

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act* S.B.C. 1995, C. 38

- by -

Bernard Helfrich  
("Helfrich")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Geoffrey Crampton

**FILE NO.:** 96/283

**DATE OF DECISION:** May 4, 2001

**DECISION**

**SUBMISSIONS BY:**

Karen Baylis-Smith	on behalf of	Bernard Helfrich
Gordon Leffler	on behalf of	Baynes Lake Enterprises Ltd. Operating J.G. Glass
Karen Madsen	on behalf of	Director of Employment Standards

**OVERVIEW**

This is an appeal by Bernard Helfrich (“Helfrich”), pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against Determination CDET# 001843 which was issued on April 2, 1996 by a delegate of the Director of Employment Standards. Helfrich disputes that he operated a business in competition with his former employer and argues that he was dismissed without just cause. Helfrich’s employer was Baynes Lake Enterprises Ltd. operating J.G. Glass (“J.G. Glass”).

I have written this decision following my review and consideration of the parties’ written submissions and the information provided to the Tribunal by the Director’s delegate.

**ISSUE TO BE DECIDED**

The issue to be decided in this appeal is whether J.G. Glass had “just cause” to terminate Helfrich’s employment.

**FACTS**

The Reason Schedule attached to the Determination set out the following facts:

- On April 26, 1995 Mr. Helfrich opened a glass shop in Baynes Lake, a community approximately 50km from Fernie. At the same time he was employed at the employer’s glass shop in Fernie.
- Ms. Jean Grey, employer, advised that she was aware Mr. Helfrich was thinking of starting his own business and was actually working towards starting his own business.

- The employer heard rumors within the community that Mr. Helfrich had started his own business. The employer obtained confirmation that Mr. Helfrich had an ICBC vendor number during the first or second week of July, 1995. At this point the decision was made to terminate Mr. Helfrich for conflict of interest since he operated a competing business. Mr. Helfrich was allowed to finish out the week and his last day was July 13, 1995.

Helfrich was employed by J.G. Glass from February, 1987 to July, 1995 as a glass installer. He did not work, due to health reasons, during June and July, 1994 and from September, 1994 to January, 1995. J.G. Glass employed another glass installer as a replacement for Helfrich during his two absences and retained him after Helfrich returned in January, 1995.

Helfrich's counsel submits that between January, 1995 and July, 1995 Helfrich "...completed eight windshields on a part-time, after work basis at his home, 50km from his (place of) employment. None of these customers were previous or current customers of J.G. Glass nor did Helfrich advise anyone that J.G. Glass was going out of business".

An undated letter from J.G. Glass (received by the Director's delegate on September 1, 1995), sets out the reasons for terminating Helfrich's employment. The relevant paragraph of that letter states:

*It came to our attention that Mr. Helfrich had obtained a vendor number from ICBC for windshield repair work and was in fact intending to go into business in competition with our Company. Once we learned this, which Mr. Helfrich did not deny, it was unacceptable to us to have him continue his employment with us, especially in view of the other problems mentioned above. We could not have him dealing with our customers and around the office of our small enterprise when he was intending to be, or already was, in business as a competitor.*

## ANALYSIS

Section 63 of the *Act* creates a liability for employers to pay to an employee compensation for length of service after three consecutive months of employment. Under Section 63(3), the liability is deemed to be discharged if the employee is given written notice of termination, terminates their employment or is dismissed for just cause.

The Director's delegate determined that:

*Mr. Helfrich operated a business in competition with his employer and was terminated for just cause. There was no evidence presented that the employer was aware he was operating the business for weeks or months before he was actually fired.*

J.G. Glass (the employer) bears the onus to establish, on the balance of probabilities, that just cause existed to dismiss Helfrich.

Helfrich's counsel argues that J.G. Glass terminated Helfrich's employment because "...they were more satisfied with the replacement employee's job performance than Helfrich's."

Helfrich's counsel also argues that J.G. Glass condoned Helfrich's plans to start his own business by not informing him of its dissatisfaction with his plans.

It is well established in the common law that employees owe a duty of fidelity to their employer. That general duty imposes a number of specific duties on employees, including a duty to avoid conflicts between their employer's interests and their own interests. The current state of the law is that, generally, it is permissible for an employee to plan and prepare for establishing his own business without creating a conflict between his interest and that of his employer.

In **Marziali v. Mario's Gelati Ltd.** [(1987) 3 ACWS (3d) 103 (BCSC), Vancouver Registry No. C852945], Mr. Justice Spencer cited the following reasoning by then Chief Justice Sloan in **Empey v. Coastal Towing Co. Ltd.** [(1977) 1 WWR 673]:

It is not against the law for an employee to start up a competing business of his own and, while still with his former employer, to work towards that end in his spare time. He is at liberty to carry away and use the general skill and knowledge of the trade which he has learned with his employer. The law favours such fair competition.

In this appeal, the Director's delegate determined that Helfrich's employment was terminated for just cause. She made that determination because "...Helfrich operated a business in competition with his employer." In doing so, she quite properly drew a distinction between Helfrich actually operating a business in competition with J.G. Glass and planning towards that end while still employed by J.G. Glass between January, 1995 and July, 1995.

Once Helfrich established himself in the windshield replacement business, as evidenced by him obtaining a vendor number from ICBC, it seems to me that he breached the fundamental duty to his employer to avoid a conflict between his employer's interests and his own interests. It also seems to me that J. G. Glass could not be said to have condoned Helfrich's actions. Grey's letter states that once J.G. Glass learned that Helfrich obtained

an ICBC vendor number, "...it was unacceptable to have him continue his employment with us..."

For all of the reasons set out above I conclude that there was just cause for J.G. Glass to terminate Helfrich's employment.

**ORDER**

I order, pursuant to Section 115 of the *Act*, that the Determination be confirmed.

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**Geoffrey Crampton**  
**Chair**  
**Employment Standards Tribunal**

GC:sf