having met all the relevant parties, she prefers Dionicio's version which indicates that she had read and considered Miner's submissions.

The evidence provided does not support Miner's allegation that the delegate of the Director exhibited a bias against him during the investigation of this matter. I am satisfied that it is not necessary for the delegate of the Director to interview all persons who might have been at the worksite, however, it is necessary that the investigation conducted disclose sufficient evidence to support the conclusion reached.

With respect to sexual harassment, the Supreme Court of Canada said, in *Janzen et al v. Platy Enterprises Ltd. et al* (1989)

*Sexual harassment also encompasses situations in which sexual demands are foisted upon unwilling employees or in which employees must endure sexual groping, propositions and inappropriate comments but where no tangible economic rewards are attached to involvement in the behaviour.*

Miner has acknowledged that conduct of a sexual nature took place, albeit, he claims that this conduct was initiated by Dionicio.

Miner did not dispute the existence of the company policy with regard to dismissal for "sexual, sexist, or racial harassment of any person in the workplace", nor did he dispute the finding of the delegate of the Director that "at the point of hiring Mr. Miner, he was advised that he would be terminated for sexual harassment".

I am now left to consider the credibility of Miner's testimony. A guide frequently relied upon with respect to credibility is found in *Faryna v. Chorny*, [952] 2 D.L.R. 354 (B.C.C.A.) at 356-8:

*....The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness is such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those circumstances. Only this can a Court satisfactorily appraise the testimony of quick-minded, experiences and confident witnesses, and of those shrewd persons adept*

*in the half-lie and of long and successful experience in combining skillful exaggeration with partial suppression of the truth....*

With respect to *Kho*, the facts in this appeal are distinguishable from the facts considered by adjudicator Crampton in a number of critical areas.

Adjudicator Crampton found that the Determination issued did not contain any reasons therefore he “must decide this appeal on the evidence which was put before me at the hearing....”.

In this case, the Determination does contain reasons for the conclusions reached.

Adjudicator Crampton noted there was no evidence that Kho had ever been made aware of any company policy with regard to sexual harassment.

In this case, the uncontradicted evidence is that Miner was aware of the company policy and further aware that violations of that policy would lead to dismissal.

Adjudicator Crampton noted that there was a complete lack of corroborating evidence by co-workers or supervisors....”

In this case, Brenya’s letter to Securiguard clearly indicates that on her next day of work, Dionicio, on her own volition, mentions to a co-worker that Miner “made some inappropriate sexual behaviour towards her including comments and touching”. Those comments to Brenya certainly add to the likelihood that the events in question did happen as reported by Dionicio.

I agree with adjudicator Crampton that 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 Code. The consequences of a finding that sexual harassment occurred would be very grave.

I must weigh the evidence to determine, on the balance of probabilities, which version of the events is most likely to have happened.

I conclude, based on the evidence provided and on the balance of probabilities, that Securiguard did have just cause to terminate the employment of Miner on January 27, 1997. Miner is therefore not entitled to receive compensation for length of service pursuant to section 63 of the *Act*.

The appeal by Miner is dismissed.

## **ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determination dated July 23, 1997 be confirmed in all respects.

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**Hans Suhr**  
**Adjudicator**  
**Employment Standards Tribunal**