Employment Standards TRIBUNAL

An appeal

- by -

National Credit Counsellors of Canada Inc.
("National")

- 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: David B. Stevenson

FILE No.: 2003A/7

DATE OF DECISION: March 25, 2003

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by National Credit Counsellors of Canada Inc. ("National") of a Determination that was issued on December 6, 2002 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that National had contravened Part 8, Section 63 of the *Act* in respect of the employment of Janet Lowe ("Lowe") and ordered National to cease contravening and to comply with the *Act* and *Regulations* and to pay an amount of $2,628.71.

The appeal sets out the following reasons for the appeal:

> The arbitrator erred in law in establishing a standard of proof of conflict of interest so high as to be unprovable under any reasonable circumstance, to wit, requiring the proof be "beyond a reasonable doubt" as in a criminal trial rather than on the basis of the "balance of probabilities" as would be reasonable in a civil trial.
>
> Can NCCC prove beyond a reasonable doubt that Janet Lowe acted in a conflict of interest and provided information to our competitor and assisted them in their startup, while an employee of NCCC. No.
>
> Can NCCC prove on a balance of probabilities that Janet Lowe acted in a conflict of interest and provided information to our competitor and assisted them in their startup, while an employee of NCCC. Yes.
>
> Janet Lowe, as supervisor of File Managers, had access to and the benfit of confidential information, and used that information to her personal benefit and the benefit of her current employer, while at NCCC.
>
> The fact she attended the offices of our competitor repeatedly during business hours while on payroll of NCCC and answered the telephone, and in fact, had her voice used as the voice mail answer for the competitor.
>
> The fact she altered evidence in the form of the letter of reference from Ian Roy, implying it was a current letter during the Arbitration, when in fact it was a letter from over a year ago.

On the basis of the above, National submits the Director erred in law, failed to observe principles of natural justice and that evidence has come available that was not available at the time the Determination was made.

The appeal asks for an oral hearing. Generally, the Tribunal will not hold an oral hearing on an appeal unless the case involves a serious question of credibility on one or more key issues or it is clear on the face of the record that an oral hearing is the only way of ensuring each party can state its case fairly (see *D. Hall & Associates Ltd. v. British Columbia (Director of Employment Standards)* [2001] B.C.J. No. 1142 (B.C.S.C.). National requests an oral hearing on the basis that "some evidence given was incorrect by other side. Also we feel we were given no opportunity to view the other sides evidence prior to the hearing. One document was critical to our case". The appeal does not identify what evidence is perceived to be 'incorrect' not does it attach the 'critical document', explain its relevance to National's

case or indicate how the inability to review this document prior to the complaint hearing affected their ability to obtain a fair hearing on their side of the issue. From a review of the material on the record, it does not appear that there were more than two documents in that record that had relevance to the question of whether National had just cause to terminate Lowe.

The Tribunal has decided that an oral hearing is not required in this matter. The appeal can be properly addressed through written submissions.

ISSUE

The issue in this appeal is whether National has shown an error in the determination sufficient to justify the Tribunal exercising its authority under Section 115 of the *Act* to cancel it or send it back to the Director for further investigation.

FACTS

National is a credit counselling and debt management business. Lowe was employed by National from April 26, 1998 to August 15, 2002, when she was terminated without notice or compensation in lieu of notice. At the time of her termination, Lowe held the position of supervisor and was earning $2,500.00 a month.

National asserted that Lowe was terminated for conflict of interest arising from an allegation that she had been assisting in the set-up of administration for a competitor and, while a supervisor, representing employees with the Workers' Compensation Board (also said to be "a serious breach of company rules or practices"), for a negative attitude and for a general lack of trust in her "ability to act in the best interests of the company".

The Director held a complaint hearing on November 22, 2002. The Determination noted that Donald Wilson, a director and officer of National and its General Manger, gave evidence for National and Lowe gave evidence on her own behalf. Mr. Wilson conceded that but for the 'conflict of interest' issues, National would have paid Lowe compensation for length of service.

The Determination set out the following evidence provided by Howe:

> Lowe stated at no time did she have access to, or knowledge of, internal personnel files, or financial files, while working for National Credit Counsellors of Canada Inc.
>
> Lowe stated that she had become the contact person for the Workers Compensation Board because Dennis and Ian refused to do it, so she said she would. Being the Workers Compensation Board representative created conflict for her with management and she resigned her position on or around July 4, 2002.
>
> Lowe was terminated from National Credit Counsellors of Canada Inc. On August 15, 2002 and started working for Credit Counselling Society of British Columbia on October 24, 2002. She . . . had no internal fiduciary knowledge of National Credit Counsellors of Canada Inc. And never shared any information with Credit Counselling Society of British Columbia. Lowe testified she never worked for the two companies at the same time.

The Determination noted that National had the burden of showing there was just cause for Lowe's termination and set out the questions that need to be addressed in a conflict of interest case:

> Was Lowe working for a direct competitor of her current employer and, first, was she a fiduciary; and second, did she have access to confidential proprietary information?

The Director states that Lowe was never in the position of serving two competing masters and that National had not shown Lowe was employed in a fiduciary capacity. On the matter of whether she had access to confidential proprietary information, the Director made the following findings:

> The information, and this was not disputed by National at the hearing, Lowe had knowledge of was 'public'. Further, the competitor had prior knowledge of the information, as two of its principles were former employees of National. When it appeared there was a position of conflict with Lowe being a supervisor and representing other employees, Lowe resigned as the other employee representative without National indicating she should do so. Finally, the fact that Lowe visited her spouse at the premises of the competitor is not, of itself, evidence of a conflict of interest.

The Director concluded National had not established just cause and Lowe was found to be entitled to compensation for length of service under the *Act*.

ARGUMENT AND ANALYSIS

I shall first address the contention that the Director held national to a standard of proof that required "proof beyond a reasonable doubt". There is nothing in the Determination, arising either directly from comments made in the Determination or inferentially from the manner in which the burden on National was analysed and applied in the decision, that suggest the Director imposed the standard of proof beyond a reasonable doubt. The Director correctly noted that whether an employee is in a conflict of interest is a question of fact. The Tribunal has, in every case where a conflict of interest is in issue, reinforced the requirement for actual proof of a conflict of interest, unless the case is one in which conflict of interest may be inferred (this is not one of those cases). There is no doubt that providing actual proof of a conflict of interest can be a difficult undertaking, particularly when no conflict of interest exists. National also appears to have argued there was a potential conflict of interest which justified Lowe's termination. In *TMSI Telephone Maintenance Services Inc.*, BC EST #D510/98, the Tribunal responded to an argument that a potential conflict of interest justified summary dismissal by adopting the position taken by our Supreme Court:

> In *Marziali v. Mario's Gelati Ltd.*,__(1989)__14 ACWS__(3rd) 253, the B.C. Supreme Court rejected the notion that the existence of a potential conflict of interest establishes just cause for summary dismissal.

National appears to equate their difficulty in providing actual proof of conflict of interest and the rejection of their argument based on potential conflict of interest with the imposition of a higher standard of proof. As indicated above, I can find no support for their belief.

The balance of the appeal does no more than challenge findings of fact and conclusions drawn from findings of fact. The assertion that Lowe had access to confidential information and used that information for the benefit of a competitor while employed at National flies directly in the face of findings made in the Determination. The assertion that Lowe attended the offices of National's competitor during working

hours was an agreed fact, but was not accepted by the Director as providing actual proof of conflict of interest. Nothing in the appeal would justify the Tribunal intervening in either of those matters.

Finally, National says Lowe "altered evidence in the form of a letter of reference". In reply to the appeal, Lowe acknowledges removing the date from the reference letter, but said she had done so for purposes unrelated to the complaint, and providing a copy of the altered reference letter during the Director's mediation process.

Accepting Lowe altered the letter by deleting the date on it, I am not convinced the Determination has been affected in any way by that change. If the letter has any evidentiary value, it only goes to the validity of National's comments in the termination letter that Lowe had a 'negative attitude' and National had lost trust in her ability to act in the best interests of the company. Mr. Wilson had indicated during the complaint hearing that the performance issues were not serious enough to warrant any letter on her file and but for the conflict of interest Lowe would have been paid compensation for length of service. The implication of that evidence is a concession that the performance issues did not constitute just cause for dismissal. The letter of reference, or its alteration, was unrelated to the allegations of a conflict of interest, making it irrelevant to the just cause issue addressed in the Determination.

One last point. Although it does not appear to be vigorously pressed in this appeal, Lowe's involvement in representing employees with the Workers' Compensation Board cannot, by any stretch, be characterized as a 'conflict of interest' and could not in the circumstances be used to support summary dismissal.

The appeal is dismissed.

National has not established any error in the Determination justifying intervention by the Tribunal under Section 115 of the *Act*.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated December 6, 2002 be confirmed in the amount of $2,628.71, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal