

An Application for Reconsideration

- by -

Keith C. Goodkey  
("Goodkey")

- 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.:** 2002/050

**DATE OF DECISION:** May 9, 2002

## DECISION

### OVERVIEW

Keith C. Goodkey (“Goodkey”) seeks reconsideration under Section 116 of the *Employment Standards Act* (the “*Act*”) of a Tribunal decision, BC EST # D001/02, dated January 3, 2002, (the “original Decision”). The original Decision considered an appeal by Dynamic Concrete Pumping Ltd. (“Dynamic Concrete”) from a Determination made on September 27th, 2001, which had concluded that Goodkey was entitled to a wage adjustment for overtime and annual vacation for a period from August 10, 2000 to April 10, 2001 and to eight weeks length of service compensation under Section 63 the *Act*, having been terminated without cause and without notice or compensation for length of service. Dynamic Concrete appealed the finding that Goodkey was entitled to length of service compensation, asserting he was terminated for just cause. The Adjudicator of the original Decision agreed that there was just cause for terminating Goodkey’s employment and varied the Determination accordingly.

During the appeal process, Goodkey advised the Director and the Tribunal that he had decided to withdraw his claim for length of service compensation and asked the Tribunal to vary the Determination to reflect that decision. The Adjudicator concluded that the request was not appropriate and went on to decide the matter of Goodkey’s entitlement to length of service compensation under the *Act*.

In this reconsideration application, Goodkey says the original Decision contains errors of law and that he was denied a fair hearing on the appeal.

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 effect under the *Act* of Goodkey having commenced a proceeding in the Supreme Court of British Columbia for wrongful dismissal were wrong in law and whether Goodkey was denied a fair hearing.

### FACTS

The salient facts are as follows:

1. On May 18, 2001, Goodkey filed a complaint with the Director, alleging, among other things, that he had been terminated in contravention of the requirements found in Section 63 of the *Act*.
2. On September 26, 2001 and without informing the Director, Goodkey commenced an action against Dynamic Concrete in the Supreme Court of British Columbia alleging wrongful dismissal and seeking damages for that wrongful dismissal.

3. Following investigation, the Director, on September 27, 2001, issued a Determination which found, among other things, that Goodkey was entitled to length of service compensation under the *Act*. The Director was unaware that Goodkey had commenced a Supreme Court Action.
4. An appeal of the Determination was filed with the Tribunal on October 22, 2001.
5. Although not entirely clear, it appears that between the date of the appeal and November 14, 2001, Goodkey sought to withdraw that part of the complaint raising a claim under Section 63 of the *Act* or, alternatively, that the Determination be varied to cancel the length of service compensation. The filing of the appeal prevented the Determination from being varied by the Director: per *Devonshire Cream Ltd.*, BC EST # D122/97.
6. Goodkey sought the same result from the Tribunal. The Adjudicator of the original Decision found it would not be appropriate for the Tribunal to cancel or vary the Determination and considered the issue of entitlement to length of service compensation under the *Act*.

### 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.

Counsel for Goodkey says there is an error of law in the original Decision. He contends that issue of law arises from the decision of the Adjudicator to consider the matter of ‘just cause’ in the context of Goodkey’s entitlement to length of service compensation. Nothing in this application has convinced me there is even a question of law, let alone an error of law, arising from the original Decision on this point. In deciding to consider the matter of ‘just cause’, the Adjudicator was doing nothing more than exercising discretion to consider an issue over which he clearly had jurisdiction - whether Dynamic Concrete should be deemed discharged, by operation of Section 63(3)(c), from its statutory obligation to pay Goodkey length of service compensation. Goodkey does not suggest the Adjudicator had no jurisdiction to examine that issue, only that he should not have because his conclusion on the matter of ‘just cause’ might create an estoppel in the Court on that question. However, it is apparent the Adjudicator was aware of that possibility and gave it consideration when deciding to proceed with the appeal on length of service compensation:

. . . to the extent that issue estoppel may arise in this case, the only “issue” that *might* be subject to an estoppel is the issue of “just cause” . . .

The decision of the Adjudicator to not allow Goodkey to withdraw a part of his complaint was an exercise of discretion on a matter within his jurisdiction. The original Decision does not say the Tribunal will never allow a party to withdraw an aspect of his complaint from the Tribunal, only that it was not proper, in all the circumstances and considering the purposes and objectives of the *Act*, to have allowed Goodkey to withdraw or hold in abeyance one aspect of his employment standards complaint.

The Adjudicator was alert to the possibility his decision may have provided a foundation for an estoppel argument. It is apparent that consideration was factored into the Decision. It is, however, for the Court to decide whether the circumstances create an estoppel in a proceeding before the Court and, in any event, whether the Court may allow that issue to proceed.

In the alternative, counsel for Goodkey contends Goodkey was denied a fair hearing. He says he was denied an opportunity to make submissions or provide evidence to the Tribunal on the issue of just cause and he refers to passages in the submissions filed by the Director and on behalf of Goodkey in the appeal. In the former, the Director stated:

I am not responding at this time to the employer’s contention that there was just cause to dismiss the employee. The issue of compensation ought not to be before the Tribunal. However, should it be found that to be, I would request permission to make a submission about cause.

In the latter, counsel for Goodkey stated:

... should the Tribunal decline to set aside the award for pay in lieu of notice, we also would like the opportunity to make submissions on the alleged cause. Obviously this will be an issue in the Supreme Court proceedings and there is a possibility of conflicting decisions if evidence which will be available to the Court is not also before the Tribunal.

Against the above submissions, several other facts and factors need to be considered. First, the original Decision notes counsel for Goodkey and Dynamic Concrete agreed the appeal could be adjudicated on the parties' written submissions. This is confirmed in a Tribunal letter dated December 24, 2001. While counsel contends his agreement was for the jurisdictional issue to be decided on the written submissions, not the factual issues related to the question of 'just cause', that contention is not borne out in the file material or on an examination of the issues raised on appeal. Second, the respective positions of the parties was adequately stated in the information provided during the investigation and with the appeal. This material included Goodkey's written statement of the events leading to his dismissal. Third, the Director may not advocate for the position of one party or the other. The Determination quite clearly set out the views and conclusions of the Director. Next, the Tribunal has a discretion about whether an oral hearing is required in any appeal. While the agreement of counsel significantly influenced the decision of the Tribunal to have the appeal decided on the written material, there is no indication anywhere in the file or in the original Decision that the Adjudicator felt this was a case where an oral hearing was necessary or that deciding the question of 'just cause' on the written submissions would deny the parties a fair hearing. Finally, the December 24, 2001 notice to the parties was explicit in stating that "a Decision will be made on the basis of the written submissions received. The Adjudicator's decision shall confirm, vary or cancel the Determination, or refer the matter back to the Director of Employment Standards".

Goodkey has not shown that he was denied an opportunity to make his position known to either the Director or the Tribunal and, consequently, there is no basis for asserting he was denied a fair hearing. An oral hearing on an appeal to the Tribunal is not a right and there is no suggestion or indication that one was required in this case.

The application does not show this is an appropriate case for reconsideration and is denied.

## **ORDER**

Pursuant to Section 116 of the *Act*, I order the original decision, BC EST # D001/02 be confirmed.

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