EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act, R.S.B.C. 1996, c. 113

-by-

MacMillan Bloedel Limited

("MacMillan Bloedel" or the "employer")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE No.:	99/74
DATE OF HEARING:	April 26th, 1999
DATE OF DECISION:	June 14th, 1999

DECISION

APPEARANCES

Adele L. Burchart	Legal Counsel for MacMillan Bloedel Limited
Eamonn Carter	on his own behalf
Sharon L. Cott	for the Director of Employment Standards

OVERVIEW

This is an appeal brought by MacMillan Bloedel Limited ("MacMillan Bloedel" or the "employer") pursuant to section 112 of the *Employment Standards Act* (the "*Act*") from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on January 18th, 1999 under file number 051507 (the "Determination").

The Director's delegate determined that MacMillan Bloedel owed its former employee, Eamonn Carter ("Carter"), the sum of $4,342.07 on account of 4 weeks' wages as compensation for length of service (see section 63) together with concomitant vacation pay (section 58) and interest (section 88).

ISSUE TO BE DECIDED

MacMillan Bloedel says that the determination should be cancelled because it had just cause to terminate Carter's employment [see section 63(3)(c)]. Specifically, it says that Carter placed himself in a conflict of interest by accepting a similar position with a competing firm and thus, MacMillan Bloedel was immediately entitled to terminate Eamonn's employment.

FACTS

For the most part, the salient facts are not in dispute. Frank Bayuk, the sole MacMillan Bloedel witness, testified that as MacMillan Bloedel's regional sales manager for the Building Materials division, he was Carter's direct supervisor when Carter was terminated. Carter was an outside sales representative whose territory included the greater Vancouver/Lower Mainland region of the province.

Carter's job duties included calling on existing and potential customers with a view to obtaining purchase orders for MacMillan Bloedel's products which included lumber and other building materials. The customer base included lumber yards, cabinet manufacturers, retail outlets and the like. As an outside sales representative (a position Carter held for some 8 months prior to termination), Carter had authority to make pricing decisions (including offering price discounts) on

his own motion and had access to proprietary and confidential marketing information. MacMillan Bloedel asserts that given the nature of the parties' relationship, Carter owed fiduciary obligations to MacMillan Bloedel.

On Friday, May 15th, 1998, Carter tendered his resignation stating that he was taking up a position with Weyerhaeuser Canada Ltd. ("Weyerhaeuser"). Carter's single-page handwritten resignation letter reads as follows:

> Dear Frank,
>
> I wish to resign from MacMillan Bloedel. I hereby give one month's written notice, as required by the procedures set down in the MB Corporate Manual.
>
> Yours Sincerely,
>
> "Eamonn Carter"

The relevant provisions of the corporate manual to which Carter referred provide as follows:

> **Resignation**
> 1. If you resign with less than three months' service, you are required to give one week's notice of termination. If you resign after three months' service, you are required to give one month's notice. If you do not give the required notice of termination, payment of your salary and continuation of benefit plans will cease on the last day worked.
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> 2. You may be asked to stop working at any time before the end of your termination notice period, in which case your salary and all benefits will cease on the last day worked. The company may, at its discretion, continue to pay your salary and benefit plans (except vacation and long term disability) for the full notice period.

When Carter explained that he was going to work for Weyerhaeuser--a MacMillan Bloedel competitor--Bayuk stated that Carter's employment would end on that day. Carter turned over to Bayuk a file containing various MacMillan Bloedel information and documentation, his office and company car keys, and a sealed envelope containing his resignation letter. The meeting between Carter and Bayuk was brief but apparently cordial; at the end of the work day, Bayuk drove Mr. Carter to the Metrotown Mall in Burnaby.

On Wednesday of the following week, Bayuk dropped off Carter's expense reimbursement cheque at the latter's home and was informed by Carter that he was starting his employment with Weyerhaeuser on the coming Monday.

Bayuk testified that Weyerhaeuser is also a wholesale distributor of building products and serves the same customer base and offers similar product lines to MacMillan Bloedel. In his capacity as an outside sales representative, Carter had access to information regarding MacMillan Bloedel's costs, inventory, profit margins, customer rebate and allowance policies and so forth--information that MacMillan Bloedel rightly considers confidential and proprietary.

Carter's testimony was not markedly at odds with that of Mr. Bayuk. Carter confirmed that he was approached by representatives of Weyerhaeuser and was offered what amounted to a better position. He claims that he acted honestly and with integrity throughout the matter and I do not doubt that to be so. However, Carter conceded that Weyerhaeuser is a MacMillan Bloedel competitor and that there is a substantial overlap in the two firms' product lines and customer bases. Indeed, Weyerhaeuser's hope was to expand into the product areas where MacMillan Bloedel held the stronger position in the market.

Carter was offered a position with Weyerhaeuser about ten days' before he tendered his resignation; this offer was accepted early the next week (*i.e.*, a few days before the meeting with Bayuk at which Carter tendered his resignation). Thus, and Carter concedes as much, when Carter met with Bayuk on Friday, May 15th, 1998 Carter had already entered into a new employment relationship with Weyerhaeuser, although he had yet to take up his new duties. When Carter met with Bayuk on the 15th, resignation letter in hand, Carter had irrevocably determined to end his employment with MacMillan Bloedel in order to take up a new position with Weyerhaeuser. Carter advised Bayuk that he was resigning to take up a new position with Weyerhaeuser; Carter tendered 4 weeks' notice but this offer was rejected by Bayuk who indicated that no notice whatsoever was required. Carter testified that he was willing to work out his 4 week notice period but did not expect (correctly, as things turned out) that he would be required to do so.

In cross-examination, Carter acknowledged that he had read and signed MacMillan Bloedel's "conflict of interest" policy which provides, in part, "it is acceptable for employees to have a second job or other business interests outside [MacMillan Bloedel], provided it does not interfere with the employee's ability to adequately perform his or her duties at [MacMillan Bloedel] *and is not in direct competition with [MacMillan Bloedel*] (my *italics*).

ANALYSIS

In upholding Carter's claim for compensation for length of service, the Director's delegate stated (commencing at p. 6 of the Determination):

> "An employer does not have just cause to terminate an employee simply because that employee has made arrangements to become employed by another firm in the same industry. There is no evidence before me that Carter, while in the employ of MacMillan Bloedel, solicited clients on behalf of Weyerhaeuser...
>
> MacMillan Bloedel Limited has failed to produce evidence which shows that Carter has breached his duty of fidelity by accepting employment with a competitor, namely Weyerhaeuser.
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> An employee takes with him or her, from position to position, knowledge gained during the normal course of employment, including confidential information retained in the employee's memory. It does not appear that Carter deliberately collected or memorized confidential information from MacMillan Bloedel Limited to pass on to his employer's competition.

> The onus is on the employer to establish that cause exits for the employee's termination. The employer must prove cause on the balance of probabilities based on a finding of real incompetence or misconduct, rather than simple dissatisfaction with performance or concern as to potential misconduct."

In making the above comments, the delegate relied on the Tribunal's decision in *TMSI Telephone Maintenance Services Inc.* (B.C.E.S.T. Decision No. 510/98). In that case the complainant, a service/repair technician, was terminated immediately upon his employer discovering that the complainant had applied for a position with a TMSI competitor, namely, B.C. Tel (both firms sold, installed and serviced business telephone systems). Both the delegate and this Tribunal held that TMSI did not have just cause to terminate the complainant on the basis that he was in a "conflict of interest". Several points are worth noting. First, in *TMSI,* the complainant *had not yet accepted employment* with the competitor firm when he was terminated. Second, in *TMSI* the complainant did not have access to confidential information and could not, in any way, be characterized as a fiduciary. As noted by the adjudicator in *TMSI:* "I am not aware of any law which stands for the proposition that applying for employment with a competitor of one's current employer creates a conflict of interest for an employee who is not a fiduciary". I entirely agree with this statement. The adjudicator also held that it was a breach of an employee's duty of fidelity to abscond with confidential information to be taken to the new employer and I agree with that view as well.

But the present case is not one where the employer alleges that the employee has absconded with, or has unlawfully disclosed, confidential documents or other proprietary information. Nor is this a case about a "potential" conflict of interest. Indeed, as I noted in *Unisource Canada, Inc.* (B.C.E.S.T. Decision No. 172/97)--a case relied on in *TMSI* and a case virtually identical on its facts to the present appeal:

> ...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"...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).
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> 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?
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> 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.
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> 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.
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> 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."

It is conceded by both parties that Weyerhaeuser is a competitor of MacMillan Bloedel. It is also conceded that Carter was joining Weyerhaeuser in a position not markedly different from that which he held with MacMillan Bloedel and that Carter had access, while employed with MacMillan Bloedel, to confidential information. While no one is suggesting that Carter had, or was about to, abscond with confidential proprietary information, that is not the issue. The key question in this appeal is: Was MacMillan Bloedel obliged to continue Carter's employment throughout the 4-week notice period in circumstances where Carter had already entered into an employment relationship to undertake essentially the same job--selling similar products to the same customer base--with a competitor firm?

In 1885 Lord Esher stated, in *Pearce v. Foster* (1885) 17 Q.B. 536, that if a servant (employee) does anything that is incompatible with the due and faithful discharge of his or her duties to the master (employer), the latter has a right to dismiss. Placing oneself in a conflict of interest by competing with one's employer has always been treated by our courts as a breach of the employee's duty of faithful service. That principle stands today, having recently been reaffirmed by our court of appeal in *Cariboo Press (1969) Ltd. v. O'Connor et al.* (Vancouver Registry No. CA018687, February 14th, 1996) where Chief Justice McEachern referred to the rule against competing with one's employer as "an absolute, or almost absolute, prohibition". The mere *fact* that the employee is competing with his employer is sufficient justification for discharge; the employer need not show that it has, or will, suffer harm as a result of the competition--see *Empey v. Coastal Towing Co. Ltd.* [1977] 1 W.W.R. 673 (B.C.S.C.) and, more recently, *Crawley v. Trans-Power Construction* (Registry No. C935678, October 22nd, 1996).

The fact that Carter had, at the point when he tendered his resignation, already entered into an employment relationship with a MacMillan Bloedel competitor does not, of itself create a conflict of interest. However, given that Carter was taking up employment in a position that was very similar to that which he held with MacMillan Bloedel, a position where he would be selling similar products to the same customer base, I must conclude that if Carter had continued his employment with MacMillan Bloedel throughout the notice period he would have been in a position of conflict of interest because he would then have been in the untenable position of having to serve two competing masters both of whom were entitled to demand his undivided loyalty. The fact that Carter disclosed his conflict to MacMillan Bloedel does not make it any less real. Simply put, in these circumstances, MacMillan Bloedel would reasonably have had concerns about Carter's loyalty and faithfulness had he continued to work throughout the proposed 4-week notice period. While Carter did not have any intent to injure MacMillan Bloedel when he accepted a new position with Weyerhaeuser, the question of intent to injure is not relevant to whether or not there was a conflict of interest--see *Crawley, supra.*

MacMillan Bloedel, of course, could have continued to employ Carter throughout the 4-week notice period but, in my view, was not legally obliged to do so. As soon as Carter accepted a similar position with Weyerhaeuser he was in a conflict of interest and thus MacMillan Bloedel had, from that point, just cause to terminate his employment.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be cancelled.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal