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-

Unisource Canada, Inc.

("Unisource")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE NO.:	96/742
DATE OF DECISION:	May 2nd, 1997

DECISION

OVERVIEW

This is an appeal brought by Unisource Canada, Inc. ("Unisource" or the "employer") pursuant to section 112 of the *Employment Standards Act* (the "*Act*") from Determination No. CDET 004798 issued by the Director of Employment Standards (the "Director") on November 27th, 1996. The Director determined that Unisource was obliged to pay the total sum of $6,820.80 as compensation for length of service [see section 63 of the *Act*] and interest (see section 88 of the *Act*) owed to four former employees--Kelly A. Gulbranson, Lee G. Gulbranson, Kim S. Howes and Keri J. Lumme.

In finding in favour of the four former Unisource employees, the Director rejected the employer's contention that it had just cause to terminate each of the complainant employees based on a potential conflict of interest arising from the employees' access to allegedly confidential and proprietary information.

Unisource's appeal is based on the ground that the Director erred in law in finding that it did not have just cause to terminate each of the four employees. In particular, the employer takes issue with the following statement contained in the Reason Schedule appended to the Determination:

> An exception to the requirement to pay compensation for length of service upon termination of employment is if the employer had just cause to terminate employment. This employer is not arguing that any of these employees provided confidential information to their new employer. The employer is arguing that because these employees had access to confidential and proprietary information, there was a potential for a conflict of interest, and that a potential for conflict of interest is just cause for termination.
>
> The Branch's policy is that a potential conflict of interest is not just cause for dismissal; there must be an actual conflict of interest.

FACTS

There does not appear to be any serious dispute among the parties with respect to certain salient facts. Each of the four employees submitted a letter of resignation in order to take up employment with a direct competitor of Unisource. Three of the former employees--Kelly Gulbranson, Kim Howes and Keri Lumme--purported to give two weeks' written notice of their resignation. The fourth employee, Lee Gulbranson, did not give two weeks' written notice; rather this employee tendered his resignation effective immediately (January 18th, 1996) with the proviso that he would "continue to work for Unisource until February 1, 1996, if required".

The Director, in the Reason Schedule appended to the Determination, found that "In each case the complainant had access to confidential information and was leaving to work for a competitor".

ISSUE TO BE DECIDED

Did the employer have just cause to terminate each of the four employees?

ANALYSIS

The Director appears to have proceeded on the assumption that in order for an employer to have just cause in a "conflict of interest" situation, the employee must, in fact, carry out some sort of act that harms the employer (such as actual disclosure of confidential information). This position is put more explicitly in the submission of the Director's legal counsel, dated March 9th, 1997.

However, in my view, the fact that an employee stands in a conflict of interest relationship is, of itself, just cause for termination. I do not find the phrase, "potential conflict of interest", which was used by the Director in the Reason Schedule to the Determination and by the appellant in some of its submissions, to be helpful. One is either in a conflict of interest vis-à-vis some other party (*i.e.,* a relationship) or one is not. In order for the employer to have just cause, the employer need not show that the employee has, in some fashion, *exploited* the conflict of interest to their own, or to some third party's, pecuniary advantage (*i.e.,* a behaviour).

In the present case, the complainant employees, who apparently all had access to confidential proprietary Unisource information (recall the Director's finding in this regard), and while still employed by Unisource, entered into employment contracts with a Unisource competitor. Absent some sort of restrictive covenant (and there is no evidence of such a covenant in this case), the employees were free to enter into employment agreements with the competitor firm. However, and this is the nub of the issue, was Unisource obliged to *continue* the complainant employees' employment in such circumstances?

Clearly, the employer had reason to be concerned about the conflicting loyalties of these four employees--for example, when prospecting for potential customers, or indeed, when dealing with existing Unisource customers, would these employees prefer the interests of Unisource or their new employer? In my view, Unisource was not obliged to, in effect, place these four employees under close supervision in order to determine if, in fact, these employees were breaching confidences or otherwise harming the pecuniary interests of Unisource. And even if Unisource had placed these employees under close supervision, there is no guarantee that any wrongful disclosures would have been uncovered--*e.g.,* the disclosure may have taken place off-the-job. It is precisely because of the inherent difficulty of detecting such wrongful disclosures that the law does not require an employer to prove actual wrongful disclosure in order to have just cause for dismissal--the significant fact that the employee stands in a conflict of interest is legally sufficient.

Once the conflict of interest arose (*i.e.,* when these employees entered into employment contracts with the competitor firm), the employer was, *by reason of that fact alone,* entitled to terminate

these employees without termination pay or notice in lieu thereof. In these circumstances, the employer could no longer be expected to repose its trust and confidence in these employees--the hallmark of any employment relationship.

I do not wish my remarks to be taken as creating a general right of termination once an employee enters into an employment contract with a competitor firm. However, where that particular employee is a fiduciary with respect to the "current" employer, or where that employee has access to confidential proprietary information, the "current" employer need not stand by and wait for the employee to steal information or otherwise breach some confidentiality--the employer, if it chooses to do so (and does not otherwise condone the situation), may terminate the employee for just cause.

In my opinion, the employer had just cause to terminate each of the four employees. However, with respect to the claim of Lee G. Gulbranson, the employer need not have concerned itself with the issue of just cause as this particular employee resigned, effective January 18th, 1996 and did not give (as did the other three employees) two weeks' "working notice". On January 18th, 1996, Lee Gulbranson submitted a letter to Unisource which read as follows: "I am writing this letter to tender my resignation effective Thursday, January 18, 1996. I will continue to work for Unisource until February 1, 1996, *if required*." (emphasis added)

Under the *Act*, an employee is not obliged to give any notice whatsoever (however, this may not be the case under the common law of contract). If an employee chooses to give notice, and if such notice is accepted by the employer, then a binding contract (to terminate the underlying employment contract) is created. On the other hand, if an employee tenders a resignation, effective immediately, and that resignation is accepted by the employer, then, in my view, that employee cannot later advance a claim for termination pay under section 63 of the *Act*. In the language of section 63(3)(c) of the *Act*, that employee has "terminated the employment" and, accordingly, the employer's liability for termination pay "is deemed to be discharged".

In my view, even if the employer did not have just cause to terminate Lee Gulbranson, this particular employee was nonetheless not entitled to claim compensation for length of service under section 63 of the *Act*. I understand that Lee Gulbranson now takes the position that it was his intention all along to give two weeks' working notice. However, I do not believe that any subsequent statement of intention can override the clear and unambiguous language of the January 18th resignation letter. For one thing, the subsequent statement of intention is parol evidence tendered to vary or contradict a prior written statement and is thus inadmissible under the parol evidence rule. For another, Lee Gulbranson specifically noted on his complaint form, filed with the Employment Standards Branch on February 9th, 1996, that he had "quit" (with a handwritten parenthetical note stating "resigned"), rather than being "fired" or "laid off" (see Section C of the form--Work History). Thus, Lee Gulbranson's subsequent behaviour is entirely consistent with his having quit rather than being dismissed--at the time he resigned (and for some time thereafter), Lee Gulbranson appears to have (mis)understood that he was entitled to termination pay whether or not he resigned voluntarily.

ORDER

Pursuant to section 115 of the *Act*, I order that Determination No. CDET 004798 be cancelled.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal