Employment Standards TRIBUNAL

An appeal

- by -

IBM Canada Limited IBM Canada Limitee
("IBM")

- 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 (as amended)

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2005A/88

DATE OF DECISION: August 5, 2005

DECISION

SUBMISSIONS

L. Novakowski, Faskin Martineau	on behalf of IBM Canada Ltd.
Robert Krell	on behalf of the Director of Employment Standards
Donald Ollivier	on his own behalf

OVERVIEW

1. This is an appeal by IBM Canada Ltd. ("IBM"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued April 11, 2005.

2. Donald (Tony) Ollivier filed a complaint alleging that IBM failed to pay him compensation for length of service.

3. The Director's delegate held a hearing into Mr. Ollivier's complaint on March 15, 2005. Mr. Ollivier appeared on his own behalf, Ms. Novakowski appeared on behalf of IBM.

4. The delegate determined that IBM terminated Mr. Ollivier without just cause, and contravened Section 63 of the *Employment Standards Act* in failing to pay him compensation for length of service. The delegate also found that IBM had attempted to contract out of the *Act*, contrary to Section 4. He concluded that Mr. Ollivier was entitled to compensation and interest in the total amount of $5,593.16. The delegate imposed a $500 penalty on IBM for a contravention of the *Act*, pursuant to Section 29(1) of the *Employment Standards Regulations.*

5. IBM contends that the delegate erred in law in concluding that Mr. Ollivier was terminated without just cause. IBM did not seek an oral hearing, and I am satisfied that this matter can be decided based on the written submissions of the parties.

ISSUES

6. Did the delegate err in law

    1. in concluding that IBM did not have just cause to terminate Mr. Ollivier's employment, and

    2. in finding that IBM's policy on employees' obligation to give notice to IBM constituted an attempt to contract out of the *Act*, contrary to Section 4 of the *Act*?

THE FACTS AND ARGUMENT

7. The relevant facts and findings are as follows.

Background

8. Mr. Ollivier began working for Lotus Development Canada in June, 1994. IBM acquired Lotus in 1995.

9. Mr. Ollivier held a high level position with IBM as a "World Wide Enablement Manager" for Lotus Workplace Messaging software. His responsibilities included designing and directing marketing campaigns, collecting information on competitors' weaknesses, and ensuring sales efforts capitalized on the strength of the Lotus Workplace messaging software. Mr. Ollivier gained information on competitors' weaknesses from public sources, and his tasks included summarizing this information and instructing staff how to exploit those weaknesses to IBM's advantage. Mr. Ollivier's other duties included making presentations, technical talks and demonstrations, and educating IMB staff and business partners and certain customers.

10. Mr. Ollivier's main sales focus was on the IBM Lotus Notes workplace messaging product, the major product in competition with Microsoft (MS) Exchange. IBM was concerned that the purchase of MS Exchange by a customer would lead that customer to purchase related Microsoft software.

11. While all IBM employees had access to confidential or proprietary information, Mr. Ollivier had greater access to that information in that he knew details of software development before other sales staff.

12. Mr. Ollivier had no authority to sign contracts or set announcement dates for new versions of software.

13. In December, 2003, IBM advised Mr. Ollivier that his position with IBM would end on January 31, 2004. Although it turned out that Mr. Ollivier's position was not eliminated, IBM told him that funding for his position would be reviewed and approved annually. Mr. Ollivier began seeking alternative employment, and obtained a sales position with Microsoft. Mr. Ollivier's responsibilities at Microsoft are for Microsoft Office suite software. Mr. Ollivier does not have any responsibilities for MS Exchange in his new position, and his knowledge of Lotus Workplace Messaging software is not relevant to his current duties.

14. On June 4, 2004, Mr. Ollivier notified IBM that he had accepted a new position and that his last day of work would be June 18th. When he verbally advised his supervisor that he would be working for Microsoft, IBM immediately terminated his employment. IBM took the position that it terminated Mr. Ollivier's position for cause, that being conflict of interest, and that he was not entitled to severance pay.

15. Although not noted in the decision, IBM's June 14th letter to Mr. Ollivier said, in part, as follows: "Although you tendered your resignation effective June 18th, 2004, IBM will no longer require your services past June 4, 2004, due to the fact that you have accepted employment with a competitor of IBM."

16. IBM relied on a "Business Conduct Guidelines" policy which provided as follows:

> If you accept employment with a competitor you must leave IBM immediately, as IBM considers you to be in a conflict of interest position. Furthermore, you are obligated to advise your new employer of your ongoing duties and obligations to IBM, including confidentiality, and any applicable non-solicitation and non-competition obligations.

17. Mr. Ollivier was aware of this policy and his obligations under it.

18. IBM agreed that it had no evidence, and did not allege, that Mr. Ollivier breached his obligation of confidentiality, or acted in a disloyal manner to IBM. It submitted that Mr. Ollivier ought to have left IBM once he received Microsoft's offer, as he was in a conflict of interest situation once he accepted employment with it. Further, it submitted that its policies obliged Mr. Ollivier to leave IBM immediately upon accepting Microsoft's offer.

19. Mr. Ollivier contended that IBM's policy was contrary to Section 4 of the *Act*, and that he had no fiduciary duty to IBM.

Conflict of Interest

20. The delegate considered and applied a number of Tribunal decisions to determine whether IBM had just cause to terminate Mr. Ollivier's employment without notice or compensation.

21. The delegate considered the Tribunal's decision in *Air Products Canada Ltd.* (BC EST #D523/01) and concluded that Mr. Ollivier did not owe a fiduciary obligation to IBM. He found that all IBM staff had access to confidential and proprietary information, and although Mr. Ollivier had some information before other staff, his job was to disseminate it to sales staff. Once disseminated, the delegate found that Mr. Ollivier's level of knowledge was the same as those sales staff he had trained. The delegate also found Mr. Ollivier was not able to sign contracts on IBM's behalf, nor commit IBM to release software on any particular date. He found Mr. Ollivier to be a communicator, trainer and strategist, albeit at a high level. He found IBM had "presented no evidence that it was at Mr. Ollivier's mercy or would have suffered greatly from his departure".

22. The delegate also considered the Tribunal's decision in *TMSI Telephone Maintenance Services Inc.* (BC EST #D510/98) and concluded that Mr. Ollivier's access to proprietary and confidential information was not at a sufficiently high level for him to determine that immediate termination was justified:

> The employer admitted that all IBM employees have access to confidential and proprietary information and its termination policy applies to all staff. With respect to the complainant, it argued that his access was more significant than normal staff members. It is true that he knew information prior to other staff, however he was mandated to disseminate it to ensure IBM sales staff and partners were well informed. Therefore, his level of access was time limited; once he communicated the information, his knowledge of the confidential and proprietary information, with respect to a particular software version, became the same as those he trained. It follows then that once he left IBM and subsequent software was released, his level of access was the same as a front-line sales person.

23. The delegate concluded that IBM did not have just cause to terminate Mr. Ollivier's employment without compensation for length of service.

24. IBM says the delegate erred in relying solely on *TMSI* in arriving at his conclusion, arguing that it is no longer the leading authority on this issue. IBM contends that the Tribunal has refined the legal test since the decision was issued, and has recognized that there need not be actual conflict of interest to terminate an employee without compensation; that it is sufficient to show that employees who have left to go to work for a competitor have access to confidential proprietary information, or are in the position of a fiduciary. Counsel for IBM submits that the Tribunal's decisions in *Re Unisource Canada Inc.* (BC EST

#D172/97) *MacMillan Bloedel Ltd.* (BC EST #D214/99) and *Air Products Canada Ltd.* (BC EST #D523/01) establish that an employee who is a fiduciary cannot benefit from his agency. Counsel also refers to the Tribunal's decision in *Westburne Industrial Enterprises Ltd.* (BC EST #D037/02) as authority for IBM's position.

25. IBM contends that Mr. Ollivier had access to proprietary and confidential knowledge, was relied on to generate revenue through the sales force, expected to interpret information to convert it into a sales strategy, involved in product groups beyond Lotus Notes and had confidential proprietary information about those products long before other employees did, and had information about new products well in advance of it being communicated to the sales force.

26. While conceding that Mr. Ollivier had access to information for a relatively short period of time before it was disseminated to other employees, IBM says that does not diminish the fact that he had confidential proprietary information about products that had not been launched at the time he left his employment, and contends that he could utilize that information with his new employer, IBM's main competitor in this area. IBM argues that Mr. Ollivier's access to confidential information and proprietary information could be used to its vulnerability, creating the conflict of interest.

27. Mr. Ollivier contends that the cases support the delegate's decision, and that IBM has not established an error of law. He submits that, as was the case with the employee in *Air Products*, he was never acting in direct competition with IBM, and there is no evidence he breached any of his employment obligations to IBM. Further, he submits that there was no evidence he was a fiduciary or that he was in an actual conflict of interest situation.

Section 4

28. The delegate also agreed that IBM's Business Conduct policy was an attempt to contract out of the *Act* contrary to Section 4 on the basis that the policy did not consider the circumstances of the employee in question. He found that such a policy could not "disenfranchise" Mr. Ollivier from compensation for length of service.

29. IMB also contends that the delegate erred in law in arriving at this conclusion. It says the delegate mischaracterized this provision as a "termination" provision. IBM says that the policy does not in any way refer to the fact that employment will be terminated; rather, it says that this is a Business Conduct Guideline which provides that an employee is not required to give notice to the employer upon leaving IBM to work for a competitor. IBM says the *Act* does not require an employee to give any notice to an employer upon resignation, this policy does not constitute contracting out of the minimum standards of the *Act*.

30. Mr. Ollivier submits that IBM relies on its policy in order to avoid its obligation under Section 63 of the *Act*, which he says is an attempt to contract out of the *Act*. He says the policy does not provide that he will not receive severance pay owed to him; rather, he says that it simply requires him to leave upon acceptance of employment with a competitor. He says that if the policy requires him to cease reporting to work, it does not excuse IBM from paying him severance.

31. Finally, the delegate found that, as an employee with ten years service, Mr. Ollivier was normally entitled to 8 weeks compensation under Section 63 of the *Act.* However, he determined that, since Mr. Ollivier

gave IBM notice on June 4th that he was leaving June 18th, he was entitled to ten working days, or two weeks compensation.

32. The Director provided the record that was before the delegate at the hearing, and submits that the Determination is self-explanatory.

ANALYSIS AND DECISION

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

a) the director erred in law

34. The burden is on an appellant to show that the Determination ought to be varied or cancelled.

Conflict of Interest

35. 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.

36. An employer bears the burden of establishing just cause for dismissal. Where an employee has been dismissed summarily, the burden is on the employer to show that the employee has fundamentally breached, or repudiated, the employment relationship. (see *Re Grouse Mountain Resorts Ltd.* (BC EST #D143/96). A conflict of interest constitutes a fundamental breach of an employment relationship. Whether a conflict of interest exists is a question of fact in each case. (*Air Care Products*)

37. The delegate made the following findings of fact which cannot be overturned on appeal since they are amply supported by the evidence:

- Mr. Ollivier functioned between the software developers and IBM staff on Lotus Workplace messaging software and was responsible for designing and directing marketing campaigns, collecting information on competitors' weaknesses and ensuring sales efforts capitalized on the strengths of the Lotus software product.

- Mr. Ollivier's other duties were making presentations, technical talks, demonstrations, education of IMB staff and business partners and some customers

- Mr. Ollivier had information about software development before other sales staff, but that information was time limited, and not exclusive to Mr. Ollivier

- Mr. Ollivier had no authority to sign contracts or set announcement dates for new versions of software

- Mr. Ollivier's sales position was contingent on funding on an annual basis.

38. The Tribunal has considered the issue of dismissal for just cause on the basis of a conflict of interest in a number of cases, including *TMSI, MacMillan Bloedel, Unisource, Air Care Products,* and *Westburne*

Industrial Enterprises Ltd. operating as Nedco BC EST #RD235/02 (a reconsideration of BC EST #D037/02).

39. In *TMSI* the Tribunal set out the following test for determining a conflict of interest sufficient to justify termination without notice:

1. Where an employee announces his or her intention to resign and take up an employment opportunity with a competitor, the mere possibility of conflict is not, of itself, grounds to dismiss the employee summarily;

2. there must be some evidence of actual breach of confidence or an intent to breach confidence by the employee;

3. It is not a breach of confidence for an employee to use the knowledge and skills he or she learned in the course of employment or the benefit of a competitor;

4. It is not a breach of confidence to gain access to a former employer's customers through the memory of the employee and other publicly available reference sources; and

5. If an employer wishes to dismiss an employer on the suspicion that he or she will breach confidence but has no evidence to that effect, it must pay compensation for length of service under Section 63 of the *Act*.

40. In *Unisource*, the Tribunal held that mere acceptance of an offer of employment with a competitor does not, of itself, create a conflict of interest. However, the Tribunal determined that an employer is entitled to terminate an employee who enters into an employment contract with a competitor firm without notice or payment of compensation for length of service, if that employee is in a fiduciary capacity with the employer.

41. In *McMillan Bloedel*, a sales representative who had authority to make pricing decisions, access to proprietary and confidential marketing information including costs, inventory, profit margins and customer rebate policies, took up employment with a competing firm in a position that was very similar to that which he held at MacMillan Bloedel, selling similar products to the same customer base. The Tribunal found that the employee was in a conflict of interest as he would have been serving two competing masters and the employer was entitled to terminate his employment for just cause.

42. In *Air Care Products*, an employee went to work for a direct competitor. As a sales representative, the employee had access to and knowledge of confidential and proprietary sales information including customer files, pricing, product lines and marketing strategies. There was no evidence the employee had used or misused confidential information.

43. The Tribunal reviewed a number of cases, including *Frame v. Smith* ([1987] 2 S.C.R. 99, S.C.C.), *Canada Aero Services Ltd.* ([1974] S.C.R. 592), *Crain- Drummond Inc. v. Hamel* ([1991] O.J. No. 75) and *Gary Rupert v. The Board of School Trustees of School District No 61 (Greater Victoria)*, [2001] B.C.J. No. 1130). The Tribunal determined that a fiduciary obligation will be found where:

(1) The fiduciary has scope for the exercise of some discretion or powers

(2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests, and

(3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or powers.

44. In *Crain-Drummond*, the court held that, while a fiduciary relationship may be found where not all of these factors exist, and while the presence of all these factors will not always identify the existence of a fiduciary relationship, the underlying factor that must be present in a relationship of a fiduciary is:

> a position of disadvantage or vulnerability on the part of one of the parties which causes him to place reliance upon the other and requires the protection of equity acting upon the conscience of that other. (quoting from *Lac Minerals Ltd. v. International Corona Resources Ltd.* [1989] 2 S.C.R. 574)

45. In *Gary Rupert*, the Court found that an employee could be a fiduciary even if the employee did not hold a directorial or senior management position if the employee is a key individual or holds a unique position with an employer.

46. The Tribunal found that the employee had no scope for the exercise of discretion or power and did not set prices or develop market strategies. Although the employer argued that the employee participated in formulating and developed strategies aimed at increasing the customer base, the Tribunal determined that such activity could not have the effect of raising the employee to a fiduciary position:

> 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. … 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 [the employee] in order that he could do his job, and whether [the employee] had been given specific instructions that this information, or parts of it, was to be treated as privileged and confidential or proprietary information…

47. The Tribunal concluded that, absent any evidence of conflict, an employee not employed in a fiduciary capacity is not in a conflict of interest by merely working for a competitor.

48. The principles that have emerged from this line of decisions may be summarized as follows:

- There is no general proposition that an employee who enters into an employment contract with a competitor provides just cause for dismissal.

- In order to justify dismissal without notice for conflict of interest, an employer must establish that the employee either:

  a) is a fiduciary and has entered into an employment contract with a competitor firm;

> b) is a key employee with an implied duty of fidelity and faithfulness because of their status and has created a reasonable risk of harm to the employer by working for a competitor in a similar position in the same marketplace, or
>
> c) is a "mere" employee and an actual conflict of interest has been established.

49. Mr. Ollivier's primary duties involved developing a competitive sales campaign for one particular software product: IBM Lotus Notes Workplace messaging product. He would have had some "insider" knowledge of that product in order to develop the sales campaign. However, he did not design or develop the software. He had some advance knowledge of the release date of the particular software product he was responsible for selling, but he did not set those dates, nor did he have any responsibility for setting prices of the product. He possessed no secret information, although the information he had could have been considered time sensitive. He did not control or manage customer accounts. Mr. Ollivier was not a director or senior manager, and had no scope for the exercise of discretion or powers.

50. Mr. Ollivier was a sales agent. Although his position was considered a high level position, it was not a managerial one. There was no evidence Mr. Ollivier had any authority to sign contracts. Further, IBM did not consider the position sufficiently important to guarantee Mr. Ollivier that the position would continue other than on a year to year basis.

51. I find the delegate did not err in finding that Mr. Ollivier was not in a fiduciary relationship with IMB. However, he did hold a high level and important position with IBM, and as such, owed it a duty of loyalty and fidelity.

52. IBM says that Mr. Ollivier's knowledge of ongoing products in development could be used with his new employer to gain an unfair advantage. Although Mr. Ollivier might have been aware of products "in the pipeline" at the time he left IBM, he was bound by a confidentiality clause which, to all accounts, he was honouring. There was no evidence, or even allegation, that Mr. Ollivier had breached any confidences, absconded with any confidential documents or other proprietary information, or had in any way been disloyal. There is a presumption therefore, that Mr Ollivier acted at all times in good faith and adhered to the confidentiality terms of his employment agreement. As noted in *Air Products*:

> There is no doubt that [the employee], having accepted employment with a competing firm which was not to commence until after completion of the notice period, was obliged not to do anything incompatible with his duty of fidelity and honesty. If he failed to fulfil that obligation, then summary dismissal would be justified. In this case, [the employee] was never in direct competition with Air Products during his employment and there is no indication he had breached any of his employment obligations to Air Products.

53. Although Mr. Ollivier went to work for a competing company, the fact is that the position he held with IBM was not in competition with the position he holds with Microsoft. There is no evidence that Mr. Ollivier is, in his current position, creating any competitive threat or risk to IBM. Therefore, I find the delegate did not err in concluding that Mr. Ollivier's employment was terminated without just cause, and that he was entitled to compensation for length of service.

Section 4

54. Section 4 provides as follows:

> The requirements of this Act and the regulations are minimum requirements, and an agreement to waive any of those requirements, not being an agreement referred to in section 3(2) or (4), has no effect.

55. I am not persuaded that the policy constitutes an agreement under Section 4, or has any contractual force. It was a unilateral term imposed on Mr. Ollivier by IBM.

56. IBM's policy "deems" a conflict of interest simply upon an employee accepting employment with a competitor. As the Tribunal has noted, conflict of interest cannot be presumed or assumed simply by an employee accepting employment with a competitor, it must be determined on a case by case basis.

57. An employer has an absolute right to terminate an employee's employment in any circumstances. A policy confirming that right does not constitute an agreement to waive the requirements of the *Act*.

58. However, IBM may not rely on the policy to relieve itself of the obligation to pay compensation for length of service. The policy does not say that an employee accepting employment with a competitor provides IBM with just cause for dismissal, although that is certainly implied. Further, it does not say that an employee will not receive compensation for length of service upon accepting employment with a competitor. Such an agreement would, in the absence of any evidence of just cause, contravene Section 63 of the *Act.* As the policy does not expressly provide that, by virtue of going to work for a competitor, Mr. Ollivier is not entitled to compensation for length of service, I find that the delegate erred in concluding that the policy was an attempt to contract out of the *Act.*

59. However, IBM may not rely on the policy to deny compensation to Mr. Ollivier.

ORDER

60. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated April 11, 2005, be confirmed in the amount of $6,093.16, plus whatever interest might have accrued since the date of issuance

Carol L. Roberts
Member
Employment Standards Tribunal