Employment
Standards
TRIBUNAL

An appeal

\- by -

Diamond Parking Ltd.
("Diamond Parking" or the "Appellant")

\- 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:** Ib S. Petersen

**FILE No.:** 2003A/162

**DATE OF DECISION:** September 5, 2003

# DECISION

## PRELIMINARY ISSUE

This is a preliminary matter arising out an appeal by the Employer, Diamond Parking, pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), of a Determination of the Director issued on May 2, 2003. The Determination concluded that Mr. Frederick Mitschele was owed $10,068.45 by his Employer on account of wages, compensation for length of service and interest.

Delta operates or manages parking lots. Mr. Mitschele worked as a city manager between March 2, 1996 and October 15, 2000. He was paid on the basis of a $62,000 annual salary and incentive bonuses.

The Appellant argues that the Determination is wrong and that it had just cause for the termination of Mr. Mitschele and he was not owed bonuses because he improperly manipulated revenues.

The Respondent, Mr. Mitschele, seeks to uphold the Determination. He says the Employer did not have cause for termination and he denies having done anything dishonest. Moreover, and that is the issue in this decision, he says that Mr. E. Ajit Saran, counsel for the Appellant, represented him in a "personal legal issue", "is acting in conflict of interest" by representing the other party in this matter and ought not to be allowed to represent the Appellant in this appeal.

The parties were allowed to make further submissions regarding the Respondent's application.

The Respondent refers to the Law Society of B.C.'s *Professional Conduct Handbook*, in particular Rule 7. which provides:

> "7. Subject to Rule 7.4, a lawyer must not represent a client for the purpose of acting against a former client of the lawyer unless:
>
> (a) the former client is informed that the lawyer proposes to act for a client adverse in interest to the former client and the former client consents to the new representation, or
>
> (b) the new representation is substantially unrelated to the lawyer's representation of the former client, and the lawyer does not possess confidential information arising from the former representation that might reasonably affect the new representation."

Mr. Mitschele argues that counsel represented him in a "personal issue and a financial bankruptcy issue." In the course of this counsel was made aware of confidential personal and financial information. Mr. Mitschele says he never consented to counsel representing the Appellant. He says that during counsel's representation of him, counsel was made aware of behavioural traits and thoughts with respect to legal processes. He also argues that having dealt with the firm of which counsel is a member over the years in his capacity as city manager, the firm has obtained knowledge about his behavioural traits and thoughts and ought not to be permitted to represent the Appellant.

Counsel agrees that he represented Mr. Mitschele in a personal matter some six years ago, that the file was closed more than five years ago, and moved off location. Counsel says he has not reviewed the file and is responding from memory. He says that the matter had nothing to do with the Respondent's employment with the Appellant, or employment generally. He says he does not have any knowledge from the earlier representation that would assist the Appellant or cause concern to Mr. Mitschele. He

argues the employment standards appeal is substantially and fundamentally different from the personal matter. Counsel also relies on Law Society of B.C.'s *Professional Conduct Handbook*, in particular, Rule 7 (set out above).

I agree with counsel for the Appellant. In reaching that conclusion, I take some guidance from the *Professional Conduct Handbook* and the decision of the Supreme Court of Canada in *Martin v. Grey* (1990), 77 D.L.R. (4th) 249. In that case, the majority of the court articulated the following two-fold test: (1) did the solicitor receive confidential information attributable to a client-and-solicitor relationship relevant to the matter at hand, and (2) is there a risk that it will be used to the client's prejudice?

In my view the matter before the Tribunal and me is substantially and fundamentally different from the earlier representation of Mr. Mitschele, which, as noted, happened 5-6 years ago. The best I can make out from the submissions is that the earlier representation related to a bankruptcy. The current matter involves an employment standards appeal and the issues have to do with the question of the existence of just cause and the entitlement, in the circumstances, to certain bonuses. These are indeed very different matters. I do not accept that counsel has confidential information "arising from the former representation... that might reasonably affect the new representation." It follows that I do not, in the particular circumstances of this case, accept that Mr. Mitschele's broad and sweeping suggestion that general knowledge imparted to counsel some 5-6 years ago about his behavioural traits and thoughts with respect to legal proceedings is relevant or sufficient for me to interfere with the Appellant's right to counsel of its choice. Briefly put, in the circumstances, I do not see that counsel received confidential information attributable to a client-and-solicitor relationship relevant to the matter at hand such that there a risk that it will be used to the client's prejudice. I reject the argument that the Appellant's counsel be barred from representing it in the matter at hand.

I also do not accept the argument that the firm of which counsel is a member should not be permitted to represent the Appellant because Mr. Mitschele had dealing with members of the firm and in the course of those dealings imparted some personal information about himself, including personal characteristics, personality traits, personal habits and thoughts of dealing with legal processes. It appears from Mr. Mitschele's submissions that he understood his dealings with the firm was in his role as city manager and its role as counsel for the Appellant. If, in the course of those dealings, Mr. Mitschele imparted personal knowledge about himself to members of the firm, that does not create a conflict of interest. I reject the argument that the Appellant's firm be barred from representing it in the matter at hand.

## ORDER

Pursuant to Section 115 of the *Act*, I dismiss the Respondent's application that the Appellant's counsel, and the firm of which he is a member, be barred from representing the Appellant in the matter at hand.

**Ib S. Petersen**
**Adjudicator**
**Employment Standards Tribunal**