BC EST #D031/98
Reconsideration of BC EST #D472/97

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 -

Paul Miner
("Miner")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: Lorna Pawluk

FILE NO.: 97/869

DATE OF DECISION: February 19, 1998

DECISION

OVERVIEW

This is an application for reconsideration by Miner pursuant to Section 116 of the *Employment Standards Act* (the "*Act"*) against Decision B.C.E.S.T. #D472/97 dated October 6, 1997 by the Employment Standards Tribunal ("The Tribunal"). That decision upheld a Determination issued by the Director of Employment Standards dated July 23, 1997. Miner applies on the grounds that the adjudicator erred in law or failed to comply with the principles of natural justice. The Director filed a brief submission in support of #D472/97, asking this panel to dismiss the reconsideration application.

ISSUE TO BE DECIDED

The issue is whether there are grounds to reconsider BC EST #D472/98.

FACTS

Miner was employed by Securigard Services Limited ("Securigard") as a security guard from August 18, 1995 to January 27, 1997. On the latter day, Miner was dismissed for breach of company policy following allegations of sexual harassment by a co-worker Evelyn Dionicio ("Dionicio"). Miner filed a complaint with the Employment Standards Branch alleging he had been terminated without just cause and was entitled to compensation for length of service under section 63 of the *Act*. A Determination dated July 23, 1997 dismissed the complaint. The Director's delegate had investigated the complaint and found that, on the balance of probabilities, Sercurigard was justified in terminating Miner for willfully violating company policy. The Determination said that the delegate had met with all of the relevant parties and preferred Dionicio's version of events to that put forth by Miner. Miner then appealed the Determination to the Tribunal and in #D472/97, the adjudicator found that, on the balance of probabilities, Securigard had just cause to terminate Miner's employment.

ANALYSIS

Section 116 of the *Act* confers reconsideration powers on the Tribunal:

> 116(1) On application under subsection (2) or on its own motion, the tribunal may
> (a) reconsider any order or decision of the tribunal, and cancel or vary the order or decision or refer the matter back to the original panel.

This is not an opportunity to revisit the evidence or reconsider the original arguments. Rather, a reconsideration application will succeed in narrow circumstances. Typical examples were outlined in *Zoltan Kiss B.C.E.S.T. # D 122/96*:

- failure to comply with the principles of natural justice
- mistake of fact
- decision inconsistent with prior decisions indistinguishable on their facts
- significant new evidence not available to the first adjudicator
- mistake of law
- misunderstanding of or failure to deal with a serious issue
- clerical error

On behalf of Miner, Mr. Barton argues that the adjudicator in #D472/97 adopted the reasoning in *Re Kho B.C.E.S.T. #D 327/97* (*"Kho"),* but failed to consider the evidence in keeping with its rationale. In particular, by relying on the statement of Kofi Brenya to corroborate Dionicio's version of events, the adjudicator relied on indirect and inexact evidence. Mr. Barton further submits that the adjudicator erred in his discussion of *Faryna v. Chorney* [1952] 2 D.L.R. 354 (B.C.C.A.) and that the testimony of Dionicio does not meet the test ennunciated there: "it is the written testimony of Ms Dionicio that is out of harmony with the preponderance of probabilities, not that of the Appellant." He also criticizes #D472/97 as it does not explain why Dionicio's testimony was preferred over that of Miner. In summary, he submits that the adjudicator "erred in law by failing to scrutinize the totality of evidence with the requisite standard of care".

The adjudicator confirmed the original Determination as he thought that the totality of the evidence supported Dionicio's and not Miner's version of events. He noted:

> 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.

In particular, he felt that a letter written by Brenya corroborated Dionicio's version of events. I agree with Mr. Barton that the Decision is somewhat lacking in detail and in particular note that the excerpt from *Faryna v. Chorney* is not followed with an explanation of how the excerpt influenced the adjudicator. Nonetheless, I cannot find grounds upon which to allow the reconsideration application as the Decision correctly confirmed the original Determination. The Director's delegate interviewed all of the critical witnesses and concluded that the version of events as put forth by Dionicio was preferable over that put forth by Miner. The Determination outlines many pieces of evidence used to reach the conclusion that Miner was dismissed for cause and none of it was refuted in the proceedings before the adjudicator.

Mr. Barton criticizes the original investigation because the Director's delegate failed to question janitors who witnessed part of an exchange between Miner and Dionicio or a Securigard driver who saw the Dionicio and Miner "strolling along sharing an umbrella" on January 23, 1997. *Kho* calls for consideration of the "totality of the circumstances" and this means that these potentially critical witnesses should have been interviewed. I agree that the totality of the circumstances should be considered, but this does not mean that every possible witness, regardless of their potential contribution to the investigation should be interviewed. The Director's delegate must perform a thorough investigation and interview all the witnesses with a potentially important contribution to make, but this does not include each and every individual who may have something to say about the incident in question. It is argued that the reconsideration application should succeed because the Director's delegate failed to interview someone who may have seen Miner and Dionicio walking together under an umbrella or witnesses who might have over heard a conversation between the two. However, their contribution has not been explained to me and I will not speculate on their importance. Moreover, I note that neither of these individuals were called by Miner as witnesses before the adjudicator. Thus, this ground for reconsideration does not succeed.

Mr. Barton also argues that neither Miner nor his counsel were given an opportunity to cross-examine Dionicio or the other witnesses and that this violates the principles of procedural fairness. This also amounts to a failure by the adjudicator to consider the totality of the circumstances. I disagree that the principles of procedural justice, in the facts of this case, are violated because Miner and his counsel did not cross-examine certain witnesses. Miner's version of events was put forth in detail first to the Director's delegate and then to the adjudicator and he has failed to bring any convincing evidence to challenge conclusions drawn by either the Director's delegate or the adjudicator.

He also submits that the adjudicator erred in distinguishing *Kho*. Although the Determination in *Kho* contained no reasons, the Determination in this case also fails to explain why Dionicio's version of events was preferred. It is also argued that like the facts in *Kho,* there is a lack of corroborating evidence since Brenya's statement cannot be relied upon. The criticisms about the thoroughness of the Decision were dealt with above, but it bears repeating that other information in the Determination provided additional support for the conclusion that Miner was dismissed for just cause.

Finally, it is argued that Miner, like *Kho* had never been warned or disciplined about this type of conduct prior to the actual dismissal. However, one serious incident of this nature justifies dismissal where it constitutes a fundamental breach of the employment relationship. There must be a well ennunciated and reasonable anti harrassment policy that clearly advises that a breach can result in dismissal, and that was the case here, unlike the circumstances in *Kho*. It was not disputed at the hearing that Miner knew of the harassment policy and that a breach would result in his dismissal; it is also clear that his actions constituted a fundamental breach of the employment relationship and thus, this ground for reconsideration does not succeed.

ORDER

Pursuant to section 116 of the Act, I confirm #D472/97.

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Lorna Pawluk
Adjudicator, Employment Standards Tribunal