Employment Standards TRIBUNAL

An appeal

- by -

Rialta Management Investments Limited o/a Richard S. Ego & Co.

- 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: John M. Orr

FILE No.: 2000/819

DATE OF DECISION: March 27, 2001

DECISION

OVERVIEW

This is an appeal by Rialta Management Investments Limited operating as Richard S. Ego & Co. ("Ego") pursuant to Section 112 of the Employment Standards Act (the *"Act"*) from a Determination (File No.097-843) dated November 9, 2000 by the Director of Employment Standards (the "Director").

Lori McLauchlan ("McLauchlan") worked for Ego from October 3, 1998 to September 22, 1999 as a hair stylist on a commission basis at a hairdressing salon owned and operated by Ego. In September 1999 McLauchlan made arrangements to go to work at a competitor of Ego's salon and on or about September 22 1999 McLauchlan gave Ego one week's notice of termination. Upon learning of the situation Ego summarily terminated the employment without notice and without compensation.

McLauchlan complained that she was dismissed without just cause. Ego alleged that there was a conflict of interest, which arose as soon as McLauchlan decided to work for a competing business. The Director investigated and found that there was no actual conflict of interest substantiated and that therefore there was not just cause for dismissal. The Director found that McLauchlan was entitled to compensation pursuant to section 63 of the A*ct.*

Ego appeals this decision on the grounds that the Director was wrong in law in finding that it was necessary for the employer to establish that the employee has actually acted on the conflict of interest. Ego submits that once the employee announced her intention to move her business to a competitor she stood in a conflict of interest situation that entitled the employer to dismiss summarily.

ISSUE TO BE DECIDED

The issue to be decided on this appeal is whether the Director made an error in law in finding that for just cause for dismissal to be established the employer had to establish that the employee had actually acted in conflict of interest

ANALYSIS

The employer's liability to pay compensation for length of service pursuant to section 63 of the A*ct* is deemed to be discharged if the employee terminates the employment, retires from employment, or is dismissed for just cause. In this case the employee initially gave notice of the intention to terminate the employment but she had not acted upon the intention prior to being dismissed. It seems clear on the facts that McLauchlan was dismissed summarily, without notice, and without compensation. The only question arises is whether not the employer met the onus of establishing that there was "just cause" for the dismissal.

In the letter of dismissal the employer noted two grounds as follows:

> a) Immediately upon your termination, when you told me you would go and rent a chair, I was no longer dealing with you as an employee, but had to consider you a competing business entity, whose interests would fully conflict with mine. According to the labour standards act (sic) you placed yourself into a direct conflict of interest with my company, which warranted an immediate termination, for just cause.
>
> b) Your consistent refusal to follow my directives to complete client records, plus your maintenance of your private file system, as well as your constant backroom undermining of my business grievously undermined my companys (sic) culture, causing much staff dissension, and hence management problems.

In the determination the Director's delegate addressed these two issues. In regard to the failure to complete client records accurately the delegate found that this did not create just cause for dismissal, as there had been no prior warnings or discipline and that it was "reluctantly tolerated". In regard to the conflict of interest allegation the delegate found that:

> "… the above statement does not correctly state the law regarding conflict of interest. The mere statement of intention to leave a company and participate in a competing business does not in itself create a conflict of interest for employees."

The delegate found that there was no substantial evidence to establish that McLauchlan had actually taken steps to entice clients away from Ego's business and consequently he found that the allegations of conflict of interest had not been substantiated.

In the appeal Ego points out that the issue of record keeping was never a central reason for the dismissal. It was not a very big issue provided that McLauchlan was continuing to work at the salon. The keeping of the client lists privately instead of in the salon's database was contrary to the salon's policy and was inappropriate, but in and of itself was not the reason for dismissal. However, as soon as McLauchlan decided to work in direct competition to her employer, her failure to have maintained the client files properly was an aggravating factor.

Ego also points out that the Director's delegate may not have understood that the term "Rent a Chair" has a special meaning in the hairdressing business. It essentially means that McLauchlan would be setting up a competing business of her own just using rented space in another business. It is very different from an employee simply going to work for another company.

The Tribunal has held that merely applying for employment with a competitor of one's current employer does not necessarily create a conflict of interest. However, the situation is different where the employee is in possession of proprietary information.

> "The employee does not breach the duty of fidelity to the employer by using knowledge which is not confidential but if the employee has deliberately collected or memorized information for the purpose of taking it to a competitor the

> employee will have breached the duty of fidelity and may be dismissed summarily.
>
> … an employee planning to resign would be in a conflict of interest where there is evidence of an intention to use that information."
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> *Re: TMSI Telephone Maintenance Services Inc.,* BCEST #D510/98.

Just cause for dismissal may arise as soon as the employer has knowledge that the employee, who is in possession of proprietary information, intends to go to work for a direct competitor. The Tribunal has held that the employer need not show that the employee has, in some fashion, exploited the conflict of interest to his or her own, or to the advantage of some third party. Once the employee puts herself in a situation where she "stands in a conflict of interest relationship" that is of itself just cause for termination: *Re: Unisource Canada Inc.,* BCEST #D172/97.

In this case McLauchlan intended to set up her own business, located at a competing salon, in direct competition with Ego. She was in possession of proprietary information and there was clear evidence that she intended to use that information to her own personal benefit. While she claims that some of this information was her own property it is clear that at least a considerable portion of the information was the property of Ego's salon. It may be in fact, that when she joined Ego's business that all of the client information became the property of her employer. However, I do not have to decide this point as it is clear that at least substantial portion of the client information belonged to the employer.

I conclude that as soon as McLauchlan formed the intention to "Rent a Chair" at a competing business she stood in a conflict of interest relationship to her employer and was subject to summary dismissal. As a result I find that the determination should be cancelled.

ORDER

I order, under Section 115 of the *Act*, that the determination is cancelled.

JOHN M. ORR

John M. Orr
Adjudicator
Employment Standards Tribunal