

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Routkovskaia v. British Columbia (Human Rights Tribunal)*,  
2011 BCSC 144

Date: 20110207  
Docket: S093256  
Registry: Vancouver

Between:

**Olga Routkovskaia (Ront)**

Petitioner

And

**British Columbia Human Rights Tribunal  
FPI Fireplace Products International Ltd.  
Deborah Millichamp**

Respondents

Before: The Honourable Madam Justice Russell

Judicial Review from BC Human Rights Tribunal Decision *Routkovskaia v. FPI Fireplace Products International and Millichamp*, 2009 BCHRT 95

## Reasons for Judgment

Counsel for Petitioner:

In Person

Counsel for Respondent BC Human Rights Tribunal:

J. Connell

Counsel for Respondents FPI Fireplace Products International Ltd. and Deborah Millichamp:

M. Korbin

Place and Date of Hearing:

Vancouver, B.C.  
October 14-15 and  
November 19, 2010

Place and Date of Judgment:

Vancouver, B.C.  
February 7, 2011

**Introduction**

[1] In Reasons for Preliminary Decision issued March 6, 2009 (the “Dismissal Decision”), the British Columbia Human Rights Tribunal (the “Tribunal”) dismissed the petitioner’s complaint (the “Complaint”) on the basis that the petitioner had no reasonable prospect of succeeding in showing that her employment was terminated because of her pregnancy and/or marital status.

[2] The petitioner seeks judicial review of both the Dismissal Decision and the Tribunal’s subsequent decision not to reconsider that decision (the “Reconsideration Decision”). She seeks an order setting aside the Dismissal Decision and remitting it to the Tribunal for reconsideration with directions or, in the alternative, an order setting aside the Reconsideration Decision and remitting the Reconsideration Decision for reconsideration with directions.

**The History of the Complaint**

[3] The petitioner worked as a Marketing Coordinator for FPI Fireplace Products International Ltd. (the “Company”) from June 18, 2007 to February 21, 2008. She originally reported to the Marketing Manager, Ms. Hillier, and later to the Marketing Director, Ms. Millichamp.

[4] On August 20, 2007, the petitioner met with Ms. Millichamp and told her that she was unexpectedly pregnant (the “August Meeting”). The petitioner and Ms. Millichamp disagree about the tenor of this meeting and what was said during it. In October, the petitioner told Ms. Millichamp that she had decided to have and keep her baby (the “October Meeting”).

[5] On February 21, 2008, at a scheduled performance evaluation, the petitioner was dismissed.

[6] On August 21, 2008, the petitioner filed the Complaint, alleging that she was discriminated against in her employment by reason of her marital status (single) and sex (pregnancy).

[7] The core of the Complaint is that Ms. Millichamp made negative assumptions about the petitioner's ability to perform well and be a valuable member of the Company's marketing team if she were to become a single mother and that Ms. Millichamp acted on those negative assumptions by dismissing the petitioner.

[8] The petitioner says that comments made by Ms. Millichamp at the August Meeting are evidence of her negative assumptions. When the petitioner told Ms. Millichamp that she was pregnant, she says that Ms. Millichamp told her to consider her options because being a single parent would make it difficult for her to do her current job and could affect her advancement opportunities as management positions require overtime and travel.

[9] The petitioner says Ms. Millichamp listed her options and told her that she knew a woman who had had to give up her career and go on welfare because she found it too difficult to be a mother and have a career. The petitioner says she was "struck" by this conversation, but did not complain about it at work.

[10] The petitioner asked the Tribunal to infer that the statements Ms. Millichamp allegedly made at the August Meeting culminated in "the ultimate discrimination" when her employment was terminated "within weeks" of the start of her maternity leave and constituted discrimination based on marital status and sex.

[11] The respondents deny that they discriminated against the petitioner. They say she was terminated "due to her continuing unsatisfactory performance and general lack of fit". The respondents also deny that Ms. Millichamp expressed prejudice towards single parents or scepticism about the petitioner's ability to perform her position as a single parent.

[12] They dispute the petitioner's evidence respecting the August Meeting. They say that Ms. Millichamp told the petitioner she should do all the thinking she needed and that the respondents would "support her in every way". Ms. Millichamp denies making the statements attributed to her by the petitioner and says that she does not

hold the view that single parents find it too difficult to combine family and career and does not know anyone who went on welfare because of such difficulties.

[13] In December 2008, the respondents applied to have the Complaint dismissed on the basis that it had no reasonable prospect of succeeding. In March 2009, the petitioner brought an application seeking disclosure and an adjournment.

[14] On March 6, 2009, the Tribunal dismissed the Complaint. In the Dismissal Decision, indexed as *Routkovskaia v. FPI Fireplace Products International and Millichamp*, 2009 BCHRT 95 at paras. 38-39 and 42 the Tribunal member said:

[38] As I have said, the primary evidence relied upon to establish [the necessary connection between the grounds relied upon and the termination of her employment] is Ms. Routkovskaia's and Ms. Millichamp's August 2007 conversation about Ms. Routkovskaia's pregnancy. The parties disagree about some of the details of that conversation, but there is no dispute about some aspects of it. Ms. Routkovskaia clearly sought out Ms. Millichamp to discuss her recently discovered pregnancy. Ms. Routkovskaia was not sure what she was going to do. They talked about the matter at some length, in the course of which they talked about Ms. Routkovskaia's options.

[39] None of this is even arguably evidence of discrimination. The only aspect of this conversation which is even arguably evidence of discrimination is Ms. Routkovskaia's allegation that Ms. Millichamp advised her to consider her options because being a single parent would be difficult, and would limit her career and advancement opportunities. Ms. Millichamp denies suggesting that being a single parent would be difficult or would limit Ms. Routkovskaia's career opportunities, but says that Ms. Routkovskaia asked about management positions. It was in that context, Ms. Millichamp says, that she told Ms. Routkovskaia that some management positions require overtime and travel, but that this was infrequent at FPI.

...

[42] Regardless of whose version of this conversation might ultimately be accepted, I find little evidence in it of discrimination or negative views about the ability of single parents to work at FPI or as managers. Further, it is clear that Ms. Routkovskaia herself thought little of it at the time. She made only a "mental note" of it, and did not mention it or complain to anyone about it until after the termination of her employment.

[15] On March 18, 2009, the petitioner applied to have her Complaint reopened and reconsidered. The Chair of the Tribunal wrote to the petitioner refusing her request (the "Letter"). The Letter reads:

The Tribunal is in receipt of your March 18, 2009 letter seeking reconsideration of its decision to dismiss your complaint.

As you correctly point out, in some limited circumstances the Tribunal has jurisdiction to reopen a decision. Those circumstances include where a decision has been made without the benefit of the full submissions made by the parties or where, after a decision has been rendered, new information or circumstances come to light that were unknown to the parties at the time they made their decision.

However, equitable jurisdiction does not extend to reconsidering submissions already made to reach a different conclusion or to correct what you term “errors in analysis”.

Decisions of the Tribunal are reviewable by the BC Supreme Court on judicial review...

[16] As I have said, the petitioner now seeks judicial review of both the Dismissal Decision and the Reconsideration Decision.

### **Issues**

1. What standard should this Court apply to review the Dismissal Decision?
2. What standard should this Court apply to review the Reconsideration Decision?
3. Did the Tribunal err in dismissing the Complaint on the basis that it had no reasonable prospect of succeeding?
4. Did the Tribunal err in refusing the petitioner’s application for reconsideration?

### **Parties’ Position on Judicial Review**

#### **Standard of Review**

[17] The parties agree that the patent unreasonableness standard exists in British Columbia. They also agree, with one exception, that it is the appropriate standard on which I should review the Dismissal Decision and the Reconsideration Decision.

[18] The petitioner says that her allegation that the Chair was biased in reaching the Reconsideration Decision must be reviewed on a standard of “fairness” pursuant to s. 59(5) of the ATA. The respondents argue that the standard of patent unreasonableness applies to the entire review of the Reconsideration Decision.

### **The Dismissal Decision**

[19] The petitioner says that the Dismissal Decision was patently unreasonable because it was made with regard to irrelevant factors, it was arbitrary and the Tribunal member failed to take statutory provisions into account.

[20] The petitioner also says that the Complaint was not suitable for dismissal because the affidavits raised credibility issues requiring a full hearing.

### ***Irrelevant Factors***

[21] The petitioner says the Tribunal was in error when it considered three irrelevant factors: 1) evidence that Ms. Millichamp's comments at the August Meeting related only to future career prospects in management, 2) a mischaracterized interpretation of the petitioner's reaction to Ms. Millichamp's comments at the August Meeting, and 3) the temporal proximity between the August Meeting and the petitioner's termination in assessing whether there was discrimination. She says these errors changed the nature of the Complaint.

### ***Arbitrariness***

[22] The petitioner alleges that the Tribunal member failed to undertake a principled analysis by omitting relevant evidence and making certain errors which indicate that the Complaint was not given due care and attention. The allegations that the decision was arbitrary are closely tied to the allegations that the Tribunal member relied on irrelevant factors.

[23] The petitioner essentially alleges that the Tribunal member either failed to consider relevant information or, if all the evidence was considered, failed to provide sufficient reasons.

[24] Regarding the failure to consider relevant evidence, the petitioner says that her Complaint and the respondents' application for dismissal were grounded in allegations of prejudice about the petitioner's ability to perform her job as a single parent but that the Tribunal member reached a decision on the basis that

Ms. Millichamp's comments at the August Meeting related only to a single mother's ability to advance her career in the future.

[25] The respondents say that the Tribunal member addressed the petitioner's evidence as it related to her current job at paras. 39, 42 and 44 of the Dismissal Decision.

[26] The petitioner further says the omission of this evidence and certain other errors, including referring to one of the alleged grounds of discrimination as "family status" when it should have read "marital status", indicates a lack of careful consideration of the Complaint.

[27] The respondents say the Tribunal member properly referred to "marital status" at paras. 31, 33, 34, 35, 36, 43, 44, 47 and 48.

### ***Statutory Provisions***

[28] The petitioner says that her submissions were not accorded the same weight as were those of the respondents, contrary to s. 15 of the *Charter*. By preferring the respondents' evidence, the member treated the parties differently, contrary to s. 15 of the *Charter*.

### ***Credibility Issues***

[29] The petitioner says that credibility issues arising from contradictory affidavits rendered the Complaint unsuitable for dismissal. At para. 22 of Appendix A to her Application to Reconsider the Decision to Dismiss and Re-Open Complaint, the petitioner says the following:

[22] If what I said about the conversation on August 20, 2007 is accepted at the hearing, then I will establish the connection between the unfair treatment and the prohibited grounds of discrimination. The discriminatory contents of this conversation are clearly in dispute and raise credibility issues that cannot be resolved on a preliminary application. A hearing is necessary.

### **The Reconsideration Decision**

[30] The petitioner advances three arguments in support of her petition to have the Reconsideration Decision remitted to the Tribunal: 1) the decision was arbitrary and lacks meaningful analysis, 2) the decision was biased, and 3) the decision was contrary to case law.

#### ***Arbitrariness***

[31] The petitioner says that the Chair's failure to provide meaningful analysis of her submissions renders the decision not to reconsider arbitrary and, therefore, patently unreasonable.

#### ***Bias***

[32] Bias is alleged because the petitioner says the Chair failed to consider whether the Dismissal Decision should be reopened to avoid unfairness. She says this is a breach of natural justice.

#### ***Contrary to Law***

[33] Citing *Willoughby v. Ballendine*, 2007 BCSC 2009, the petitioner says the exercise of the Chair's discretionary authority is contrary to law because it amounts to a blanket policy to refuse reconsideration except in exceptional circumstances.

### **Law**

#### **Standard of Review**

[34] Section 59 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 (the "ATA") determines the standard of review this Court must undertake on this application:

59(1) In a judicial review proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness.

(2) A court must not set aside a finding of fact by the tribunal unless there is no evidence to support it or if, in light of all the evidence, the finding is otherwise unreasonable.

(3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.

(4) For the purposes of subsection (3), a discretionary decision is patently unreasonable if the discretion

(a) is exercised arbitrarily or in bad faith,

(b) is exercised for an improper purpose,

(c) is based entirely or predominantly on irrelevant factors, or

(d) fails to take statutory requirements into account.

(5) Questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly.

[35] In *Karbalaeiali v. British Columbia (Human Rights Tribunal)*, 2010 BCSC 1130 at para. 36 Mr. Justice Butler explained the effect of the recent Supreme Court of Canada decision *Dunsmuir v. New Brunswick*, 2008 SCC 9 on the standards of review set out in the ATA:

[36] The Supreme Court of Canada in *Dunsmuir* collapsed the “patently unreasonable”/“unreasonable” dichotomy into one standard of “reasonableness”. However, despite *Dunsmuir*, “patent unreasonableness” lives on in B.C. with respect to the provincial administrative tribunals to which the ATA applies: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at paras. 18-19...

[36] Patent unreasonableness is defined in s. 59(4) of the ATA; there is no need to invoke a common law definition of patent unreasonableness: *Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95 at para. 19.

[37] For the purpose of s. 59(4)(a) of the ATA, a failure to consider the whole of the complaint may be patently unreasonable because it is an arbitrary exercise of discretionary authority: *Rojas v. EaglePicher Energy Products Corp. et al*, 2006 BCSC 1101 at para. 57.

[38] Only one standard applies to a review of the Tribunal’s decision to dismiss. As Mr. Justice Chiasson said in *Gichuru v. British Columbia (Workers Compensation Appeal Tribunal)*, 2010 BCCA 191, at para. 35:

[35] I do not suggest that no determination under the subsections of s. 27(1) of the *Code* could engage a different standard of review [ ], **but in my view, a determination whether to dismiss a complaint because it has no reasonable prospect of success is not to be reviewed on more than one standard of review.** The inquiry involves the Tribunal's expertise, exercised by the Member in her appreciation of whether the complaint has no reasonable prospect of success and in the determination whether to dismiss the complaint or to let it proceed. It is in all respects discretionary. [Emphasis added.]

### **The Dismissal Decision and Reconsideration Decision**

[39] The relevant provisions of the *Human Rights Code*, R.S.B.C. 1996, c. 210 (the "*Code*") are ss. 13 and 27:

13 (1) A person must not

- (a) refuse to employ or refuse to continue to employ a person, or
- (b) discriminate against a person regarding employment or any term or condition of employment

because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.

...

27 (1) A member of panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply:

...

- (c) there is no reasonable prospect that the complaint will succeed;

...

(2) If a member or panel dismisses a complaint or part of a complaint under subsection (1), that member or panel must inform the following persons of the decision in writing and give reasons for the decision:

- (a) the complainant;

- (b) the person against whom the complaint was made, if that person had been given notice of the complaint;
- (c) any other party;
- (d) an intervenor.

[40] To succeed in having a complaint dismissed pursuant to s. 27(1)(c), the respondent must establish that the complaint has no reasonable prospect of success: *Wickham and Wickham v. Mesa Contemporary Folk Art and others*, 2004 BCHRT 134 at para. 11. A complaint can be dismissed on a preliminary basis where the complainant fails to take the claim out of the realm of speculation and conjecture: *Lapansie v. Dr. Ralph Bieg Medical Corporation*, 2008 BCHRT 210 at paras. 12-13.

[41] The use of the word “may” in s. 27(1)(c) indicates that the Tribunal’s power to dismiss is discretionary: *Workers’ Compensation Appeal Tribunal v. Hill*, 2009 BCSC 107 at para. 52. The Tribunal is accorded a high degree of deference in exercising its discretion under s. 27(1)(c): *Berezoutskaia* at paras. 24-26.

[42] The scope of the inquiry on an application to dismiss is limited. The Tribunal does not make findings of fact or findings of credibility. On findings of fact, Chiasson J.A. said the following in *Gichuru* at para. 31:

[31] *Berezoutskaia* held that the standard of review is patent unreasonableness. The decision under s. 27(1) being discretionary there seems to be no doubt about that. The discretion is whether to dismiss: the Member can dismiss or not dismiss. If the inquiry is under s. 27(1)(c), the member first must decide whether there is no reasonable prospect the complaint will succeed. *Berezoutskaia* established that this exercise does not involve weighing evidence and making findings of fact. It is discretionary. *Berezoutskaia* and *Lee* place the threshold very low...

[43] On findings of credibility, the member writing in *Bell v. Dr. Sherk and others*, 2003 BCHRT 63 at paras. 28-29 said:

[28] Credibility is a factor in virtually every human rights complaint. Tribunal members, however, when considering the information which is before them in an application to dismiss, are not making findings of credibility *per se*, but rather are evaluating all the information before them in order to determine whether there is a reasonable prospect the complaint will succeed.

[29] This evaluation or weighing of the evidence for the purpose of determining whether there is a reasonable prospect the complaint will succeed is not of the same nature as that which occurs at a hearing before a tribunal, where the tribunal would make an assessment of the evidence on the balance of probabilities. The weighing or assessing at the s. 27 stage should relate solely to the question of whether there is a reasonable prospect that the complaint will succeed: *Rogers v. British Columbia (Council of Human Rights)* (1993), 21 C.H.R.R. D/67 (B.C.S.C.) at paras. 23-24...

[44] In some circumstances, a preliminary decision cannot be reached. For instance, where the evidence in conflict is such that the Tribunal member cannot conclude that there is no reasonable prospect that the complaint will not succeed, the parties' competing positions are best resolved at a hearing: see *Miller v. Village Green Hotel and others*, 2010 BCHRT 258 at para. 43 in which the member said:

[43] ...[T]he parties in this complaint disagree on the critical issues, such as whether Ms. Miller has a disability, whether Ms. Miller's disability was a factor either in disciplining or relieving her of her duties, and whether either party discharged their duties in regard to an accommodation process. I am unable to reconcile the many factual differences between the parties on the materials before me. A hearing is required to make this determination.

[45] However, the Court is not prevented from considering conflicting affidavits for the limited purpose of carrying out its gate-keeper function: *Evans v. University of British Columbia*, 2008 BCSC 1026 at para. 34.

[46] The Tribunal has no statutory authority to hear appeals from its members' decisions. However, it is open to the Tribunal to rehear a matter and arrive at a different outcome: *Karbalaeiali*. This is an extraordinary measure which should be undertaken where necessary in the interests of fairness and justice: *Grant v. City of Vancouver and others (No. 4)*, 2007 BCHRT 206 at para 10; *Zutter v. British Columbia (Council of Human Rights)* (1995), 122 D.L.R. (4<sup>th</sup>) 665 (B.C.C.A.); *Rashead v. Vereschagin*, 2005 BCHRT 426.

[47] Reconsideration may be appropriate where the decision includes or is based on incorrect or incomplete information: *Maydak v. B.C. (Ministry of Public Safety and Solicitor General and Ministry of Attorney General) (No. 2)*, 2007 BCHRT 455.

[48] The petitioner has alleged bias on reconsideration. The Supreme Court of Canada adopted the following definition of bias in *Wewaykum Indian Band v. Canada*, 2003 SCC 45 at para. 58:

[58] ...a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case.

[49] Some of the petitioner's bases for review amount to claims that the member's reasons were insufficient. This sufficiency of reasons was addressed in *Kinexus Bioinformatics Corporation v. Asad*, 2010 BCSC 33 at para 18:

[18] A tribunal is not required to address every argument made by the parties. Nor is it required to recite all of the evidence, or even all of its highlights, or demonstrate that all aspects of the evidence have been considered. As noted in *R. v. Morin*, [1992] 3 S.C.R. 286 (S.C.C.) at p. 296, the tribunal:

... must consider all of the evidence in relation to the ultimate issue but unless the reasons demonstrate that this was not done, the failure to record the fact of it having been done is not a proper basis for concluding that there was error in law in this respect.

## **Analysis**

### **Issues 1 & 2: What standard should this Court apply to review the Dismissal Decision and the Reconsideration Decision?**

[50] I have concluded that I must review both the Dismissal Decision and the Reconsideration Decision on the standard of patent unreasonableness.

[51] The Tribunal's authority to dismiss a complaint on the basis that it has no reasonable prospect of succeeding, under s. 27(1)(c), is a discretionary decision: see *Hill and Berezoutskaia*. The decision whether to reconsider is also discretionary: *Karbalaeiali* at para. 38. Section 59(3) of the ATA prohibits a court from setting aside a discretionary decision unless it is patently unreasonable.

[52] The petitioner alleges the Chair was biased when she made the Reconsideration Decision and says that, as bias is a breach of natural justice, this part of the review should be undertaken on the less deferential standard of “fairness” in s. 59(5).

[53] It is necessary to examine this allegation to give effect to the petitioner’s argument. The petitioner says that the Chair failed to entertain the idea that the Dismissal Decision might constitute injustice; the Chair was predisposed to find that the Dismissal Decision and the manner of reaching it were fair.

[54] Section 59(5) confers on courts a broader jurisdiction on which to review the Tribunal’s decisions when a breach of procedural fairness, such as bias, is alleged. However I cannot accept that “bias” is the proper characterization of the petitioner’s argument.

[55] The Tribunal has a limited jurisdiction to reopen and reconsider its decisions when the interests of fairness require that it do so. Therefore, when the Chair made the Reconsideration Decision, she was obliged to decide whether fairness required the Dismissal Decision be reconsidered. If the Chair failed to consider fairness, as alleged by the petitioner, the Chair’s decision was patently unreasonable as defined in s. 59(4)(c), because it would be based on entirely or predominantly irrelevant factors, that is, on factors other than fairness.

[56] That is not in substance an allegation of bias but an allegation that the Chair exercised her discretionary power improperly.

[57] I therefore find that on these facts, the allegation of bias is in fact an allegation that the Reconsideration Decision was patently unreasonable because it considered irrelevant factors and is reviewable on the standard of patent unreasonableness.

[58] I will therefore proceed to review both the Dismissal Decision and the Reconsideration Decision on the standard of patent unreasonableness.

**Issue 3: Did the Tribunal Err in Dismissing the Complaint on the Basis that it had no Reasonable Prospect of Succeeding?**

[59] I have concluded that the Tribunal member's decision to dismiss the Complaint because it had no reasonable prospect of succeeding was not patently unreasonable.

[60] Patent unreasonableness is defined in s. 59(4)(a)-(d) of the ATA. The petitioner has alleged that the Dismissal Decision is patently unreasonable because it was arbitrary, decided on the basis of irrelevant factors and failed to take statutory requirements into account.

***Irrelevant Factors***

[61] The petitioner takes the position that the Tribunal member relied on three irrelevant factors in reaching her decision and that this was an error.

[62] A factor is relevant if it helps to prove or disprove a material fact. Relevance must therefore be assessed with reference to the facts at issue in a give case.

**Ms. Millichamp's Comments**

[63] The primary error alleged by the petitioner is that the Tribunal member took an overly narrow interpretation of the petitioner's evidence of Ms. Millichamp's comments at the August Meeting. Under this head for seeking relief, the petitioner says that the member's reliance on this evidence was a reviewable error because it constituted reliance on an irrelevant factor. I cannot agree.

[64] Both parties placed evidence about what occurred at the August Meeting before the Tribunal. The petitioner says that Ms. Millichamp told her to consider her options because it would be difficult to balance single parenthood and a career, and the respondents say that there was a discussion but the difficulties of obtaining such a life balance were only mentioned as a result of the petitioner's inquiries about management positions.

[65] The member was not in a position to make findings of fact or credibility; she was required to review the evidence before her to determine whether the Complaint had a reasonable prospect of succeeding. Included in the evidence before her were the submissions on the context and content of the August Meeting.

[66] The respondents' evidence about whether and how management positions factored into the discussion forms part of the evidence before the member. It was therefore relevant.

[67] It follows that in considering this evidence, the member did not rely entirely or predominantly on irrelevant factors.

#### The Petitioner's Feelings Following August Meeting

[68] The petitioner does not agree that she "thought little" of the comments made by Ms. Millichamp at the August Meeting. She says that this interpretation was not only wrong, but irrelevant.

[69] I will consider whether this interpretation can be said to be wrong below, however I cannot find that it was irrelevant.

[70] The Tribunal member considered the evidence before her to determine whether there was any evidence which might take the petitioner's Complaint out of the realm of speculation and require a hearing. She was looking for evidence of "discrimination or negative views": Dismissal Decision at para. 42.

[71] The petitioner relied on evidence of what transpired at the August Meeting. Her reaction to the comments made at the meeting was part of the relevant context within which the member had to assess whether those comments expressed negative views or discrimination and is therefore relevant.

#### Temporal Proximity Between the August Meeting and the Comments

[72] The petitioner says that because she did not rely on the temporal proximity between the August Meeting and her termination, the member should not have considered this factor.

[73] The member explained her reasoning for considering the timing. In her view, the delay between the alleged expression of negative views and the petitioner's dismissal was relevant to assessing whether there was a nexus between the two.

[74] While I agree with the petitioner's assertion that there is no time limit on discriminatory conduct, the comments themselves do not constitute discriminatory conduct. They are alleged to be evidence of prejudicial beliefs which *led* to discriminatory conduct when the petitioner was terminated.

[75] It was open to the member to consider the time which had lapsed between the purported expression of prejudice and the discriminatory conduct to assess the likelihood of a nexus between the two.

### ***Arbitrariness***

[76] I begin this analysis by saying that it is not possible and not necessary that the Dismissal Decision be capable of being dissected to ensure that each allegation was addressed and to assess whether additional material should have been referenced. Though certain evidence is not mentioned, it does not follow that the decision maker ignored it.

[77] The petitioner says that the Dismissal Decision is arbitrary because it lacks principled analysis. She says the member misapprehended evidence of Ms. Millichamp's comments at the August Meeting and omitted reference to the October Meeting, at which she told Ms. Millichamp of her decision to have and keep her child.

[78] By narrowly interpreting the remarks made at the August Meeting, the petitioner says that the Tribunal ignored evidence about her primary allegation of discrimination which, properly understood, would have provided the required nexus between the alleged prejudice and her dismissal.

[79] I have reviewed the Dismissal Decision and am unable to agree with the petitioner's submissions. While the Tribunal member spent more of her analysis on

how the allegedly prejudicial comments related to the petitioner's future career prospects at the Company than how they related to her employer's perception of her ability to do her current job, it is clear that the Tribunal member was alive to both aspects of this evidence and considered it in reaching her decision. As I said above, both versions of what occurred at the August Meeting were relevant to the member's decision and both were considered.

[80] The member makes express reference to the petitioner's submissions regarding her current job at paras. 42 and 44 of the Dismissal Decision:

[42] Regardless of whose version of this conversation might ultimately be accepted, I find little evidence in it of discrimination or negative views about the ability of single parents to **work at FPI** or as managers...

...

[44] The conversation between Ms. Millichamp and Ms. Routkovskaia happened in August 2007. Ms. Routkovskaia's employment was terminated on February 21, 2008, some six months later. **If the respondents had the negative views about Ms. Routkovskaia's ability to perform her job as a single parent which Ms. Routkovskaia alleges, they had ample opportunity between August and February to terminate her employment.** In particular, they could easily have done so within the original six month probationary period set out in the June 12, 2007 letter to Ms. Routkovskaia offering her employment, without any need to extend that probationary period.

[81] It is evident from these statements that not only did the Tribunal member understand that the petitioner was arguing that Ms. Millichamp held negative views about her ability to do her current job, but also that the member considered this evidence in deciding that the Complaint had no reasonable prospect of success.

[82] This is not a situation like the one in *Rojas* in which the Tribunal failed to consider a branch of the complaint. In that case, the Claimant alleged, in part, that he had been discriminated against on the basis of gender when his employer and union failed to accord him procedural fairness during investigations into allegations against him of sexual harassment. The complainant alleged that he was not made aware of the names of his accusers and so could not answer the complaint. In

reaching a decision to dismiss, the Tribunal failed to consider his procedural fairness allegations.

[83] Here, the member placed different emphasis on certain evidence than did the petitioner; this is not an error. The member considered the whole of the Complaint and reviewed the evidence in relation to the ultimate issue in reaching her decision that the Complaint could not succeed.

[84] She found that even if a member accepted as true the only evidence which could even “arguably” demonstrate discrimination – the comments allegedly made by Ms. Millichamp at the August Meeting – the Complaint could not succeed.

[85] The petitioner further submits that certain errors in the Dismissal Decision indicate that the Complaint was not carefully considered. One of these errors is her interpretation of the evidence of the petitioner’s reaction to the August Meeting by saying that the petitioner made only a “mental note” of it.

[86] The Tribunal member appears to have taken the petitioner’s statement that she was “struck” by the August Meeting to mean that she made note of it but was not sufficiently concerned to pursue it with the Company or to ask for further explanation. This accords with the evidence. This is an interpretation which, in my view, does not disregard the petitioner’s evidence. I cannot find this interpretation patently unreasonable and it does not constitute a finding of fact.

[87] The member clearly understood the substance of the petitioner’s Complaint and, as outlined above, properly considered the evidence. There is no dearth of reasoning; the Dismissal Decision is not arbitrary.

### ***Statutory Provisions***

[88] The petitioner says that the Tribunal failed to take the *Charter* s. 15 requirement that she be treated equally into account in assessing her submissions.

[89] The petitioner did not undertake a s. 15 analysis. No comparator group has been suggested and, most importantly, the petitioner has not alleged that the

unequal treatment was on the basis of a prohibited ground. I therefore cannot give effect to this argument.

***Credibility Issues***

[90] There were material discrepancies in the affidavit evidence regarding what transpired at the August Meeting. The Tribunal member did not attempt to reconcile the evidence and did not suggest that she preferred one version over the other. This was appropriate. As I have said, it was not open to the member to make findings of fact or credibility on the application to dismiss under s. 27(1)(c): see *Gichuru and Bell*.

[91] The member looked at the whole of the evidence and determined that, no matter which version was accepted, the Complaint could not succeed. This was the proper approach.

[92] This is not a case like *Miller*, in which the Court determined that a hearing was required. In that case, the credibility issues made it impossible for the member to assess whether the Complaint was likely to succeed. That is not the case here. Many of the material facts were agreed. On the affidavit evidence, and despite different characterizations of the evidence, the member considered that she was able to assess whether the Complaint had a reasonable prospect of succeeding.

[93] Accordingly, in reviewing the Tribunal's decision with the deference required by the *ATA*, I do not find the Tribunal member's decision to dismiss the Complaint as having no reasonable prospect of success was patently unreasonable.

**Issue 4: Did the Tribunal Err in refusing the petitioner's application for reconsideration?**

[94] The petitioner advances three arguments in support of her petition to have the Reconsideration Decision remitted to the Tribunal: 1) the decision was arbitrary and lacks meaningful analysis, 2) the decision was biased, and 3) the decision was contrary to case law.

**Arbitrariness**

[95] The petitioner says that the Chair's decision not to reopen the Complaint was arbitrary because the Chair failed to provide meaningful analysis supporting her decision. An arbitrary decision is patently unreasonable: *ATA* s. 59(4)(a).

[96] The Tribunal may preliminarily assess and dismiss a complaint pursuant to s. 27 of the *Code*. The Tribunal does not have jurisdiction to hear appeals of its decisions, but has an equitable jurisdiction to reopen a complaint if it is in the interests of justice and fairness to do so: *Karbalaeiali; Grant; Zutter*.

[97] In the Letter, the Chair rejected the petitioner's application for reconsideration on the grounds that the errors alleged by the petitioner fell outside the scope of the Tribunal's equitable jurisdiction to reconsider.

[98] As outlined above, the petitioner alleges several errors were made in making the Dismissal Decision. She says that key evidence was missing or was misunderstood and that this constituted unfairness which permitted the Chair to reconsider the decision.

[99] I have found that in reaching the Dismissal Decision, the member properly considered and reasonably interpreted the evidence before the Tribunal without making findings of fact. I therefore find that it was reasonable for the Chair to conclude that fairness did not require reconsideration of the Dismissal Decision.

[100] The petitioner appears to take the position that when the Tribunal receives an application for reconsideration it is required to seek submissions on the application, and cites *CUPE Local 873* as authority requiring the Tribunal to take certain steps when an application for reconsideration is made.

[101] *CUPE Local 873* is authority for the proposition that the Tribunal may reconsider and reopen a complaint and that it has done so, but it does not lead to the conclusion that the Tribunal must handle a request for reconsideration in a specified manner.

[102] In that case, the member dismissed the Ministry's application to dismiss and the Ministry sought a reconsideration of that decision on the basis that the Tribunal had misunderstood submissions. The submissions related to whether the complaint was out of time.

[103] The Tribunal's decision reinforces the view that reconsideration is not automatic. In para. 5 of *CUPE Local 873*, the member says:

[5] After reviewing all of the information and submissions before me, I find that it would be appropriate to grant the Ministry's application for reconsideration. However, I find that this reconsideration does not provide any basis for varying the original decision.

[104] There is therefore a threshold question of whether there should be a reconsideration before reconsideration is undertaken. It is at this first step that the petitioner's application failed.

[105] I have not been cited any authority which requires the Chair to provide an analysis supporting her decision to decline the petitioner's application for reconsideration. However, I find that if such an obligation were imposed on the Chair, the Letter was sufficient.

[106] The Letter laid out the scope of the Tribunal's equitable jurisdiction, a summary of what the Chair understood the petitioner to be alleging, and the Chair's conclusion that the errors alleged by the petitioner did not fall within the Tribunal's jurisdiction. I have found this a sufficient basis on which to review the Reconsideration Decision.

[107] I also note that as part of her application for reconsideration, the petitioner submitted a letter and a 14-page Appendix A which detailed the errors which formed the basis of her request. This material was before the Chair when she determined that the request did not fall within the Tribunal's jurisdiction to reopen a complaint, as evidenced by the fact it was referred to and quoted in the Chair's Letter refusing the reconsideration.

[108] I do not say that the Chair was required to receive submissions on the request for reconsideration, but only that an outline of the petitioner's arguments was before her when she made her decision.

[109] While the Chair's decision was brief, I do not find that it was arbitrary.

***Bias***

[110] As I have said, I do not consider the petitioner's allegation that the Chair failed to consider whether fairness required that the Dismissal Decision be reconsidered a bias argument; it is an allegation that the Chair failed to properly exercise her equitable jurisdiction.

[111] If demonstrated, this would, by definition, be patently unreasonable. However I find that this allegation is not substantiated.

[112] The Chair reviewed the bases upon which the Tribunal has jurisdiction to reconsider (in "limited circumstances" the Tribunal has "an equitable jurisdiction"), characterized the petitioner's alleged errors (as "errors in analysis") and concluded that those bases fell outside the scope of the reconsideration jurisdiction. I do not find this decision patently unreasonable.

[113] In light of my characterization of this allegation, I found that the patent unreasonableness standard applies to my review of it. However, if I had found that the "fairness" standard in s. 59(5) applied, I would have come to the conclusion that the Chair acted fairly. As an allegation of bias, I find this argument is even less tenable.

[114] There is nothing in the circumstances surrounding the writing of the Letter or in the Letter itself which leads me to conclude that the Chair's decision was biased.

[115] In considering this submission, I adopt the language of Butler J. in *Karbalaeeiali* at para. 43:

[43] In considering an allegation of bias against an adjudicator, the court must apply the reasonable apprehension of bias test. This test asks whether

an informed person, viewing the matter realistically and practically and having thought the matter through, would conclude there was bias [citations omitted]. An allegation of bias is serious and, thus, the evidence to show an apprehension of bias must be substantial [citations omitted].

[116] There is no evidence, much less “substantial” evidence, suggesting that the Chair was biased or that she was predisposed to decide in a certain way. I do not draw this inference from the fact she acted quickly on receiving the application for reconsideration or from the fact she did not ask for submissions. The petitioner points to cases in which a “submission schedule” was drawn up to assess an application for reconsideration. However I have not been shown authority requiring the Chair to ask for submissions.

[117] In any event, while the Chair did not ask for submissions she had the benefit of the petitioner’s material before her. In those pages the petitioner advanced many of the same arguments she advanced before this Court. The heart of her complaint is and was that her evidence was misunderstood by the member. I have found that the member properly considered the evidence and gave effect to the petitioner’s submissions. I therefore do not find that the Dismissal Decision resulted in unfairness. On that basis, I cannot find that the Chair’s decision not to reconsider was unreasonable or that in declining to reconsider she acted unfairly.

[118] I also cannot give effect to the petitioner’s arguments that a limited jurisdiction to reconsider a decision should be distinguished from a limited jurisdiction to accept applications for reconsideration or that receipt of an application should be distinguished from accepting it. The petitioner seeks to slice the apple too thinly.

[119] Reconsideration is a two-stage process. At the first stage, the Tribunal must decide whether fairness requires reconsideration, or, in other words, whether the decision should be reconsidered. When the Chair decides not to reconsider the decision, the complainant who wishes to pursue his or her complaint may seek judicial review.

[120] That is what happened here. The Chair made a discretionary decision. She was not biased, the decision was not arbitrary and it was not made on the basis of irrelevant considerations. The decision was not patently unreasonable.

[121] The petitioner simply disagrees with the Chair's decision.

***Contrary to Law***

[122] The petitioner says that the Chair's decision to refuse reconsideration is contrary to law and cites *Willoughby v. Ballendine*, 2007 BCSC 2009.

[123] In that case, Mr. Justice Leask of this Court determined that a blanket rule permitting reconsideration only in "exceptional circumstances" does not accord with the common law rules of procedural fairness and natural justice.

[124] A distinction must be made between circumstances in which the Tribunal has jurisdiction to reconsider but declines to do so because there are no exceptional circumstances and where the Tribunal has no jurisdiction to reconsider.

[125] Leask J. referred to the former; this case falls into the latter. Certainly where the interests of fairness require a complaint be reopened, the Tribunal may exercise its discretion despite there being no additional exceptional circumstances. However where fairness does not require a reconsideration, the Tribunal lacks jurisdiction to reconsider, whether or not there are exceptional circumstances.

[126] *Mokhtari v. Hain-Celestial Canada*, 2007 BCHRT 467 is an example in which the Tribunal reopened a complaint. In that case, the Tribunal's decision referred to medical evidence which did not relate to the matter before the Tribunal. This was a special circumstance in which the interests of fairness required the Tribunal to reconsider a decision made on completely irrelevant and erroneous evidence.

[127] In *Maydek*, the Tribunal declined to exercise its discretionary authority in favour of a party whom it understood had been deported from Canada and was living in South America to avoid arrest in the United States. The party asked to

appear before the Tribunal by teleconference and the Tribunal understood that permitting this would be facilitating his evasion of American authorities.

[128] The Tribunal reconsidered its decision in the face of evidence that the party had in fact been extradited and not deported and had served his sentence in the United States and was not evading capture there.

[129] As the bases upon which the Tribunal had declined to exercise its equitable jurisdiction were mistaken, the Tribunal decided that fairness required that it reconsider its decision.

[130] Those cases do not assist the petitioner in the present case. Here, after receiving the petitioner's application, including certain submissions on reconsideration, the Chair determined that the bases for the request were outside the scope of its jurisdiction – that is, that fairness was not in issue.

[131] Once that determination was made it was no longer open to the Tribunal to reconsider the Dismissal Decision; it lacked jurisdiction to do so.

[132] For the foregoing reasons, I do not find that the Chair acted unreasonably in declining to reconsider.

### **Conclusion**

[133] I have determined that the appropriate standard of review for both the Dismissal Decision and the Reconsideration Decision is patent unreasonableness. I find that neither decision was patently unreasonable. I have also found that if the allegation of bias can be properly framed as such, the Reconsideration Decision was not unfair.

[134] In the result, the petition is dismissed.

[135] At every stage in this process the petitioner has put together detailed and well-researched arguments in support of her case. Despite these thorough submissions, the member could not find evidence of discrimination which might

reasonably lead to a successful complaint, the Chair found that the Dismissal Decision was not suitable for reconsideration and I find that neither the Dismissal Decision nor the Reconsideration Decision was patently unreasonable.

[136] The petitioner argued that costs should not be ordered against her because of her financial situation.

[137] In *Cowherd v. Fraser Valley Health Region et al*, 2004 BCSC 698, Ballance J. said the following, at para. 5:

[5] The principle which has emerged from recently decided authorities is that, in general, the unfortunate personal circumstances and characteristics of a litigant are not to be taken into account by the court in exercising its discretion in making an award of costs. Such personal circumstances would encompass a party's needy financial situation [citations omitted]. There is also authority that the financial hardship of a litigant who would otherwise be responsible to pay costs should not, standing alone, justify a departure from the ordinary rule [citation omitted].

[138] The Tribunal has not sought costs. The Company and Ms. Millichamp will share one set of costs.

“L.D. Russell J.”

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The Honourable Madam Justice Loryl D. Russell