EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act R.S.B.C. 1996, C.113

- by -

Allied Store Equipment Ltd.
("Allied Store" or the "employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 1999/611

DATE OF HEARING: January 10, 2000

DATE OF DECISION: January 24, 2000

DECISION

APPEARANCES:

Roy Radons, Manager	for Allied Store Equipment Ltd.
Merina Lai Lee	on her own behalf
No appearance	for the Director of Employment Standards

OVERVIEW

This is an appeal filed on October 13th, 1999 by Florence Lambrecht on behalf of Allied Store Equipment Ltd. ("Allied Store" or the "employer") pursuant to section 112 of the *Employment Standards Act* (the "*Act*") from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on September 21st, 1999 under file number ER 095-555 (the "Determination").

The Director's delegate determined that Allied Store terminated its former employee, the complainant Merina Lai Lee ("Lee"), without paying compensation for length of service (see section 63 of the *Act*) nor with proper written notice in lieu of termination pay. The delegate awarded Lee 7 weeks' wages as compensation for length of service; the award, including interest (see section 88), totalled $4,773.41.

The employer's appeal was heard at the Tribunal's offices in Vancouver on January 10th, 2000. Mr. Roy Radons, a senior Allied Store employee, appeared on behalf of the appellant and testified before me as did one other employer witness, Ms. Adele Burris. Ms. Lee appeared and testified on her own behalf. The Director did not appear at the appeal hearing.

ISSUE TO BE DECIDED

In its initial appeal documents, Allied Store submitted that the Determination should be cancelled because, in fact, Lee was given sufficient notice of termination, albeit only verbal notice.

Subsequent to the filing of the appeal, Allied Store, in a written submission to the Tribunal dated November 29th, 1999, raised another ground of appeal, namely, that it had just cause to terminate Ms. Lee by reason of her being, during her employment, in a "conflict of interest".

It should be noted that this latter argument was not advanced during the course of the delegate's investigation. Nevertheless, inasmuch as the information upon which the just cause allegation is founded was not known to Allied Store--nor could it have reasonably have been expected to have been known since Ms. Lee did not disclose this information to her employer during her employment--I am of the view that the evidence relating to the "just cause" argument is properly admissible before me. This is not a situation where the employer failed to participate in the delegate's investigation, nor is it a situation where the employer withheld relevant information from

the delegate during the investigation. Thus, in my view, the exclusionary rule set out in Kaiser Stables Ltd. (B.C.E.S.T. No. D058/97) has no application here.

FACTS

Allied Store sells trade fixtures and other display units used by retailers and other commercial enterprises. Lee commenced her employment with Allied Store in March 1986; her employment ended on or about February 14th, 1999. Ms. Lee's employment was continuous except for a brief hiatus during which time she quit and went to work for another employer only to be re-hired about one month later. At the time of her termination, Lee was Allied Store's office manager and was paid a monthly salary of $2,844.20. Among other tasks, Lee acted as the company bookkeeper and payroll clerk. She was not involved, in any direct fashion, in selling the company's products.

Lee testified that Allied Store was in financial difficulty and that she was informed, in December 1998, by principals of the company that she would be laid off. It is not clear in the evidence before me if the employer advised Lee that her employment would end as of a specific date. In any event, Lee's employment actually ended on February 14th, 1999. Allied Store concedes that it never gave Lee any written notice of termination.

Knowing that Allied Store was in financial difficulty, Lee and two other employees--both involved on the sales side of the business--entered into discussions about starting their own competing business. These discussions, according to Lee, occurred during the summer of 1998 and came to fruition in August 1998. According to a "B.C. OnLine" corporate search conducted on behalf of Allied Store on November 25th, 1999, a firm known as "Superior Store Equipment and Display Co. Ltd." ("Superior") was incorporated on September 15th, 1998. The three directors of this latter firm were Lee and her two former Allied Store colleagues. Lee is also a shareholder in this firm and presently serves as the company's bookkeeper. Superior, which opened for business in March 1999, competes directly with Allied Store.

ANALYSIS

Notice of Termination

An employer is not obliged to pay compensation for length of service if, *inter alia*, the employer gives to the employee in question the appropriate written notice of termination which may range from 1 to 8 weeks' notice depending on the employee's length of service [see section 63(3)(a) of the *Act*]. As previously noted, Allied Store did not give written notice and, as this Tribunal has consistently held, the *Act* calls for written notice of termination; verbal notice is not legally sufficient (see e.g., JFL Ventures Ltd., B.C.E.S.T. Decision No. 230/96; Frans Markets Inc., B.C.E.S.T. Decision No.309/96; Sun Wah Supermarket Ltd., B.C.E.S.T. Decision No. 324/96; Wright, B.C.E.S.T. Decision No. 132/97; G.A. Fletcher Music Co., B.C.E.S.T. Decision No. 213/97; Zaretski, B.C.E.S.T. Decision No. 214/97).

In light of the foregoing, there is no merit to the employer's assertion that the Determination should be set aside on the basis that Lee was given verbal notice of termination.

If an employer fails to give proper written notice of termination, that employer may nonetheless avoid paying compensation for length of service if it has just cause for termination [see section 63(3)(c) of the *Act*]. I now turn to this issue.

Just Cause

Allied Store did not learn about Ms. Lee's involvement as a founding director of Superior Store Equipment and Display Co. Ltd. until after Ms. Lee was terminated. Nevertheless, for the purpose of establishing just cause, an employer is entitled to rely on facts and circumstances that it discovers after the employee's termination so long as such facts and circumstances existed as at the point of termination [cf. Lake Ont. Portland Cement v. Groner [1961] 28 D.L.R. (2d) 589 (S.C.C.); Empire International Investment Corp., B.C.E.S.T. Decision No. 076/99], and further provided that the employer never "condoned" the employee's alleged misconduct [cf. King v. Mayne Nickless Transport Inc. (1994), 114 D.L.R. (4th) 124 (B.C.C.A.); Victoria Books and Volumes Bookstores Ltd., B.C.E.S.T. Decision No. 404/98].

Allied Store's position is that it would have been entitled to discharge Ms. Lee for cause in February 1999 (or even earlier), had it known that Lee, along with two other employees, had caused a competitor firm to be incorporated. It should be recalled that this is not a situation--as in TMSI Telephone Maintenance Services Inc., B.C.E.S.T. Decision No. 510/98--where Lee simply resigned to take employment with a competitor firm; rather, she was a principal of a firm that was established for the express purpose of competing with Allied Store.

As observed by the Supreme Court of Canada in Bank of Montreal v. Ng (1989), 62 D.L.R. (4th) 1, an employee "is expected to give loyal and indeed faithful service...this duty of loyalty clearly implies that the employee will devote all of [her] efforts during working hours to the undertaking; if [she] works for third parties outside those hours, [she] should avoid competing with [her] employer directly or indirectly". The facts of this case are not dissimilar from those in State Vacuum Stores v. Phillips, 12 W.W.R. 489 (B.C.C.A.) or Empey v. Coastal Towing Co. Ltd., [1977] 1 W.W.R. 673 (B.C.S.C.) where, in each case, an employee established a firm to compete with the employee's current employer while still employed by the current employer. Both our Court of Appeal and the B.C. Supreme Court held that such conduct constituted a breach of the employee's duty of faithful service thus entitling the employer to terminate the employee without any notice or severance pay in lieu of notice.

In my view, this is clearly a case where the employer had just cause to terminate Ms. Lee based on her, and her fellow fellow employees', decision to incorporate and otherwise establish a competitor firm while still employed by Allied Store. This competitor firm, namely, Superior Store Equipment and Display Co. Ltd., was intended to compete directly with Allied Store and now does so. The competitor firm opened for business within a matter of weeks after Lee was terminated. Unquestionably, any number of administrative and other operational matters had to be attended to by Lee and the other principals prior to the new competitor store opening--throughout this "pre-opening" period, Ms. Lee was employed by Allied Store and thus owed Allied Store a duty of

faithful service. In my opinion, Ms. Lee manifestly failed in that duty and, accordingly, Allied Store was not obliged to pay any compensation for length of service because, as at mid-February 1999 (and for several months prior thereto) it had just cause to terminate Ms. Lee's employment. The only reason Allied Store did not terminate Ms. Lee for breach of her duty of faithful service was because Ms. Lee deliberately concealed her (and her fellow employees') actions from Allied Store.

Finally, I should add that, undoubtedly, Lee and her fellow former Allied Store employees established the competitor firm in an effort to protect their own economic interests. I do not think that their primary motivation was to harm Allied Store's economic interests although obviously that is an effect of their actions. However, the law is clear that whether or not the former employee intended to injure their former employee is irrelevant; the only relevant inquiry is whether the former employee failed to meet his or her duty of faithful service (see Empey, supra., at p. 677).

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be cancelled.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal