Employment Standards TRIBUNAL

An appeal

- by -

Westburne Industrial Enterprises Ltd. Les Entrepri operating as Nedco
("Nedco" or 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: Ib S. Petersen

FILE No.: 2001/596

DATE OF DECISION: January 22, 2002

DECISION

SUBMISSIONS:

Mr. Tim Charron	on behalf of the Employer
Ms. P.A. Smith-Gander	on behalf of Mr. Amiralai
Mr. Curtis Lappin	on behalf of himself
Mr. Debbie sigurdson	on behalf of the Director

OVERVIEW

This decision arises out of a referral back to the Director of Employment Standards (the "Director") in two earlier decisions of the Tribunal (*Westburne Industrial Enterprises*, BCEST #D371/00 and *Westburne Industrial Enterprises*, BCEST #D347/01). The first decision was issued on September 15, 2000, the other on June 27, 2001. In the first decision, I decided to refer the matter back to the Director for further investigation on an "expeditious basis." Based, among others, on my conclusion that there was a reasonable apprehension of bias in the manner in which the subsequent investigation was carried out, in the following decision, BCEST #D347/01, the matter was again referred back for investigation by a Delegate other than the Delegate who had made the original Determination.

In turn, those decisions arose out of an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against two Determinations of the Director issued on May 19, 2000. The Determinations concluded that Mr. Reza Amiralai ("Amiralai") and Mr. Curtis Lappin ("Lappin") were owed $2,752.15 and $1,528.91, respectively, by the Employer on account of compensation for length of service. The two Employees left the Employer, in one case to start a business, in another, to work for another employer.

This decision deals with the results of the referral back.

In her report, dated August 16, 2001, the Delegate concluded:

> (1) that Amiralai, who had left the Employer to start his own business, was in a conflict of interest, and that he was not entitled to compensation for length of service; and
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> (2) that Lappin, a former "inside" sales person, who left to become employed by another company, was not in a conflict of interest. He was entitled to compensation for length of service.

In brief, the Delegate, following her extensive investigation, concluded that the Determination with respect to Amiralai be cancelled, and the determination with respect to Lappin be upheld.

Amiralai appeals the first conclusion. The Employer appeals the second.

FACTS AND ANALYSIS

It is trite law that the Appellant bears the onus of showing on the balance of probabilities that the Determination is wrong. In this case, and for the reasons set out below, I am of the view that neither of the Appellants have succeeded.

I have reviewed the submissions on file and it is my decision that an oral hearing is not required to dispose of these appeals. In my view, the dispute is primarily over the characterization of the facts and the applicable law.

The law in this area has been canvassed in a series of decisions of the Tribunal over the last few years: see, for example, *Unisource Canada Inc.*, BCEST #D172/97, *Macmillan Bloedel Limited*, BCEST D#279/00, upheld on reconsideration in BCEST #D214/99, *Unisource Canada Inc.*, BCEST #D513/01, *Unisource Canada Inc.*, BCEST #D514/01. In *Air Products Canada Ltd.*, BCEST #D523/01, Adjudicator Stevenson summarized the principles as follows (at page 6-7):

> In *Re Unisource Canada, Inc*., BC EST #D172/97, four employees with "access to confidential information" were leaving to work for a direct competitor of Unisource. All of the employees were terminated by
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> Unisource for a "potential" conflict of interest. The Determination had concluded that in order to establish just cause for the purposes of the *Ac*t, the employer had to establish an "actual" conflict of interest. The issue considered on appeal in that case was whether the employer, Unisource, was required to establish an actual conflict of interest, or whether the just cause test was met in a potential conflict of interest situation. The Tribunal found, first, that the use of the terms "actual" or "potential" conflict of interest were not helpful, stating:
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> > "Either one is in a conflict of interest vis-à-vis some other party *(i.*e. a relationship) or one is not."
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> It was accepted in the appeal of that case that the terminated employees were in a conflict of interest with their employer and the Tribunal, allowing the appeal, made the following statement:
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> > "Once the conflict of interest arose *(i.e.* when these employees entered into employment contracts with the competitor firm), the employer was, *by reason of that fact alon*e, entitled to terminate these employees without termination pay or notice in lieu thereof."

The Tribunal did place the following caveat on the decision in that appeal:

> "I do not wish my remarks to be taken as creating a general right of termination once an employee enters into an employment contract with a competitor firm. However, where the particular employee is a fiduciary with respect to the "current" employer, or when that employee has access to confidential proprietary information, the "current" employer need not stand by and wait for the employee to steal information or otherwise breach some confidentiality - - the employer, if it chooses to do so (and does not otherwise condone the situation), may terminate the employee for just cause."

In the second case, *Re MacMillan Bloede*l, BC EST #D214/99, the employee was an outside sales representative and, according to the decision, had "authority to make pricing decisions (including offering price discounts) on his own motion and had access to proprietary and confidential marketing information" and to information regarding "costs, inventory, profit margins, customer rebate and allowance policies and so forth . . .". The issue before the Tribunal in *Re MacMillan Bloedel* was whether there was just cause because the employee had placed himself in a conflict of interest with his employer by accepting employment with a competing firm. It is clear from the decision that the Tribunal found the employee occupied a key position with MacMillan Bloedel and had access to sensitive confidential or proprietary information. The Tribunal concluded that the employee was in a conflict of interest:

> "The fact that Carter had, at that point when he tendered his resignation, already entered into an employment relationship with a MacMillan Bloedel competitor does not, of itself, create a conflict of interest. However, given that Carter was taking up employment in a position that was very similar to that which he held with MacMillan Bloedel, a position where he would be selling similar products to a similar customer base, I must conclude that if Carter had continued his employment with MacMillan Bloedel throughout the notice period he would have been in a position of conflict of interest because he then would have been in the untenable position of having to serve two competing masters both of whom were entitled to demand his undivided loyalty."

As the Tribunal noted in *Re Unisource Canada, Inc*., however, there is no general proposition that an employee who enters into an agreement to be employed by a competitor provides just cause for dismissal. In every case, it is a question of fact. The *Re Unisource Canada, Inc.* decision identifies two circumstances where the dismissal of an employee who agrees to be employed by a direct competitor of his current employer would be justified: first, if the employee is a fiduciary; and second, where the employee has access to confidential proprietary information."

With respect to who is a fiduciary, the panel in *Air Products Canada*, noted, after a review of the case law, at page 8 (citing the decision of the Supreme Court of Canada in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574):

> "The one feature, however, which is considered to be indispensable to the existence of the relationship, and which is most relevant in this case is that of dependency or vulnerability."

On the issue of confidential information, the panel in *Air Products Canada* noted, at page 10-11:

> Whether an employee is in a conflict of interest is a question of fact. As noted in *Re Unisource Canada Inc*., a fiduciary employee, or one considered to have fiduciary responsibilities because of their access to confidential proprietary information, who takes employment with a direct competitor is in a conflict of interest and may be summarily dismissed. The material on file and the evidence in this case, however, does not establish that Laroque had access to confidential proprietary information. While Air Products has contended that information about pricing, current customer accounts, upcoming sales and marketing initiatives is confidential and proprietary, *there is no general presumption that such information falls within that class of information generally described as confidential or proprietary information*. Air Products has provided no evidentiary basis compelling a conclusion that such information was confidential or proprietary information. I do not know, for example, *whether the information could reasonably be regarded as clearly secret or sensitive, whether the distribution of such information is restricted to an exclusive group of employees or is more broadly distributed, and if so, to whom it is made available, whether this information was acquired by Laroque in order that he could do his job and whether Laroque had been given specific instructions that this information, or parts of it, was to be treated as privileged and confidential or proprietary information*. Consistent with the requirement that an employer bears the burden of establishing just cause for dismissal, Air Products bears the burden of proving the existence of a conflict of interest in this case. They have not done so in this appeal.

In *Unisource Canada*, BCEST #D513/01, the Adjudicator noted, at page 6-8:

> "....What is noteworthy in that effort is the difficulty the Courts have had in capturing the meaning of those concepts with any precision. In *Ebco Industries Ltd. v. Kaltech Manufacturing Ltd. and other*s, [1999] B.C.J. No.2350 (BCSC), the Court considered a number of authorities that had defined trade secrets and confidential information. I do not perceive there to be any significant difference between what had been termed "trade secret" and what has been referred to as proprietary information. In respect of trade secrets, or proprietary information, the Court stated:
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> > In *RI Crane Limited v. Ashto*n, [1949] O.R. 303, Chevrier J. accepted the following definitions of trade secrets, at 388-89:
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> > 1 st . "A trade secret . . . is a property right, and differs from a patent in that as soon as the secret is discovered, either by an examination of the product or any

> other honest way, the discoverer has the full right of using it. . . . *Progress Laundry Co. v. Hamilto*n, 270 S.W. 834, 835, 208 Ky. 348."
>
> 2 nd . "A trade secret is a plan or process, tool mechanism or compound known only to its owner and those of his employees to whom it is necessary to confide it. *Cameron Mach. Co. v. Samuel M. Longdon Co*., N.J. 115 A. 212, 214; *Victor Chemical Works v. Iliff*, 132 N.E. 806, 811, 299 Ill. 532."
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> 3 rd . "The term 'trade secret', as usually understood, means a secret formula or process not patented, but known only to certain individuals using it in compounding some article of trade having a commercial value, and does not denote the mere privacy with which an ordinary commercial business is carried on. *Glucol Mfg. Co. v. Shulis*t, 214 N.W. 152, 153, 239 Mich. 70."
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> 4 th . "A trade secret may consist of any formula, pattern, device, or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. A trade secret is a process or device for continuous use in the operation of the business. The subject matter of a trade secret must be secret.
> Restatement, Torts, 757."

In *Faccenda Chicken Ltd. v. Fowle*r, [1986] 1 All E.R. 617 (C.A.), it was stated that the obligation not to use or disclose information clearly covered such things as secret processes of manufacture or designs or special methods of construction and other information which is of a sufficiently high degree of confidentiality as to amount to a trade secret, but it was impossible to provide a list of matters which could qualify as trade secrets. However, as to trade secrets, certain facts could throw light on the status of the information and its degree of confidentiality. *These include the nature of the employment, whether the employer impressed on the employee the confidentiality of the information or restricted its dissemination and whether the relevant information could be easily isolated from other information which the employee was free to use or disclose.* (emphasis added)

The Court said the following about what is confidential information:

> In *Pharand Ski Corp. v. Alberta,* (1991), 37 C.P.R. (3d) 288 (Alta. Q.B.), the Court considered a claim for breach of confidence. On the issue of whether the information had the necessary quality of confidentiality, Mason J. stated, at 316:
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> > A list of factors to be considered to determine if the information has a quality of confidence about it may be found in *Ansell Rubber Co. Pty Ltd. v. Allied Rubber Industries Pty Ltd*., [1967] V.R. 37, and *Deta Nominees Pty Ltd. v. Viscount Plastics Products Pty Ltd*., [1979] V.R. 167 at p. 193: see Kearney, *op. cit*., p. 12.__They are:
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> > 1. the extent to which the information is known outside the owner's business

2. the extent to which it is known by employees and others involved in the owner's business
3. the extent of measures taken by him to guard the secrecy of the information
4. the value of the information to him and his competitors
5. the amount of money or effort expended by him in developing the information
6. the ease or difficulty with which the information could be properly acquired or duplicated by others [i.e. by their independent endeavours].

In my view, these are the relevant legal principles to be applied.

1. Mr. Amiralai

With respect to Amiralai, the Delegate noted that he started a business that "will, in some instances, compete directly with Nedco." The Delegate's analysis concluded:

> "Mr. Amiralai was in a position of trust and confidence at Nedco, in that he had direct control and management of customer accounts at Nedco and was the representative Nedco held out to its customers. Mr. Amiralai was in a position at Nedco and his new business venture where he can use the information about Nedco's business to the potential harm of Nedco. Mr. Amiralai had intimate knowledge of the customers and their needs, and of the shortcomings in Nedco's ability to meet those needs. Mr. Amiralai's role at Nedco was to establish and maintain customer contacts, and to bring business to Nedco. Upon entering an agreement to start his own business venture in data communications, Mr. Amiralai's best interests may no longer have remained with Nedco."

In his appeal, Amiralai questions the basis for the Delegate's Determination. He argues, among others, that while he, "as much as any sales representative," was in a position of "trust and confidence" of Nedco, he did not have any "direct control over pricing and that only the Data Manager at Nedco had access to the actual costs of the products." He stresses his long industry experience, knowledge of the customers and suppliers, and mentions, as well, that it is contrary to industry practice to restrict individuals as suggested in the Determination. He also says that "his company was still in the start-up phase," for the first four months after leaving Nedco, and that militates against Nedco suffering any damage from his business venture.

Amiralai considers that the Delegate's conclusions is "exceedingly insulting to his character and integrity." On that note, I would like to emphasize that there is nothing before me that cast any aspersions against his character or integrity.

I am not persuaded that the Delegate erred. In my view, Amiralai's arguments do not address the core issue, namely conflict of interest. In Amiralai's case, the nub of the Delegate's decision, as set out in her report, though those terms are not used, is that Amiralai was more akin to a fiduciary. There was a degree of vulnerability in the relationship between him and Nedco because of his position. He had access to confidential information and he was the company's "face" towards its customers.

In short, I am of the view that the Appellant Amiralai has failed to show that the Delegate erred in her report and I set aside the Determination with respect to Amiralai.

2. Mr. Lappin

The Employer takes issue with the conclusion that Lappin was not in a position "to influence customers or affect customer negotiations." From the Employer's standpoint, he had a "pro-active" role as a commissioned "inside" sales person. Lappin says that he was not on commission, and his attached T4 show that he did not earn any commissions. The employer says that Lappin had the authority to change prices. The Delegate's report notes that the Employer stated that Lappin had the ability to override the computer pricing to match a competitors's prices. Lappin says that he required the approval of a manager in order to adjust prices. He says that he was given a list of customers and asked to solicit strictly on price. There seems to be no dispute that there is some overlap with respect to customers and products between Nedco and Lappin's new employer. However, according to a witness, interviewed by the Delegate, the focus of Lappin's new employer is data communications while Nedco is an electrical company. The report also notes, and this is not addressed in the submissions of the Employer Appellant, that there is very little overlap in customers and suppliers. The report also notes, according to the Employer, that Lappin did not have his own accounts, and "may talk to 30 to 40 customers in a day." From Lappin's standpoint, he was simply a "voice" on the telephone with no on-going customer relations. Lappin points out that he had no "face to face contact" with the customers.

The Delegate concluded on balance that Lappin was not in a position of trust and confidence. He had no dedicated, ongoing accounts. He was in a support position (to Amiralai) with little authority. He was, essentially, a "voice" on the telephone.

There is, in my view, nothing in the submissions of the parties that would serve to elevate Lappin to the position of a "fiduciary" of Nedco. Accordingly, the Employer must establish that the was a conflict of interest because Lappin as a mere employee had "access to confidential proprietary information." This is a question of fact.

The emphasis of the Employer's submissions is on Lappin's position and his ability to influence customers, rather than the confidentiality of the information to which Lappin had access. Presumably, however, any sales person seeks to influence customers to purchase his or her employer's products or services. On balance, on the facts of this case, I am not satisfied that Lappin had access to confidential to the degree, for example, that Amiralai had. From my

review of the information on file, Amiralai had greater access to the information said to be confidential, including pricing, margins and strategies. Amiralai had the ability to print out hard copies of the information, Lappin did not. I also find it hard to accept that as a telephone--or inside--salesperson, without his own accounts, serving as Amiralai's "back-up", is in a similar position to Amiralai. The burden is on the Employer to satisfy the burden that it had cause for termination. In this case, on balance, I am not persuaded that the Employer had met that burden. In the result, the appeal is dismissed.

ORDER

Pursuant to Sections 115 of the Act, I order that the Determination dated May 19, 2000 with respect to Amiralai be cancelled.

Pursuant to Sections 115 of the Act, I order that the Determination dated May 19, 2000 with respect to Lappin be confirmed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal