Employment Standards TRIBUNAL

An appeal

- by -

Jim Pattison Chev-Olds, A division of Jim Pattison Industries Ltd.
(the "Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2001/285

DATE OF HEARING: July 17 & 30th, 2001

DATE OF DECISION: October 19, 2001

DECISION

APPEARANCES:

Donald J. Jordan, Q.C., Barrister & Solicitor	for Jim Pattison Industries Ltd.
Raymond Coumont	on his own behalf
Adele Adamic, Barrister & Solicitor & Lesley Christensen, I.R.O.	for the Director of Employment Standards

OVERVIEW

This is an appeal filed by Jim Pattison Industries Ltd., carrying on business as "Jim Pattison Chev-Olds" (the "Employer"), pursuant to section 112 of the *Employment Standards Act* (the *"Act"*). The Employer appeals a Determination that was issued by a delegate of the Director of Employment Standards (the "Director") on March 9th, 2001 (the "Determination").

THE DETERMINATION

The Director's delegate determined that the Employer owed its former employee, Raymond Coumont ("Coumont"), the sum of $5,524.69 on account of 6 weeks' wages as compensation for length of service, concomitant vacation pay and section 88 interest. The delegate held that Coumont was not intoxicated by alcohol when he reported for work on May 11th, 2000. Rather, the delegate concluded (at page 4 of the Determination), based on certain medical information provided to her during the investigation by Mr. Coumont, that the Employer did not have just cause for termination:

> The employer made the decision to terminate Coumont's employment based on the observable behaviour of Coumont on May 11, 2000. Of the three witnesses to this behaviour, 2 did not smell alcohol on Coumont and Coumont challenges the credibility of the third witness, McDonald [sic].
>
> Given the medical evidence submitted by Coumont, there can be no doubt that Coumont was experiencing complex partial [temporal lobe] seizures in 2000...
>
> In matters of this nature, the burden of proving just cause lies with the employer. I find that the evidence of Lawless and Olson of Coumont's behaviour at the workplace on May 11, 2000 can, on a balance of probabilities, be explained by Coumont's medical evidence of complex partial seizures. With regard to Lawless' allegation of Coumont's admission to having been drinking, and of McDonald's [sic] evidence that he smelled the odour of alcohol on Coumont, I

> prefer in both cases the evidence of the Affidavit sworn by Coumont. Lawless also stated in his evidence that there was a history of Coumont being warned about drinking at work. Despite requests for the submission of this evidence, Lawless did not provide it and from this I can only assume that there is no evidence of prior warnings for drinking on file.
>
> Based on the finding that Coumont was not intoxicated while at work on May 11, 2000, there is no need to make a finding on the secondary issue of if Coumont was intoxicated, did the employer have just cause to terminate his employment.

I should note that the affidavit to which the delegate refers was sworn on March 7th, 2001 and states simply that Coumont had not consumed any alcoholic beverages "for at least 24 hours prior to my last shift" and, indeed, on his physician's advice had not consumed any alcohol "for at least three months before this date".

THE APPEAL HEARING AND SUBSEQUENT PROCEEDINGS

This appeal was originally scheduled to be heard at the Tribunal's offices in Vancouver on July 17th, 2001, however, on that day the Employer's request for an adjournment was granted on a peremptory basis. The appeal hearing reconvened on July 30th, 2001 at which time I heard the testimony of Mr. Rick Olson, Mr. Ron Lawless and Mr. Jim MacDonald (via teleconference) on behalf of the Employer. Ms. Doris Botter and the respondent employee, Mr. Coumont, testified on the latter's behalf. The Director did not call any *viva voce* evidence. In addition to the witnesses' testimony, I have also considered the various documents and submissions submitted by the parties to the Tribunal.

At the conclusion of the hearing on July 30th, I directed (after consultation with the parties) that written submissions be filed on the following matters, namely:

> 1. Resolution of the conflicting evidence of the witnesses regarding the events in question on May 11th, 2000 (*i.e.,* what are "facts"?).
>
> 2. The application of the *Evidence Act* and, in particular, the expert witness provisions of that legislation, to proceedings under the *Employment Standards Act* (including proceedings before both the delegate and the Tribunal) and the admissibility of Dr. Smythe's medical report dated July 31st, 2000.
>
> 3. The employer's "bias" and "natural justice" grounds of appeal as set out at pages 3-5 of Employer's counsel's April 9th, 2001 letter (appended to the notice of appeal).

In a letter to the parties dated July 31st, 2000 I indicated that once I had the various submissions in hand I would "issue written reasons for decision and directions regarding the further conduct

of this appeal". The parties' respective submissions were to be delivered according to the following timetable:

- Employer's initial submission August 9th, 2001
- Director's/Mr. Coumont's submissions September 5th, 2001
- Employer's reply September 10th, 2001

I received the written submissions from counsel for the Employer (dated August 9th and September 10th, 2001) and counsel for the Director (dated September 5th, 2001). Although invited to do so, Mr. Coumont did not file a written submission with respect to any of the above issues.

I shall now address each of the issues in turn commencing with the applicability of the *Evidence Act* and the admissibility of the medical consultation report.

THE *EVIDENCE ACT* AND THE ADMISSIBILITY OF DR. SMYTHE'S REPORT

Dr. Smythe's report

It is apparent that the delegate's decision in favour of Mr. Coumont was strongly influenced by the medical evidence supplied by Coumont during the course of the investigation. Specifically, Mr. Coumont provided the delegate with a consultation report dated July 31st, 2000 from Dr. A.J. Smythe (a neurologist) to Dr. W.R. Blackshaw, the latter being Mr. Coumont's family physician. The relevant portion of the consultation report reads as follows:

> Mr. Coumont had a seizure on June 23rd [2000]. This was a nocturnal and was a full blown generalized seizure, well described by his spouse. He was unresponsive for some ten minutes after the seizure and then was confused for an equal period of time...
>
> I spent some time going over the history. It turns out that Mr. Coumont has been having episodes of confusion which are clearly minor seizures for over a year, and probably longer. Last summer when they were out camping he came up to his wife and offered her a cigarette, and had a bewildered, glazed look, and then some ten minutes later everything was back to normal. He had no recollection of the incident. Since that time he has continued to have spells which recur any time, and basically they are always the same. He feels confused and disorientated, and gets a funny feeling in his left arm and then it passes. In addition, his memory has been very poor...
>
> In summary, Mr. Coumont has been having partial complex seizures, that is, temporal lobe seizures, and in fact he has been having these spells for a year, maybe a year and a half. In addition, he had a major seizure a month ago.

A copy of Dr. Smythe's consultation report was *not* provided to the Employer prior to the issuance of the Determination although the Employer did have a copy of Dr. Smythe's report in hand prior to the appeal hearing. This omission forms part of the Employer's "bias" and "natural justice" arguments which are addressed later on in these reasons. At this juncture, I am addressing a separate issue with respect to the medical report, namely, its admissibility at the appeal hearing.

The Evidence Act and the Tribunal

At the appeal hearing, Mr. Coumont tendered Dr. Smythe's report, however, counsel for the Employer objected to it being received into evidence because the report was not relevant and, in any event, Dr. Smythe did not appear at the hearing for purposes of cross-examination despite notice being given to Mr. Coumont by Employer's counsel that Dr. Smythe's attendance would be required.

Section 10(1) of the *Evidence Act* states that sections 10, 11 and 12, which address the evidence of "experts", apply to expert evidence tendered at a "proceeding", which, in turn, "includes a quasi-judicial or administrative hearing but does not include a proceeding in the Court of Appeal, the Supreme or the Provincial Court". I might parenthetically note that Rule 40A of the Supreme Court Rules deals with expert evidence in civil trials and sets out broadly similar provisions to those found in sections 10 to 12 of the *Evidence Act.* Section 10(2) of the *Evidence Act* states that sections 10 and 11 "do not apply to proceedings of a tribunal, commission, board or other similar body that enacts or makes its own rules for the introduction of expert evidence and the testimony of experts, and if there is a conflict between any such rules and this section or section 11, those rules apply."

The Tribunal is a quasi-judicial administrative tribunal and thus the *Evidence Act* "expert evidence" provisions apply in the absence of separate rules promulgated by the Tribunal. Although the Tribunal has issued, in accordance with section 109(1)(c) of the *Act*, "Rules of Procedure", none of these rules specifically addresses expert evidence although Rule 19 states that an adjudicator may conduct an oral hearing "without complying with the formal rules of procedure and evidence applicable in courts of law". In my view, however, it would not be appropriate to admit Dr. Smythe's report relying on Rule 19 since section 10(2) of the *Evidence Act* contemplates an explicit rule with respect to expert evidence rather than a rule of more general application such as Rule 19.

Section 11 of the *Evidence Act* is not relevant here inasmuch as Dr. Smythe did not appear in person to testify before me. However, as noted above, Mr. Coumont tendered Dr. Smythe's July 31st, 2000 consultation report at the appeal hearing and wished to rely on its contents. Counsel for the Employer objected to my receiving the report into evidence.

Section 10(3) of the *Evidence Act* provides as follows:

> 10.(3) A statement in writing setting out the opinion of an expert is admissible in evidence in a proceeding without proof of the expert's signature if, at least 30 days before the statement is given in evidence, a copy of the written statement is furnished to every party to the proceeding that is adverse in interest to the party tendering the statement.

Counsel for the Employer, in his August 9th, 2001 submission, acknowledged that there was adequate prehearing disclosure of the medical report:

> While we raise no particular complaint with regards to "notice" of Dr. Smythe's report with regard to the Tribunal proceedings because we were aware of its existence prior to the thirty (30) days before the hearing, it is our position that Coumont is required to comply with the other provisions of the Evidence Act regarding expert reports.

Counsel for the Employer submits, however, that the report is inadmissible because it is not relevant. Further, counsel says that even if the report is relevant it ought not to be received into evidence because Dr. Smythe did not attend the appeal hearing [see *Evidence Act*, section 10(5)] even though Mr. Coumont was given prior notice by counsel for the Employer that Dr. Smythe's attendance would be required if Coumont intended to rely on the doctor's report (see Employer' counsel's letter dated July 26th, 2001).

Evidentiary ruling

I am satisfied (and there is no serious dispute about this point) that the *Evidence Act* provisions relating to expert evidence apply to Tribunal hearings. Counsel for the Employer concedes that there was timely disclosure of the report at least insofar as the Tribunal's proceedings are concerned.

Although Mr. Coumont was aware that the Employer required Dr. Smythe to appear at the appeal hearing on July 30th, 2001 if Mr. Coumont proposed to tender Dr. Smythe's report, Dr. Smythe was not summoned to appear at the July 30th hearing. There is, however, no specific provision in the *Evidence Act* declaring an expert's report *inadmissible* simply because the expert does not appear at the hearing. Indeed, the purpose of section 11 is to enable an expert's opinion to be received into evidence by way of a report rather than through *viva voce* evidence--see *Pedersen v. Degelder* (1985), 62 B.C.L.R. 253 (B.C.S.C.) and *British Columbia v. Clayoqout Band* [1991] B.C.J. No. 3367 (B.C.S.C.).

On the other hand, section 10(5) states that once an expert's report is admitted into evidence, "any party to the proceeding may require the expert to be called as a witness". This latter provision is consistent with the notion that the party tendering the report is, in essence, and through the report itself, calling the expert as their own witness and thus, in accordance with the

usual rules of civil procedure, parties adverse in interest are entitled to cross-examine the witness. However, I return to the language of section 10(3) which states that an expert's report "*is admissible in evidence* in a proceeding without proof of the expert's signature" providing certain disclosure obligations are satisfied.

Section 10(6) of the *Evidence Act* states that if the expert's *viva voce* evidence "does not materially add to the information" contained in the report, "the person presiding may order the party that required the attendance of the expert to pay, as costs, a sum the person presiding considers appropriate".

In my opinion, the combined effect of subsections 10(5) and 10(6) is that the party tendering the expert's report, if requested by an adverse party, should produce--at their own expense--the expert for purposes of cross-examination. Thus, the party relying on the expert's report will either arrange directly with the expert for his or her attendance at the appeal hearing or, if necessary, will obtain the requisite summons from the Tribunal and then serve it on the expert. In *Carew v. Loblaws Ltd.* (1977), 83 D.L.R. (3d) 603 (Ont. H.C.), Mr. Justice Holland stated:

> In my view, once a party files a medical report that party becomes obligated to produce that doctor before the Court and for the purpose of cross-examination by the party adverse in interest, if so requested.

I accept the principle enunciated by Holland, J. If, however, the expert's cross-examination does not materially add to the information contained in the report, the Tribunal retains the residual discretion to order the party requiring the expert's attendance to pay costs to the party producing the expert.

In this case, of course, the expert, namely, Dr. Smythe, did not appear as a witness even though Coumont was put on notice that Dr. Smythe's attendance was required. If Dr. Smythe had attended the hearing but did not provide any new material evidence, then an order could have been issued directing the Employer to pay certain costs to Mr. Coumont. However, since Dr. Smythe did not attend the hearing, does it follow that his report is, by reason of that circumstance, inadmissible? In my view, that question must be answered in the negative.

As previously noted, section 10(3) states that the report *is* admissible--and admissible without qualification--provided the disclosure obligations are satisfied. It should also be noted that the right to require the expert to attend as a witness arises only *after* the report is already "given in evidence in a proceeding" [see section 10(5)]. However, where the expert is not produced for purposes of cross-examination, despite a timely request to do so, I am of the view that the adjudicator presiding at the appeal hearing may:

- issue an order, pursuant to section 108 of the *Act* and section 15 of the *Inquiry Act*, summoning the expert to appear before the Tribunal;

- adjourn the proceedings in order to allow the adverse party to summon the expert to the appeal hearing;

- draw an inference adverse to the party tendering the report based on that party's refusal to produce the expert for purposes of cross-examination;

- ascribe little or no evidentiary value to the report since, in essence, the adverse party has been denied the opportunity to challenge and test the expert's opinion evidence by way of cross-examination.

Which, if any, of the above options (and I do not say that the above list is exhaustive) might be appropriate in a given case will depend on the conclusions expressed in the report and the relevance of the expert's report in light of the issues in dispute. In light of the foregoing comments, it is my view that although Dr. Smythe's report is admissible for the limited purpose of proving that Coumont suffered from a particular medical condition, I see no reason to require his attendance inasmuch as the report is of little, if any, relevance to the real and substantial issue that I must address, namely, whether or not Coumont was intoxicated on May 11th.

The Employer does not seriously contest--nor could it, in my opinion--that Coumont suffered a series of seizures during 1999 and 2000. However, it does not follow from the recognition of that medical fact that Coumont's behaviour on May 11th can be explained by a seizure. Dr. Smythe expresses no such opinion. Further, the symptoms (which, according to Coumont, are "always the same") reportedly associated with Coumont's seizures (I refer to Dr. Smythe's report)--ten minute episodes of confusion, bewilderment, disorientation, "a funny feeling in the left arm", subsequent unresponsiveness and no subsequent recollection after the event--are *completely inconsistent with Coumont's own evidence* with respect to the events of May 11th. Coumont specifically recalls the events in question and his anger. He did not testify about any left arm numbness. On the day in question, far from being bewildered, confused and unresponsive, Coumont was aggressively asserting his view that the service technician was not competently attending to his daughter's car and that the proposed charge for the repairs was unacceptable--a position, incidentally, he continues to assert.

Thus, in sum, the report is properly before me but has little, if any, evidentiary value with respect to the issues that I must address, namely, was Coumont intoxicated on May 11th, 2000 and, in any event, did the Employer have just cause for termination by reason of Coumont's behaviour on May 11th?

The Evidence Act and delegates' investigations

Although counsel for the Employer concedes that the Employer was given sufficient notice of Dr. Smythe's report prior to the appeal hearing, he says that the same cannot be said about the "hearing" before the delegate (August 9th submission, page 5):

> ...regardless of form, the defining characteristic of the term "hearing" is that circumstances must involve a determination of some sort which affects rights. In our respectful submission, both the Delegate and the Tribunal regardless of the form of their inquiry and deliberations, are holding a hearing.
>
> Based on all the foregoing comments, it is our respectful submission that requirements of the *Evidence Act* regarding the production of expert reports are applicable to both the Delegate and the Tribunal. Therefore, in compliance with Section 10(3) the Delegate was obliged to provide the Employer with a copy of Dr. Smythe's report dated July 21, 2000, at least thirty (30) days prior to it being "given in evidence" so that she could rely on it.

I accept that in carrying out her *adjudicative* function, the delegate conducted a "hearing" of sorts albeit not a hearing in which the parties faced each other in a formal adversarial setting with the fully panoply of procedures normally associated with a civil trial. Nevertheless, I am of the view that neither complainants nor the Director and her delegates are obliged to comply with section 10(3) of the *Evidence Act*.

It is important to remember that the Director's delegates have a dual function, namely, *investigation* and *adjudication* of complaints. In *Director of Employment Standards (Milan Holdings Inc.)*, B.C.E.S.T. Decision No. 313/98 the Tribunal observed:

> An investigation is, by its nature, different from a proceeding conducted in the cool detachment of a quasi-judicial hearing where all parties are present and procedural niceties are attended to. Investigations are a dynamic process, in which information is collected from different persons in different circumstances over time. At different points during the investigation, the investigator may hold different perspectives or viewpoints that lead him or her in one direction or another. A proper investigation cannot be run like a quasi-judicial hearing. Investigations necessarily operate in much more informal, flexible and dynamic fashion. All this is reinforced by s. 77 which requires only that "If an investigation is conducted, the director must make *reasonable efforts* to give a party under investigation an opportunity to respond." This modification of the common law standard is legislative recognition that the Director's role is more subtle and more complicated than can be expressed by the label "quasi-judicial".

The statutory scheme set out in the *Evidence Act* regarding expert evidence does not neatly fit into the investigative process that delegates are mandated to conduct. How, for example, could a

complainant's confidentiality be protected (see section 75) if expert medical reports are subject to a blanket disclosure rule? Since delegates are not required to hold formal oral hearings (and rarely, if ever, do), how could an expert be required to attend as a *witness* (*Evidence Act*, section 10(5)] before the delegate? Since an oral hearing is not required, what purpose is served by a rule requiring 30 days' prehearing disclosure? If adverse parties are entitled to 30 days' notice before any expert's report can be submitted to, or relied on by, the investigating delegate, investigations will inevitably become bogged down--surely, such a result is not in keeping with a fair and efficient dispute resolution process [see section 2(d) of the *Act*].

In a given case, a delegate might well be obliged to disclose relevant medical evidence in order to comply with section 77 of the *Act*, however, that sort of disclosure does not necessarily imply that the report itself must be disclosed nor does it imply that 30 days' advance "notice" must be given and, in my view, it certainly does not imply that the expert can be required to appear for purposes of cross-examination before the delegate.

THE DUTY TO ACT FAIRLY AND REASONABLE APPREHENSION OF BIAS

The Employer's Submission

Section 77 of the *Act* states:

> If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

The Director and her delegates must make reasonable efforts to ensure that a party being investigated is given an opportunity to present "their side of the story". Further, investigations into unpaid wage complaints must not be tainted by either actual bias, or the appearance of bias, on the part of the delegate conducting the investigation (see *Milan Holdings Inc.*, B.C.E.S.T. Decision No. D559/97; confirmed on reconsideration: B.C.E.S.T. Decision No. D313/98).

Counsel for the Employer says that the delegate's investigation into Coumont's complaint was unfair and that the investigation raises a reasonable apprehension of bias on the part of the delegate (Employer's Counsel's August 9th submission at pages 8-9):

> ...the [delegate's] failure to disclose the doctor's report, in addition to being a violation of the *Evidence Act* as argued above, constituted a violation of the duty to act fairly. Similarly, the failure to disclose the affidavit of Coumont was a breach of the Delegate's duty to act fairly toward the Employer...
>
> We rely upon our submissions under the duty to act fairly as being indicative of circumstances that also raise a reasonable apprehension of bias. The Delegate's failure to disclose the physician's report and then her reliance upon it for several key findings, such as the finding that the behaviour that characterizes the type of seizures suffered by Coumont can "be favourably compared to the behaviour

> witnessed by Lawless and Olson, which they described as intoxication" would raise in any person's mind a reasonable apprehension of bias. There is simply no explanation for not providing a copy of the physician's report to the Employer in circumstances where it is clear that the Delegate treated it as a crucial piece of evidence. We make a similar submission with regards to the failure to disclose the affidavit of Coumont.

As I have already noted, the delegate placed considerable weight on Dr. Smythe's consultation report in determining that the Employer did not have just cause to terminate Coumont because he was not intoxicated on May 11th, 2000. Since the delegate concluded that Coumont was not intoxicated on May 11th, she did not find it necessary to address the separate question of whether the Employer would have had just cause if Coumont was intoxicated on May 11th.

The duty to act fairly

The duty to act fairly, codified in section 77 of the *Act*, obliges the Director and her delegates, at a minimum, to apprise an employer in an unpaid wage complaint investigation of the nature of the complaint and to invite the employer's response. In this fashion, the employer is given an opportunity to present its case and, equally importantly, the delegate is able to make an informed decision based on all relevant evidence.

Apart from the provisions of section 10(3) *Evidence Act* (which, in my view, do not apply to a delegate's investigation under the *Act*), I do not accept that the delegate was obliged, in this case, to provided a copy of Dr. Smythe's report to the Employer. The delegate was, however, obliged to provide sufficient particulars regarding the thrust of Coumont's complaint so that the Employer could make an informed response.

The delegate advised the Employer's representative, Mr. Lawless--several months before the Determination was issued--that Coumont was maintaining that he was not intoxicated on May 11th and that his behaviour was caused by a seizure. Mr. Lawless, for his part, maintained that given Coumont's admission about alcohol consumption and the observations of other employees, the Employer believed that Coumont was intoxicated on May 11th and, accordingly, had just cause for termination. Although the delegate did not provide a copy of Dr. Smythe's report to the Employer, the delegate did provide particulars regarding both Coumont's position and the substance of the medical report. Thus, the Employer was reasonably well-informed about the nature of Coumont's claim and was invited to respond.

However, the Employer chose not to engage in a medical debate but, rather, continued to press its position that Coumont was terminated for cause, namely, being intoxicated at work. It bears repeating that there is no medical dispute in this case--Coumont clearly suffered several "partial temporal seizures" during 2000--and, so far as I can determine, the Employer has never taken issue with that medical diagnosis. Although the Employer accepts that Coumont has a medical condition, it does not follow that Coumont's behaviour on May 11th, 2000 can be explained by that condition. In other words, the issue before me is factual (was Coumont intoxicated on May

11th?), not medical (does Coumont have a medical condition?), and in that respect the medical evidence, such as it is, does not even purport to address the factual question.

I now turn to the matter of Coumont's affidavit. The delegate prepared a brief affidavit regarding Coumont's alcohol consumption on May 10th and 11th, 2000. This affidavit was sworn by Coumont before another delegate who is a commissioner for taking affidavits. Counsel for the Employer submits that the delegate should not have requested sworn evidence from one party (Coumont) if she was not prepared to make a similar request of the Employer's witnesses. Further, counsel says that the delegate improperly preferred Coumont's sworn evidence (because it was sworn) over the unsworn evidence of the Employer's witnesses.

While I do not think it is, in general, a good practice for delegates to prepare affidavits to be sworn by one of the interested parties, I am not satisfied that, in this case, this circumstance, standing alone, constitutes a breach of the duty to act fairly or that it raises a reasonable apprehension of bias. Coumont's affidavit simply sets out his position that he was not intoxicated on May 11th and nothing more--a position, I might add, that both Coumont and the delegate clearly communicated to the Employer. The form of affidavit does not, in my view, represent any form of "advocacy" by the delegate on Coumont's behalf. The delegate was entitled to require Coumont to give a statement under oath or affirmation [see section 85(1)(e)] and, in making that request, I do not believe that the delegate was obliged to seek sworn evidence from the Employer's witnesses.

As I read the Determination, the delegate did not prefer Coumont's evidence to that provided by the Employer simply because the former was under oath and the latter was not. Rather, it appears to me the delegate concluded that Coumont's story was more consistent with all of the available evidence (most of which was not under oath) and thus the delegate issued the Determination in Coumont's favour.

In light of the foregoing, I am not satisfied that this matter ought to be referred back to the Director on the basis that the Employer was not treated fairly or because the delegate appeared to be biased against the Employer.

I now turn to the *viva voce* evidence presented at the appeal hearing.

THE EVIDENCE AT THE APPEAL HEARING

Three witnesses testified on behalf of the Employer: Rick Olson, Ron Lawless and Jim MacDonald (by teleconference). Mr. Coumont and his wife, Doris Botter, were the only other witnesses who testified before me.

The Employer's Evidence

Mr. Olson is the assistant service manager at the Employer's automobile dealership and was so employed on May 11th, 2000. On the afternoon of May 11th he observed Coumont speaking

with a service technician about Coumont's daughter's vehicle. According to Olson, Coumont was agitated and was berating the technician regarding certain repair charges; Coumont's speech was slurred, he was "wobbly" on his feet and his eyes appeared to be "glazed". Olson concluded that Coumont was drunk and reported the matter to Mr. Lawless--the dealership's general manager. Mr. Olson acknowledged that Coumont's behaviour was "out of character", that he did not actually smell alcohol on Coumont's breath, however, he was some 10 feet away from Coumont when he made his observations. Olson never had any direct conversation with Coumont that afternoon.

Mr. MacDonald, a former service technician with the appellant (he left for a better paying position with another firm in October 2000), spoke with Coumont on the afternoon of May 11th about Coumont's daughter's car. Coumont's speech was slurred and there was a smell of alcohol on his breath. Coumont said that he had been drinking in a nearby bar while watching a Canadian hockey game (Canada played Sweden in a televised international hockey game on May 11th, 2000). MacDonald concluded that Coumont was intoxicated; MacDonald reported to his service manager and, after that conversation, Mr. Lawless appeared and sent Coumont home for the day. MacDonald stated that he had always had a good relationship with Coumont, that Coumont appeared to be very upset about his daughter's car and that, the very next day, Coumont telephoned MacDonald and apologized for his behaviour the previous afternoon.

Ron Lawless testified that he was in his office in the later afternoon of May 11th, 2000 when he was approached by Olson who stated "You've got a problem" because "there is a drunk salesman in the service department". Lawless proceeded to the service area where he saw Coumont speaking with a service representative, Peter Chu. Lawless concluded from Coumont's speech, agitated demeanor and odd behaviour that Coumont was drunk. Lawless directed Coumont to the former's office. In Lawless' office there was a short conversation. Lawless asked Coumont if he had been drinking and Coumont quietly replied that he had been. Lawless concluded that Coumont was not in a condition to see customers; certainly not to take them for test drives and, accordingly, he told Coumont that he was being sent home for the day and Coumont left the office.

A short time later, MacDonald came to Lawless' office and asked Lawless to "come and get this drunk out of my [service] bay". Lawless found Coumont in the service area and asked him "what are you doing"; Coumont was not fully coherent but did leave the area when Lawless told him "Ray, you've got to get out of here". MacDonald observed Coumont walk out of the dealership and across the street. Some ten to fifteen minutes later, Coumont was back in the dealership sitting at his desk at which point Lawless told Coumont "Ray, you've got to go home now!". Lawless requested and received Coumont's keys to his company-provided vehicle; Coumont left the dealership and did not return that day.

After considering the matter overnight, and after consulting the sales manager, Lawless determined that Coumont's employment would be terminated. Coumont reported for work the next day; Lawless told Coumont that he was being "let go"; Coumont apologized for his

behaviour the previous day but did not say much else. Lawless arranged for Coumont to be driven home. A few days later, Coumont was at the dealership to pick up his final cheque at which time he indicated that he had found new employment with another dealership.

In cross-examination, Lawless acknowledged that he did not smell alcohol on Coumont's breath, that he was very surprised by Coumont's behaviour ("I couldn't believe it"), that Coumont had never reported for work in an intoxicated condition before May 11th; and that Coumont always conducted himself appropriately save for a disputed sexual harassment allegation which, as I understand it, is proceeding to a hearing before the Human Rights Tribunal.

Coumont's Evidence

Coumont testified that he reported for work on May 11th, 2000 at about 2:30 P.M. whereupon he proceeded to the service area to speak with a service technician, Peter Chu, about his daughter's vehicle--it had been towed in for service the previous day. Coumont conceded that he was very upset about the work (and related repair charges) being undertaken on his daughter's car. Coumont said that his tone was "rough", "abrupt" and "loud" but not "abusive".

Coumont testified that Lawless appeared in the service area, accused him of being drunk and told him to go home. Although he left the dealership, Coumont says that he did not go home but, rather, returned a short while later to try and "rectify" the situation. At that point, Lawless demanded his car keys and told him to go home, which he did (by bus). The next day, Lawless approached him and said that he (Lawless) had thought about the situation overnight and had decided to "let me go".

Coumont denies that he consumed alcohol or that he admitted to consuming any alcohol on May 11th. He denied saying that he had been in a bar across the street watching Canada play a hockey game. He denied ever speaking with Lawless in the latter's office. He does acknowledge making an apology to Lawless the next day, that he was, as he put it, "fighting with people" on May 11th and that his words may have been slurred on that day. Curiously, and I have carefully reviewed my notes in this regard, although Coumont says that he was, on several occasions, accused of being drunk on May 11th, he never denied, at any time on May 11th, those accusations.

Doris Potter's evidence is of limited assistance. She was not present on May 11th when the events in question occurred. She first observed her husband's memory lapses and "strange behaviour" in 1999 and confirmed some aspects about her husband's subsequent diagnosis. He first saw a neurologist in February 2000, however, a "CAT scan" undertaken at that time did not show any serious problem and, as she put, the doctors "continued looking for the problem". Her husband had a grand mal seizure in either June or July 2000. She said that when she arrived home on May 11th her husband was already at home and did not appear to her to be intoxicated. He did say to her that he had been sent home because he had been drinking.

Findings of Fact

I reject Coumont's assertion that his condition on May 11th can be accounted for by a seizure. The medical evidence does not, in my view, support such a conclusion (indeed, the medical evidence is totally inconsistent with such a conclusion). I find the evidence of the Employer's witnesses to be both consistent and credible. On May 11th, Coumont appeared to be drunk, acted as if he was drunk, admitted that he had been drinking, never denied that he had been drinking and, the very next day, apologized on two separate occasions for his behaviour the previous afternoon.

I am particularly impressed by the evidence of MacDonald, the only "independent" witness who appeared before me. Since he is no longer employed by the Employer, what incentive would MacDonald have to fabricate his evidence? Indeed, he testified that he had never had any difficulties with Coumont and frankly conceded that Coumont's behaviour on May 11th was out of character. How would MacDonald know about the televised hockey game unless Coumont told him? Why would Coumont tell MacDonald that he had been drinking in the bar while watching the game if that were not so? Finally, MacDonald's evidence was not shaken in any fashion by either Coumont or by the Director's counsel on cross-examination.

If Coumont was not drinking on May 11th, I find it inconceivable that he would admit to such behaviour. He never denied, to any of his accusers, that he had been drinking. Indeed, he admitted that he had been drinking to both Lawless and MacDonald. Coumont never even denied to his wife, on May 11th, that he had been drinking--rather, his testimony was that he told her he had been sent home for drinking. I suspect that Coumont did not anticipate that his behaviour would result in termination and, accordingly, he never attempted to deny that of which he had been accused. I am fortified in this conclusion by the fact that Coumont spoke with both Lawless and MacDonald the next day and apologized for his behaviour; in my view, a recognition that his behaviour the day before was both willful and inappropriate.

DIRECTIONS

The delegate concluded that Coumont was not intoxicated on May 11th and, accordingly, never turned her mind to the question of whether or not that behaviour justified termination. I have concluded, based on a consideration of all of the evidence before me, that the delegate's determination on that point was incorrect. However, even though I accept that Coumont was intoxicated on May 11th, it does not inevitably follow that the Employer had just cause for termination.

Although it is within my jurisdiction to refer this matter back to the delegate to determine if the Employer had just cause in light of the facts as I have found them, I do not consider that approach to be appropriate in this case, especially when all of the relevant evidence is now before me. A referral back will only lengthen and delay the adjudication of this matter which has now been ongoing for nearly 1 1/2 years.

Accordingly, I am directing the Registrar to canvass the parties regarding their preference for making written or oral submissions on the issue of just cause. Upon hearing from the parties, the parties will be given a schedule for delivery of final written submissions or, alternatively, a date will be set for final oral submissions.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal