

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 -

Admiral's Fleet Subs
("Admiral's")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Genevieve Eden

FILE NO.: 96/184

DATE OF HEARING: June 28, 1996

DATE OF DECISION: July 3, 1996

DECISION

APPEARANCES

Doug Burley President, Admiral's Fleet Subs

Ronald Wyndels on his own behalf

Ron Corrigan on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by Admiral's Fleet Subs ("Admiral's") pursuant to Section 112 of the *Employment Standards Act* (the "Act") against Determination # CDET 001230 issued by the Director of Employment Standards on February 19, 1996. The Director found that Ronald Wyndels ("Wyndels") had been dismissed without just cause and was entitled to compensation for length of service in the amount of \$1,383.55 including vacation pay and interest. Admiral's appealed the Determination on March 13, 1996.

A hearing was held in Victoria on June 28, 1996. All witnesses gave evidence under oath or affirmation.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether Wyndels is entitled to compensation for length of service under Section 63 of the *Act*. That is, has Admiral's demonstrated, on the balance of probabilities, that Wyndels was terminated for just cause.

FACTS

Wyndels was employed by Admiral's as a Driver from October 26, 1994 to November 3, 1995. His employment was terminated by Admiral's without notice or compensation. At the time of termination, Wyndels earned \$650.00 per week.

Admiral's Reasons for Appeal refer to their letter dated February 15, 1996 to the Director's delegate, Ron Corrigan ("Corrigan"). Corrigan had written Admiral's on January 30th requesting "proof and evidence upon which you intend to rely upon in establishing that the complainant was dismissed with cause". Admiral's letter to Corrigan asserts that, on November 1, 1995, Wyndels advised them that he wanted to work for a competitor, the Little Deli, on Saturdays while continuing to work for Admiral's from Monday to Friday, and that he would be distributing some of the same products as Admiral's. This was viewed as a conflict of interest. The letter further states that Wyndels said he was prepared to lose his job with Admiral's because he would rather work for the Little Deli. Given Wyndels' decision, Admiral's felt there was just cause for dismissal. Subsequent to the dismissal, Admiral's

offered Wyndels a role as an Independent Distributor, not as an employee. The appeal and attached letter were signed by Scott Burley, owner and operator of Admiral's.

Doug Burley ("Burley") testified on behalf of Admiral's. Burley had been a former owner of Admiral's, and was currently the President, but he was not part of Admiral's during the time of Wyndels' employment. His evidence was based on discussions he had with his son, Scott Burley, who owned Admiral's, and the previous President, Jason Stewart ("Stewart"), as well as a conversation with Wyndels. In addition, he submitted a letter signed by one of their customers, "Faye". Scott Burley, Stewart, and Faye were not present at the hearing.

Burley's evidence was that Wyndels had been in a position of trust with Admiral's and he violated that trust. According to Burley, Wyndels was working for his employer and underhandedly trying to do the employer damage. He maintained Wyndels was getting paid by Admiral's and "was getting commission from Little Deli". Further, according to Burley, Wyndels was "going to our stores when working for us and talking about his products that he intends to distribute" and that he should have been "talking about our products and servicing our products as quickly as possible". Burley maintained that managers of stores that Admiral's delivers to don't work on the weekends and that Wyndels must have talked to them during the week about products that were not Admiral's.

Burley submitted examples of products including pepperoni sticks from both Admiral's and Little Deli noting their similarity and maintained that Wyndels would be distributing such products for Little Deli, and that, from Monday to Friday, Admiral's would have no sales on these products from Wyndels whom they were paying \$40,000 per year. He maintained that these products were close enough that a store would carry only one and not both. He explained that the smaller stores allow less competition in terms of selling similar products. Even the larger stores that may allow more competing products would, in most cases, bring in different products given greater opportunity for sales.

Burley testified that Wyndels would talk to their customers about distributing sausage rolls and "behind our back would sell those sausage rolls". He cited one occasion, when Stewart rode with Wyndels; they stopped at Mohawk convenience store in Campbell River and the manager asked for his sausage rolls. According to Burley, Stewart maintained that Wyndels asked if he could pick up sausage rolls that were waiting for him at the Denman Island Ferry. Burley stated that one "would have to read between the lines; he was using our truck and our time to pick them up" and "we have to assume he'd be distributing in our truck".

Burley submitted a letter from "Faye" who works at Pay Less gas station in Qualicum Beach. He did not know Faye's last name which was indecipherable. The letter reads:

This letter is to confirm that Ron Wyndels while employed by Admiral's Fleet Subs did, on several occasions, try to sell me products for my store. These products were other than Admiral's Subs products, although similar and that he would deliver them with his regular order. When I replied that this seemed unethical he said he would deliver on Saturdays, if I preferred. I felt strongly about this situation & informed Scott Burley his employer.

When questioned by me, Burley stated that his wife had written the letter the morning of the hearing and faxed it to Faye who signed and faxed it back. He said Faye was busy and told them to write the letter.

Burley claimed that Admiral's had no problem with Wyndels working on weekends; it was "working with Little Deli" and "selling the exact same products" that was the problem. He maintained that you can't do this job on the weekends and not hurt your employer. He considered Wyndels' conduct reprehensible, unscrupulous and wrong and it would have destroyed Admiral's business.

On cross-examination, Burley was unable to name other customers Wyndels was alleged to have talked to other than Pay Less and Mohawk. He clarified that "in Mohawk, it was not Ron trying to sell anything, it was the Mohawk manager wanting Ron to bring him the sausage rolls; that's how the story came to me from Scott". Burley denied he had testified earlier that Wyndels was working for Little Deli while in Admiral's employ explaining that it was a fine line between working for an employer and getting paid as a distributor. He added that Scott Burley had told Wyndels when hired that he was allowed only to distribute Admiral's products.

Burley testified that a conversation he had with Wyndels subsequent to his termination, wherein Wyndels acknowledged that he had made a big mistake and that he didn't think he'd ever get fired, was evidence of wrongdoing.

Burley also testified that, subsequent to his termination, Wyndels approached Admiral's to be a distributor in Vancouver. Given that he was a good salesman, and that Admiral's did not have any business in Vancouver, they considered having him as a distributor. Had this arrangement materialized, Admiral's would have sold their product to Wyndels directly and thus he could not hurt the company. Admiral's would not consider hiring Wyndels as an employee again because of his disreputable conduct during employment.

Burley reiterated that "I wasn't there at the time any of this stuff happened" and that he was in "receipt of the knowledge" by talking extensively to Scott Burley and Stewart. Scott Burley was not at the hearing because he was "up island distributing".

Wyndels testified that, when hired by Admiral's, he was given an existing route of 28 stores in the Victoria, Sooke, and Sidney area. In six months he serviced these stores and called on new ones expanding the route to 64 stores. He was then given an "up island" route of 60 stores to which he added about four. He promoted Admiral's products whenever he could and "did 100% for Admiral's". To his knowledge there was never a complaint from even one customer.

Given personal, family, and financial circumstances, Wyndels wanted to make some extra income on Saturdays. His evidence was that he talked to Admiral's many times over several months asking if he could work on Saturdays. Given that many stores asked if he carried sausage rolls, he sought out a sausage roll company for the purpose of distributing these for Admiral's as an additional line. However, Admiral's turned down his proposal. He later proposed that he work on Saturdays making sausage rolls to earn a small commission but again Admiral's turned him down. Given that Admiral's did not want to get into the sausage roll business, he decided to work Saturdays and make some extra money, but not to undermine or compete with Admiral's.

Wyndels testified that on November 1, 1995 he advised Scott Burley and Stewart that he would like to start distributing his own line of products including sausage rolls as well as some products for Little Deli on Saturdays, his day off. He maintained he would not be carrying subs

and sandwiches nor any other products carried by Admiral's. He was dismissed November 3, 1995.

Wyndels submitted in evidence the ROE (Record of Employment form) completed by Admiral's which includes the following statement: *working for the competition while employed by Admirals Fleet Subs.* Wyndels testified that, during his employment with Admiral's, he never worked for the Little Deli, nor anyone else, not even himself. He submitted a letter from Little Deli dated May 11, 1996 stating that, prior to November 3, 1995, Wyndels had never been in their employ nor did he have any business or other dealings with them; on February 29, 1996, they offered Wyndels a job which he accepted.

Wyndels maintained he never said that he wanted to work for Little Deli as contended by the employer, rather he said he wanted to distribute some products for them. Given that he had been in the business a number of years, he was aware of their products and prices although he had not spoken to them regarding distribution. He acknowledged that he said he would leave Admiral's if he couldn't distribute products on Saturdays; he recalls that his statement was "if you're going to tell me what to do on my days off, I'll leave", but it was made under stress and he never intended to leave.

Wyndels also testified that, with the exception of Mohawk, he never spoke to a single store about selling products or implied what he was going to do on Saturdays. He maintained that, in informal conversation, the manager of Mohawk remarked that Wyndels was lucky he got Saturdays off; it was only then that Wyndels mentioned he was thinking of working on Saturdays and establishing a small route to make extra money selling sausage rolls. When asked by the manager if he would throw a case of sausage rolls on the truck and deliver it to Mohawk, Wyndels responded that he would not carry another company's products on his truck. When he was at Mohawk another time with Stewart, the manager asked "have you got my sausage rolls yet?" to which Wyndels replied in the negative. He could see how Stewart could take it the wrong way, but it was never his intention to use the truck to pick up sausage rolls. He asserted that he would never have done this without Admiral's permission.

Wyndels denied speaking to Faye in Qualicum Beach about any other products and insisted the letter was a lie. He added that Faye and Scott Burley knew each other for several years and were the best of friends. Wyndels insisted he never solicited business while working for Admiral's and "never made a dime for anybody except for Admiral's".

Wyndels submitted the Board of Referees' decision allowing his appeal of an initial disqualification for unemployment insurance and noted the following statement:

... the claimant tendered evidence, corroborated by the employer ..., that very shortly after he was let go the employer twice offered him another job. Accordingly, no matter the degree of competition, the employer obviously did not consider the claimant's conduct reprehensible, or else the employer would not have offered the claimant further employment. As a result the Board finds that the claimant did not misconduct himself.

Wyndels emphasized that the decision confirms that there was no misconduct and that Admiral's offered him another job after his dismissal. His evidence is that Scott Burley and Stewart offered him a distributor role in Vancouver on salary for the first three months and commission thereafter.

Wyndels confirmed that he told Burley he had made a big mistake. However, the mistake he was referring to was his suggestion that he work on Saturdays distributing his own line of products. In retrospect, working Saturdays wasn't worth the ensuing mess and loss of his job which came as a shock to him.

On cross-examination, Wyndels acknowledged that Little Deli was a competitor but denied he would ever distribute competitive products while in the employ of Admiral's. His evidence was that subs were 90% of Admiral's business and he would not supply subs in his own line of products even if asked. He acknowledged that he planned to carry pepperoni sticks but they were different than that carried by Admiral's and that every store he called on already carried a pepperoni stick and cheese package for Admiral's. He maintained that whenever Admiral's had the product, he sold it all, however, Admiral's was out of product half the time and he would be without it for 2 or 3 weeks.

ARGUMENTS

Burley argued that Wyndels stole time from Admiral's by talking about his products while he should have been selling and talking about Admiral's products. He submitted Admiral's would have no problem with Wyndels working on Saturdays delivering other products and that he could have worked at any number of jobs, but he chose to work for the competition. Further, he chose to call on the same type of stores as he did for Admiral's. When paying an employee that will put a competitor in a site such as Campbell River, the situation becomes unbearable. Wyndels could no longer meet the position of trust.

Burley maintained that "the whole world knows if a customer wants a product and you don't bring it in, your services would be terminated at that location". He could not understand how the situation could be misconstrued as anything but misconduct when Wyndels acknowledged he would work for the competition and that would hurt Admiral's badly. He could not understand how Wyndels could distribute a person's products he had no previous dealings with.

Wyndels argued that he did not violate any trust and that he was straightforward with Admiral's and told them of his intention to work for himself on weekends to earn extra income. He didn't do anything behind their back and never intended to do anything underhanded. He never worked with anyone while he was with Admirals; it was a future thing and he never intended to compete with Admiral's and distribute competitive products.

The Director's delegate argued that no direct evidence had been presented that would dissuade him from his decision and that the Determination ought to be confirmed. He submitted that Wyndels' direct testimony should be preferred over the employer's indirect testimony. He asserted that the employer had relied on an allegation that the complainant was employed by a competitor while working for Admiral's as noted on the ROE, but there was no evidence of that. The direct evidence of Wyndels was that he was not employed by Little Deli or anyone while with Admiral's, rather it revealed he was contemplating setting up an endeavour to sell products that were not in competition with the employer.

ANALYSIS

Section 63 of the *Act* provides that when an employer terminates the employment of an employee, the employer is liable to pay the employee compensation for length of service. The liability is discharged, however, if written notice is given to the employee or if the employee is dismissed for just cause.

The burden of proof for establishing that Wyndels was dismissed for just cause rests with the employer. The evidence presented by Admiral's in attempting to substantiate a conflict of interest warranting dismissal relates to alleged conduct by Wyndels while in their employ as well as alleged activity contemplated by Wyndels on Saturdays.

Burley, the sole witness at the hearing for the employer, acknowledged he was not part of Admiral's while Wyndels was employed there and that his evidence was based on discussions with others. Thus, his evidence was not based upon his personal and direct observations or knowledge of the facts, rather he was repeating what others said to him. In effect, his testimony was hearsay evidence. The problem with such second-hand evidence is that its accuracy cannot really be tested. Those with first-hand knowledge of the events were not at the hearing to give direct evidence under oath or affirmation and have their evidence tested under cross-examination.

With respect to Wyndels' conduct during his employ with Admiral's, there is no evidence which directly establishes that Wyndels was working for the competition as stated on the ROE form and suggested by Burley. Moreover, the statement on the ROE is inconsistent with Scott Burley's letter to Corrigan of February 15, 1996 which only refers to business activity that Wyndels planned to engage in on Saturdays as the basis for dismissal.

The only examples Burley was able to give regarding his assertions that Wyndels was selling or talking about his products to Admiral's customers was the sausage roll discussion at Mohawk and the letter he produced from Faye.

With respect to the sausage roll discussion at Mohawk, Burley's testimony was even more than once removed from direct evidence; the "story" was recounted to Burley from Scott Burley who was not at Mohawk at the time but presumably received the information from Stewart. Further, Burley's evidence on cross-examination that Wyndels was not trying to sell anything at Mohawk, rather it was the manager wanting him to bring the sausage rolls, does not support his evidence in chief that Wyndels was selling sausage rolls behind Admiral's back.

The letter signed by Faye again is a form of second-hand, indirect evidence. Since Faye was not a witness, I cannot test the reliability of the statements made in her letter and assess her general demeanour. Moreover, the letter was signed but not written by Faye, thus it is not possible to ascertain whether she would have expressed herself in the same way had she written the letter herself. Further, the letter states she "felt strongly" about the situation, but there is no indication when she informed the employer of what she deemed to be unethical conduct by Wyndels. If she felt strongly, I would think she would have raised this during the time she alleged it happened, that is, while Wyndels was employed with Admiral's. However, there is no evidence whatsoever that this matter was raised with Wyndels; further, Wyndels' direct evidence is that he was not aware of a single complaint by a customer. Even after the dismissal such evidence was not put forward by the employer in their response to Corrigan's request for information, nor when a hearing was held regarding Wyndels' appeal for unemployment insurance. For all these reasons, I do not accord any weight to Faye's letter.

Further, I was able to observe Wyndels giving evidence and responding to cross-examination. He was forthright in his testimony and his statements were consistent throughout the hearing. He freely acknowledged he told Burley he had made a mistake; his explanation that his plan to work Saturdays wasn't worth the resulting dismissal is logical.

Based on the evidence before me, I am not satisfied that Wyndels engaged in any activity that would constitute a conflict of interest while in the employ of Admiral's.

Also I am not satisfied that Wyndels' plan to distribute his own line of products on Saturdays warranted dismissal. He was up front with Admiral's and informed them of his intent. His evidence was that subs were 90% of Admiral's business and that he would not carry subs, nor would he ever distribute competitive products while in the employ of Admiral's. Even if the products Wyndels planned to distribute would compete with a small portion of Admiral's product line, I do not conclude that dismissal was warranted in the particular circumstances of this case. In the absence of direct, sworn evidence from the employer to the contrary, I accept Wyndels' evidence that he was offered a job by the employer subsequent to his dismissal; this does not support the position now taken by the employer that his conduct was such as to warrant dismissal.

Further, I submit that, if the the employer regarded Wyndels' planned endeavour as a conflict of interest, it had an obligation to clearly and unequivocally inform him that such activity was prohibited and warn him that his continued employment was in jeopardy should he proceed with his plans. There is no direct, sworn evidence that this occurred, rather Wyndels' direct evidence is that he was shocked at his dismissal.

Finally, I conclude that Wyndels' statement about leaving Admiral's did not reflect an intention to leave rather it reflected more an emotional response to the stress he was under at the time. In any event, Admiral's has not claimed that Wyndels' employment was terminated by a resignation.

For the above reasons, I conclude on the balance of probabilities that Admiral's has not met the onus of proving Wyndels was dismissed for just cause.

ORDER

Pursuant to Section 115 of the *Act*, I order that Determination #CDET 001230 be confirmed.

Genevieve Eden
Adjudicator
Employment Standards Tribunal