Employment Standards TRIBUNAL

An appeal

- by -

OD International, Inc. operating as Office Depot
("Office Depot")

- 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

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2004A/112

DATE OF DECISION: August 31, 2004

DECISION

SUBMISSIONS

A. Paul Devine, Barrister & Solicitor	On behalf of Office Depot
Lynne Egan	On behalf of the Director of Employment Standards
Michel Menkes, Barrister & Solicitor	On behalf of Rejean J. Talbot

OVERVIEW

This is an appeal by OD International Ltd. operating as Office Depot ("Office Depot") of a Determination of a delegate of the Director of Employment Standards issued May 19, 2004.

Rejean J. Talbot complained to the Director that Office Depot had contravened the *Employment Standards Act* ("the *Act*") by failing to pay him compensation for length of service. The delegate held a hearing into Mr. Talbot's complaint on March 29, 2004. Office Depot contended that Mr. Talbot's employment had been terminated for just cause. In a decision issued May 19, 2004, the delegate concluded that Mr. Talbot's employment had not been terminated for just cause, and ordered that Office Depot pay Mr. Talbot seven week's compensation for length of service, vacation pay and interest in the total amount of $3,475.81.

Office Depot argues that the delegate erred in law, and seeks to have the Determination cancelled.

ISSUE

Did the delegate err in concluding that Office Depot failed to discharge the burden of establishing that Mr. Talbot was terminated for just cause?

FACTS

Neither party disputes the delegate's findings of fact. The facts, as set out by the delegate and contained in the record, are as follows.

Mr. Talbot worked for Office Depot from March 11, 1996 until April 8, 2003. During his last year of employment, he worked as an inside salesperson.

On March 21, 2003, Martin Hanslo, Office Depot's Assistant Manager, conducted a performance review with Mr. Talbot. The performance appraisal document identified five categories of assessment, with five rating standards for each. Mr. Talbot's appraisal indicated that he met the standard for each category of assessment, as well as for overall performance.

Mr. Talbot's document contained both positive and negative statements, one of which, in the 'customer service' category, contained the following comment:

> … There are certain time (sic) when Reg must kindly refuse services like computer and hardware repair. As he is a representative of Office Depot, he is holding the company responsible for any mistakes he performs. These services and suggestive services must be directed to management for appropriate references…

Office Depot submitted that this comment was included a result of Office Depot's concerns Mr. Talbot was soliciting personal work from Office Depot's customers while working as Office Depot's salesperson. Mr. Hanslo's evidence was that he had previous discussions with Mr. Talbot about conflict of interest by soliciting customers outside of Office Depot while on the job, and that he clearly explained this to him during the performance review.

Although Mr. Talbot signed the performance appraisal document, he testified that he did not hear Mr. Hanslo tell him that he was not permitted to repair computers.

The signature space contains a notation as follows:

> My signature indicates that this performance appraisal has been discussed with me, not that I agree or disagree. I have been given the opportunity to write comments above (Employee is entitle to a copy of this appraisal when signed.)

The evidence of the store manager, Victor Vilas, was that, in December 2002, he had warned Mr. Talbot about soliciting business for himself while working at the store and that Mr. Talbot understood that he could not take money from customers for outside work. Mr. Vilas' evidence was that he warned Mr. Talbot that soliciting business for personal gain could lead to the termination of his employment because it violated Office Depot's conflict of interest policy.

The delegate determined that, since Mr. Talbot was not provided with a copy of the performance appraisal, he did not know that he was not permitted to repair computers outside of work hours. She made no finding as to whether Mr. Talbot had been warned about conflict of interest apart from the performance review process.

Office Depot published a manual containing a code of ethics which prohibited employees from engaging in activities or other employment that could present a conflict of interest. Although the employer's evidence was that the manual was available in the staff lounge, Mr. Talbot denied that he ever read it. The delegate concluded that there was no evidence Mr. Talbot had read the manual or that he had any understanding of Office Depot's written code of ethics.

Office Depot's evidence was that a copy of its code of ethical behaviour, which included a statement that the interests of Office Depot and that of an employee must not be in conflict "in fact or even appearance", had been posted on the employee bulletin board since 2002. Mr. Talbot testified that he had not read the document.

On March 21, 2003, the day the performance appraisal was conducted, a customer came to the store to purchase a laptop computer and anti-virus software, and discussed her computer problems with Mr. Talbot. Mr. Talbot and the customer agreed that Mr. Talbot would go to the customer's home and update her computer for a fee. Mr. Talbot went to the customer's home, installed the anti-virus program, and upgraded her software. The upgrade was a Microsoft XP package that was available for sale at Office

Depot. Although the customer paid Mr. Talbot $400.00 for his services, the customer was dissatisfied with the work. After unsuccessfully attempting to resolve the matter with Mr. Talbot directly, the customer complained to the employer. After investigating the customer's complaint, Office Depot refunded the $400.00 she paid to Mr. Talbot for his work. The customer later returned the laptop, and Office Depot refunded her money for this purchase as well.

Office Depot later dismissed Mr. Talbot on the grounds that his actions constituted a breach of company policy and conflict of interest. Mr. Talbot asserted that his actions did not constitute a conflict of interest because Office Depot did not provide computer technical support to its customers.

Office Depot also contended that Mr. Talbot had competed with his employer because he installed his own program on the customer's computer rather than selling the customer a new program, resulting in a financial loss to Office Depot.

The delegate considered the Tribunal's decision in *Adam Ellison* (BC EST #D463/02, Reconsidered: BC EST #RD122/03), and determined that, on the evidence, Mr. Talbot had not been provided with any training that would assist him in meeting the employer's expectations of job performance.

The delegate also considered that Mr. Talbot's actions in providing customer assistance directly did not cause irreparable damage to Office Depot such that his continued employment was impossible.

The delegate was not satisfied that Mr. Talbot had read or understood the employee manual and company policies, and noted that, even if he had, neither the manual or the policy specifically prohibited Mr. Talbot from accepting work not provided by Office Depot. She noted that they merely prohibited employees from competing with Office Depot. She accepted that Mr. Talbot was of the view that he was assisting a customer, not competing with his employer, and determined that Mr. Talbot may not have understood that he was denying Office Depot a sale by installing his own program on the customer's computer.

The delegate concluded that there was no evidence Mr. Talbot was aware his job was in jeopardy, or that he would lose his job if he provided technical support to a customer, and determined that Office Depot had failed to discharge the burden of substantiating that Mr. Talbot was dismissed for just cause.

ARGUMENT

Office Depot's counsel contends that competing against one's employer constitutes just cause for termination, and that the matter of degree is not relevant. He argues that Mr. Talbot's actions constituted competition, and gave rise to grounds for dismissal for cause. Office Depot's counsel submits that Mr. Talbot solicited the customer for his competing business while engaged in employment for Office Depot. Counsel cites the Tribunal's decision in *Liana Gray et al.* (BC EST #D151/96) and *Unisource Canada Inc.* (BC EST #D172/97) in support of his contention that an employee engaged in establishing a competing business while employed by the employer may be dismissed for just cause. He contends that Mr. Talbot, as an inside sales representative for Office Depot, should have been aware that he was denying Office Depot a sale by installing his own software on the customer's computer, even if the delegate concluded he may not have understood that.

Office Depot further contends that, even if the incident that led to Mr. Talbot's dismissal was not a "first time" offence, which he submits that the evidence suggests was not, no prior warning prior to his dismissal was necessary when the incident was competing with one's employer.

Office Depot's counsel also argues that the delegate erred in concluding that, even though Mr. Talbot had signed the performance evaluation, he did not know he was not to engage in outside computer repair business. He submits that the delegate should have presumed that Mr. Talbot had the opportunity to read and understand the contents of the performance evaluation, including the comments about not doing outside work, and that his denial that he did not hear his manager warn him is insufficient to rebut that presumption.

As a result, therefore, counsel contends that Mr. Talbot's subsequent activity was in direct defiance of his employer's direction not to engage in this type of activity, and constituted grounds for dismissal for cause (*Grouse Mountain Resorts Ltd.*, BC EST #D143/96).

Counsel for Mr. Talbot submits that Office Depot is, in essence, seeking a reconsideration of the facts, and refers to the Tribunal's cases on the exercise of its reconsideration power. As this appeal is of the Determination rather than a reconsideration of a Tribunal decision, those cases are of no relevance to this appeal and no further references will be made to them.

Counsel for Mr. Talbot also submits that the evidence at the hearing was that Office Depot did not provide technical support to customers, and therefore, Mr. Talbot did not compete with his employer. Further, counsel submits, Office Depot confirmed at the hearing that technical support was referred to third party providers. He contends that the evidence, as found by the delegate, does not support a conclusion that Mr. Talbot was competing against his employer, and that competition, by itself, does not justify dismissal for cause. He submits that, based on the Tribunal's decision in *Air Products Canada Ltd.* (BC EST #D523/01), the issue of competing with one's employer must be associated with a finding of a fiduciary relationship or the use of or access to the employer' confidential information.

Finally, counsel submits that the customer was free to purchase anti-virus software from any rival retail outlet, and Mr. Talbot's actions did not deprive Office Depot of a sale.

ANALYSIS

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.

The objective of any analysis of dismissal for just cause under the *Act* is to decide whether the conduct of the employee has undermined the employment relationship, effectively depriving the employer of its part of the bargain (see *Adam Ellison, supra*). In that case, the Tribunal adopted the following statement of law:

> … In order to constitute just cause for dismissal, the acts of the employee must constitute a repudiation of the employment relationship which the employer may accept by terminating the contract. (Sproat, John R. *Employment Law Manual: Wrongful Dismissal, Human Rights and Employment Standards*, 1990 (Carswell)

The Tribunal determined that this test applied whether the employee's actions were considered to be misconduct or unsatisfactory conduct, or any combination of the two:

> The above statement does not distinguish between misconduct, on the one hand, and an inability to meet the requirements of the job on the other, when deciding if the acts of the employee amount to a repudiation of the employment relationship.

The Tribunal stated that, in each case, the circumstances of the alleged conduct, its level of seriousness, and the extent to which it impacted upon the employment relationship must be analyzed to determine whether dismissal is warranted.

The Tribunal has accepted that, in exceptional circumstances, a single act of minor misconduct by an employee may be sufficiently serious to justify summary dismissal without the requirement of a warning. (*Adam Ellison, supra*)

In cases where misconduct is alleged, the Tribunal will be guided by the common law on the question of whether the facts justify a dismissal in 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, insubordination and conflict of interest. (see *Kruger, Re: Glenwood Label and Box Manufacturing*, BC EST # D079/97, *Liana Gray et. al., supra*).

Employees owe a duty of fidelity and good faith to their employer. In *Air Products Canada Ltd.* (BC EST #D523/01), the Tribunal stated:

> It has long been accepted that there is a fundamental term implied in every contract of employment that an employee is expected to serve his employer honestly and faithfully during the term of his employment. This duty of fidelity and good faith permeates the entire relationship between employer and employee. This duty includes an obligation upon the employee to act in the best interests of his employer at all times. The employee shall not follow a course of action that harms or places at risk the interests of the employer.

The Tribunal added:

> The duty to serve honestly and faithfully includes an obligation on the employee to avoid any conflict of interest with his employer. The presence of a conflict of interest will almost invariably justify an employee's dismissal.

The Tribunal cited with approval the decision of the British Columbia Supreme Court in *Crowley v. Trans Power Construction Ltd.,* [1996] B.C.J. No 3111, where the court held that result of a breach of the implied term of an employment contract that an employee would perform his duty duly and faithfully gives rise to an employer's right to dismiss an employee without notice and for cause. The Tribunal concluded that the existence of a conflict of interest signifies a breach of perhaps the most fundamental employment obligation – the duty to act honestly and faithfully during the term of employment, and gives rise to dismissal for cause.

At common law, competition with one's employer constitutes just cause for termination. *King v. Harris & Hiscock Ltd.* (1980) 30 Nfld. & P.E.I. Rep. 118 (Nfld. S.C.) 118, at 137:

> Competing with one's employer's interest is a just ground for dismissal. It is not a matter of degree. It makes no difference whether one competes just a bit or quite a lot. It does not even matter that the employer may not suffer from the competition or that the competition never comes to fruition.

At issue is whether, on the facts, Mr. Talbot's actions amounted to either competition with his employer or insubordination or both, and secondly, whether such activity constitutes an act of misconduct giving rise to justify summary dismissal without warning.

Did Mr. Talbot's actions amount to competition with Office Depot?

The undisputed evidence is that, while working as a salesperson in the computer department for Office Depot, Mr. Talbot entered into an agreement to go to the home of an Office Depot customer and update her computer anti virus software for his own personal gain. Although the delegate made no findings as to whether Mr. Talbot solicited the customer's business while she was in the store, the customer's letter, which was in evidence before the delegate indicated that he had. While he was at the customer's house installing her software, he also sold the customer software that was not only available from Office Depot, but which was his duty to sell to customers.

As a result of Mr. Talbot's actions, Office Depot lost software and computer sales. In an attempt to retain a customer, it also incurred additional costs reimbursing the payment the customer made to Mr. Talbot for his unsatisfactory work.

Although the delegate found that Mr. Talbot agreed to perform personal services for an Office Depot customer while at work for Office Depot, she concluded that, because he was of the view he was assisting a customer, he was not competing with his employer. She also determined that, because Mr. Talbot "he may not have understood" that he was denying Office Depot a sale by selling the customer a program that was available in the store, Office Depot had a duty to warn Mr. Talbot before terminating his employment. I find that the delegate erred in this conclusion.

The test of whether an employee has engaged in an act of misconduct is not a subjective one. In my view, the facts establish that Mr. Talbot's actions constituted a breach of an implied term of his employment contract to serve his employer honestly and faithfully. I find that such actions amounted to a repudiation of the employment relationship, giving rise to Office Depot's right to dismiss Mr. Talbot for cause without warning.

In light of my conclusions on whether Mr. Talbot's actions constituted a fundamental breach of the employment relationship, I need not determine whether Office Depot was justified in terminating Mr. Talbot's employment for insubordination.

ORDER

I Order that the Determination, dated May 19, 2004, be cancelled.

Carol L. Roberts
Member
Employment Standards Tribunal