Employment Standards TRIBUNAL

An appeal

- by -

Lisa Technologies Inc.
("LTI")

- 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:** Carol L. Roberts

**FILE No.:** 2002A/2

**DATE OF DECISION:** February 12, 2003

# DECISION

This decision is based on written submissions by Sean Ross, Director of Operations for LISA Technologies Inc., Lance Nelson, and Gerry Goncalves on behalf of the Director of Employment Standards.

## OVERVIEW

This is an appeal by LISA Technologies Inc. ("LTI") of a Determination of a delegate of the Director of Employment Standards issued December 3, 2002. The delegate concluded that LTI terminated Lance Nelson's employment without cause, and ordered that it pay Mr. Nelson compensation for length of service in the amount of $2,816.11.

## ISSUE TO BE DECIDED

Whether the delegate erred in concluding LTI terminated Mr. Nelson's employment without cause.

## FACTS

Mr. Nelson worked for LTI, a computer programming services company, from March 1, 1999 to June 12, 2002 as a sales representative.

In late May, 2002, Weston Forest Corporation ("Weston") approached LTI regarding the provision of an information system for its operations. Mr. Nelson says that he asked Weston's CFO to forward the request for proposal (RFP) to him once it had been developed.

Mr. Nelson was on vacation from June 3 to June 7, 2002. LTI says that, during that time, LTI's President, Jason Dudar, spoke to Weston's CFO, and confirmed LTI's interest in submitting an RFP.

LTI also says that, when Mr. Nelson returned to work on June 10, Mr. Dudar asked Mr. Nelson to respond favourably to the RFP. Mr. Nelson denied receiving any such instruction.

Mr. Nelson replied to Weston as follows:

> Thank you for forwarding Weston's RFP.
>
> We have reviewed the RFP and determined that our available capacity is insufficient to effectively implement the specifications. Therefore LISA Technologies will not be participating as a vendor….

Shortly thereafter, the Weston's CFO replied to Mr. Nelson:

> We appreciate your response to our RFP but we are a bit surprised.… This is why we encouraged all vendors to visit us for a detailed information session and indicated that the submission deadline could be flexible. …
>
> We are prepared to have you reconsider your position, but failing that we would like to have some further insight into why you have decided to participate.

I infer the last sentence should have read "…decided not to participate." This email was copied to Mr. Dudar.

Within 2 hours, Mr. Nelson responded to the CFO as follows:

> We would be pleased to pursue your RFP further.
>
> According to the proposal specification the deadline is Monday June 10 @ 5PM. We received the RFP early last week, to investigate the issues surrounding the specs and reply on such short notice would not do justice to such a comprehensive document.
>
> If there is flexibility in the proposal date, I was not made aware of it.

LTI contended that Mr. Nelson's last email was sent only after it had "much discussion with" Mr. Nelson.

Mr. Nelson's employment was terminated on July 12 for "failure to fulfil the responsibilities of the position of Account Executive." No other reasons were given.

LTI argued that Mr. Nelson's email

> substantially undermined our bid for Weston's business, and possibly eliminated us from contention for revenues of …. It also demonstrated that Mr. Nelson was conducting himself in a manner that was damaging to the company as a whole, and jeopardizing employment to other LISA staff by not fulfilling his duties to the best of his abilities.

The delegate concluded that LTI failed to provide any evidence that Mr. Nelson's email was a deliberate attempt to undermine LTI, or that it was a regular pattern of behaviour. He determined that the evidence did not demonstrate that Mr. Nelson's behaviour or conduct was so unacceptable that it was not only cause for dismissal, but dismissal without compensation or notice in lieu of compensation.

**ARGUMENT**

LTI contends that the delegate erred in law and that LTI did in fact have just cause for terminating Mr. Nelson's employment.

LTI argues that Mr. Nelson's single act of refusing LTI's participation in the RFP fundamentally undermined LTIs relationship with a potential customer and breached the employment relationship. It also argues that Mr. Nelson's refusal to participate was a deliberate attempt to undermine LTI. In essence, LIT's arguments are the same it advanced before the delegate.

LTI argues that Mr. Nelson's response to Weston Forest Corporation's RFP was in direct contradiction of Mr. Dudar's previous conversation with the CFO and his request to Mr. Nelson to confirm LTI's participation. While LTI acknowledges that, although Weston is willing to give LTI an additional opportunity, LTI's participation in the RFP is now flawed.

Mr. Nelson contends that the RFP, which had a deadline of June 10, was a very detailed 12 page document which formed a binding agreement if accepted, and that only original documents could be delivered. He argued that it was impossible for LTI to comply with that deadline. Mr. Nelson says that, once he was told that the deadline was flexible, he advised Weston that a proposal would be submitted. Mr. Nelson argued that it would have been irresponsible and unprofessional for him to attempt to put

together a package in a short time frame, and that any attempt to do so could have exposed LTI to legal problems.

## ANALYSIS

Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

1. the director erred in law

2. the director failed to observe the principles of natural justice in making the determination; or

3. evidence has become available that was not available at the time the determination was being made

LTI contends that the director erred in law in concluding that it had not provided compelling evidence that it had grounds to terminate Mr. Nelson's employment. The burden is on LTI to demonstrate, on persuasive grounds, that the determination is incorrect. I am unable to conclude that LTI has discharged that burden.

Section 63 of the *Act* establishes a statutory liability on an employer to pay length of service compensation to an employee on termination of employment. An employer may be discharged from that liability where the employer is able to establish that the employee is dismissed for just cause.

What constitutes just cause has been addressed by the Tribunal on many occasions. Generally speaking, what constitutes just cause falls into two categories.

The first category is unsatisfactory conduct, or minor infractions of workplace rules that are repeated despite clear warnings to the contrary, and progressive discipline measures. Because LTI does not rely on this ground for dismissing Mr. Nelson, I have not addressed it.

The second category is that of exceptional circumstances where a single act of misconduct may justify dismissal without the requirement of a warning. This single act must constitute a fundamental breach of the employment relationship.

The Tribunal is guided by the common law on the question of whether the facts justify a dismissal in these circumstances. Situations which have been held to constitute misconduct include failure to attend work, gross incompetence, a significant breach of a material workplace policy, criminal acts, and insubordination. (see *Kruger, Re: Glenwood Label and Box Manufacturing*, BC EST # D079/97).

LTI provided no evidence that its relationship with Weston is "now flawed", as it asserts, or that it is disadvantaged in any way with respect to the RFP. Furthermore, LTI provided no evidence that LTI's relationship with Weston or any other potential client has been damaged as a result of Mr. Nelson's conduct.

Although LTI asserts that "should it be rumoured within the forest and building products industry that LTI has insufficient resources to take on new business, LTI's reputation …could be irreparably damaged", there is no evidence to show either that those rumors exist, or that, if they do, LTI's reputation

has been damaged. Mere speculation is an insufficient basis to find a single act of misconduct justifying immediate dismissal.

There is no evidence that Mr. Nelson turned away business. What Mr. Nelson did was indicate to Weston that he could not respond to its RFP in the time it set for LTI to do so. When Weston indicated that the deadline was "flexible" Mr. Nelson responded positively.

I agree with Mr. Nelson that, had he attempted to put together a detailed 12 page proposal on very short notice would have been irresponsible and unprofessional. While there may have been more appropriate ways to respond to Weston's RFP, I am unable to conclude that the delegate erred in finding that Mr. Nelson's actions constituted misconduct.

I am unable to conclude that the delegate erred in finding that Mr. Nelson was terminated without cause. The appeal is denied.

**ORDER**

I Order, pursuant to Section of the Act, that the determination, dated December 3, 2002, be confirmed in the amount of $2,816.11, together with such interest as may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

**Carol L. Roberts**
**Adjudicator**
**Employment Standards Tribunal**