

An Application for Reconsideration

- by -

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

- of a Decision issued by -

The Employment Standards Tribunal  
(the "Tribunal")

pursuant to Section 116 of the  
*Employment Standards Act* R.S.B.C. 1996, C.113

**ADJUDICATOR:** David B. Stevenson

**FILE No.:** 2002/2

**DATE OF DECISION:** March 14, 2002

## DECISION

### OVERVIEW

Jim Pattison Chev-Olds, A Division of Jim Pattison Industries Ltd. (“Jim Pattison”) seeks reconsideration under Section 116 of the *Employment Standards Act* (the “Act”) of two Tribunal decisions, BC EST #D551/01, dated October 19, 2001, and #D643/01, dated December 4, 2001, (the “original decisions”). Those decisions considered an appeal by Jim Pattison from a Determination made on March 9, 2001, which had concluded that a former employee of Jim Pattison, Raymond Coumont (“Coumont”), was entitled to length of service compensation under Section 63 the *Act*, having been terminated without cause and without notice or compensation for length of service.

Jim Pattison says the Adjudicator of the original decisions made serious errors of law and failed to deal with a significant issue.

This application for reconsideration has been filed in a timely way.

### ISSUE

In any application for reconsideration there is a threshold issue of whether the Tribunal will exercise its discretion under Section 116 of the *Act* to reconsider the original decision. If satisfied the case is appropriate for reconsideration, the substantive issues raised in this application are whether the Adjudicator’s conclusions regarding the scope of Section 77 of the *Act*, whether the Delegate’s conduct during the investigation of the complaint raised a reasonable apprehension of bias, whether just cause had been established and whether the Adjudicator failed to deal with a significant issue.

### ANALYSIS OF THRESHOLD ISSUE

The legislature has conferred an express reconsideration power on the Tribunal in Section 116, which provides:

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*
  - (b) *cancel or vary the order or decision or refer the matter back to the original panel.*
- (2) *The director or a person named in a decision or order of the tribunal may make an application under this section.*
- (3) *An application may be made only once with respect to the same order or decision.*

Section 116 is discretionary. The Tribunal has developed a principled approach to the exercise of this discretion. The rationale for the Tribunal's approach is grounded in the language and the purposes of the *Act*. One of the purposes of the *Act*, found in subsection 2(d), is “to provide fair and efficient procedures for resolving disputes over the interpretation and application” of its provisions. Another stated purpose, found in subsection 2(b), is to “promote the fair treatment of employees and employers”. The general approach to reconsideration is set out in *Milan Holdings Ltd.*, BC EST #D313/98 (Reconsideration of BC EST #D559/97). Briefly stated, the Tribunal exercises the reconsideration power with restraint. In deciding whether to reconsider, the Tribunal considers factors such as timeliness, the nature of the issue and its importance both to the parties and the system generally. An assessment is also made of the merits of the Adjudicator's decision. Consistent with the above considerations, the Tribunal has accepted an approach to applications for reconsideration that resolves into a two stage analysis. At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration. The circumstances where the Tribunal's discretion will be exercised in favour of reconsideration have been identified by the tribunal as including:

- failure to comply with the principles of natural justice;
- mistake of law or fact;
- significant new evidence that was not reasonably available to the original panel;
- inconsistency between decisions of the tribunal that are indistinguishable on the critical facts;
- misunderstanding or failure to deal with a serious issue; and
- clerical error.

If the matters warrant reconsideration, the second stage is a full analysis of the substantive issue or issues raised in the application for reconsideration. While the above list is not exhaustive, it reflects the practice of the Tribunal to use its power to reconsider only in very limited circumstances. The reconsideration process was not meant to allow parties another opportunity to re-argue their case. As stated in *Milan Holdings Ltd.*, *supra*:

It would be both unfair and inefficient if the Tribunal were to allow, in effect, two hearings of each appeal where the appeal hearing becomes nothing more than a discovery process for a reconsideration application.

Jim Pattison says the Adjudicator's conclusions regarding disclosure and the duty to act fairly under Section 77 of the *Act*, that his conclusion regarding whether the Delegate's conduct in preparing an affidavit to be signed by Mr. Coumont raised a reasonable apprehension of bias and that his application of the just cause standard were all serious mistakes in applying the law. In addition, Jim Pattison says the Adjudicator's failure to deal with the scope of the delegate's participation in the proceedings, particularly on the issue of just cause, constituted a failure to deal with a significant issue.

The argument of the applicant on the issue of procedural fairness refers to the decision of Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, which identified several factors as being relevant when considering the scope of the duty of procedural fairness. Reference by the Court to those factors was preceded by the following comment:

The existence of a duty of fairness, however, does not determine what requirements will be applicable in a given set of circumstances. As I wrote in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682, “the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case”. All of the circumstances must be considered in order to determine the content of the duty of procedural fairness: *Knight*, at pp. 682-83; *Cardinal*, supra, at p. 654; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, per Sopinka J.

In the same context, I also note, and adopt, the words of the majority of the Court in *Downing v. Graydon*, (1978) 21 O.R. (2d) 292 (C.A.), that:

There are no rigid rules of procedure which must be followed to satisfy the requirements of natural justice. Courts have been careful not to place the decision-making officials and tribunals in a procedural strait-jacket, and, in particular, not to require them to hold judicial type hearings in every case. The purpose of beneficent legislation must not be stultified by unnecessary judicialization of procedure. The presentation of this case suffered from the initial misconception that the right to know and to reply required a full scale hearing. This is not so. The appropriate procedure depends on the provisions of the statute and the circumstances in which it has to be applied.(page 310 . . .)

It is apparent that the conclusions of the Adjudicator were responsive to the objectives and purposes of the *Act*, the provisions of Section 77 of the *Act* and the applicable circumstances. In that respect, the material shows that Jim Pattison was provided ample opportunity to respond to the complaint and was also apprised of all information acquired during the investigation and given an opportunity to respond to that information. Further, I note the finding by the Adjudicator that, while the Delegate did not provide a copy of either the medical report or the affidavit, she did provide Jim Pattison with particulars of the substance of the medical report and with Mr. Coumont’s position. I agree entirely with the conclusion of the Adjudicator that there was nothing in the circumstances that compelled a level of procedural fairness beyond that required by a plain reading and application of the words in Section 77 of the *Act* or that the Delegate failed to meet the duty codified in that provision. I also agree with the Adjudicator that while it is not, in general, a good practice for a delegate to prepare affidavits for signing by one of the interested parties, that conduct did not raise a reasonable apprehension of bias. The Adjudicator quite correctly noted that the delegate was authorized by Section 85(1)(e) of the *Act* to make that request and that the affidavit did no more than set out his position that he was not

drunk on May 11, 2000 - a position he had already taken and which had already been communicated to Jim Pattison.

On the just cause issue, I note, first, that there is no challenge to the findings of fact made by the Adjudicator. Rather, Jim Pattison argues that the Adjudicator's analysis of the issue was flawed because he did not give effect to Mr. Coumont's dishonesty after his termination in deciding whether there was just cause to terminate Mr. Coumont's employment. In my view, the Adjudicator made no error in his analysis of this issue.

Finally, Jim Pattison says the Adjudicator's failure to deal with the scope of the Delegate's participation amounted to a failure to deal with a serious issue. I note, however, that apart from a reference in the statement of facts in the application for reconsideration that counsel for Jim Pattison had, in a letter to counsel for the Delegate dated July 26, 2001, objected to the allegedly adversarial position being taken by the Delegate in a letter dated July 23, 2001, there is no indication that his 'issue' was ever raised during the proceedings. Nevertheless, the participation of the Delegate on the issue of just cause was included in the directions given by the Adjudicator to the parties in BC EST #D551/01. There is no indication of any objection to those directions. In my view, those directions, and specifically that part of the directions allowing the Delegate to submit her position on the just cause issue, allowed the Delegate no more participation on that issue than what is contemplated by the *Act*. The Adjudicator noted in BC EST #D551/01 that one of the options available, having found the Delegate's appreciation of the facts to be wrong, was to refer the issue of just cause back to the Director under Section 115(1)(b) of the *Act*. The direction to allow the Delegate to state her position, with supporting reasons, on the issue of just cause can fairly be viewed as a substitute for the statutory authority of the Delegate to make a determination on that issue under Section 79 of the *Act*, which, by application of Section 81(1)(a), would also require reasons be given. The Adjudicator had the authority under Section 107 of the *Act* to adopt this procedure:

*107. Subject to any rules made under Section 109(1)(c), the tribunal may conduct an appeal or other proceeding in the manner it considers necessary and is not required to hold an oral hearing.*

I am not satisfied that Jim Pattison has raised any matters that warrant reconsideration and the application is, accordingly, denied. The employer is putting forward at reconsideration essentially the same case made at appeal and ably addressed by the original adjudicator in his decision. However, even reviewing this on the standard of "correctness", there is nothing in the employer's argument that would cause me to decide that the Adjudicator made any mistake in applying the law.

**ORDER**

Pursuant to Section 116 of the *Act*, I order the original decision, BC EST #D551/01 and BC EST #D643/01, be confirmed.

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**David B. Stevenson**  
**Adjudicator**  
**Employment Standards Tribunal**