

**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 -

E.P.S. Communications Ltd.  
("EPS")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Lorne D. Collingwood

**FILE NO.:** 98/137

**DATE OF HEARING:** May 25, 1998

**DATE OF DECISION:** June 18, 1998

**DECISION**

**APPEARANCES**

Edward Skulsky

For E.P.S. Communications Ltd.

Joseph Wiedenman

The Complainant

**OVERVIEW**

This appeal is by E.P.S. Communications Ltd. (“EPS”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) and it is against a Determination by a delegate of the Director of Employment Standards (the “Director”) dated February 10, 1998. The Determination is that EPS dismissed Joseph Wiedenman without notice or just cause and that as such it must pay him compensation for length of service.

**ISSUE TO BE DECIDED**

At issue is the matter of whether or not EPS had just cause to terminate Wiedenman. According to EPS, there was not only conflict of interest, Wiedenman acted quite improperly while on the job.

**FACTS**

EPS is a retailer of mobile communication products and marine electronics. Ed Skulsky is owner and president of EPS. Joseph Wiedenman was employed by the company as a technician from November 9, 1995 to October 10, 1997. His pay was \$1,360 semi-monthly.

Skulsky, on hiring Wiedenman, knew that he operated a business called Tac-1 Communications (“Tac-1”) and that the nature of the business was the selling, installation and repair of CB radios. Skulsky had no problem with that. Indeed, he encouraged and assisted Wiedenman with his business.

In 1996, EPS changed its ad in the Yellow Pages directory by adding CB radios to its list of products. That led to an increase in calls from people interested in the radios. When Ron Kolbuck, salesman for EPS, would receive one of those calls he would pass the person on Wiedenman. EPS had no interest in the radios at that point.

EPS decided to get into the CB radio business and did so in August of 1997. It began to carry the Midland and Uniden brands of CB radios. It did not tell Wiedenman that he should cease or, at least, curtail selling CB radios through Tac-1. Indeed, EPS bought a

Uniden CB and accessories from Tac-1 on 07/10/97. And Kolbuck continued to refer CB radio customers to Wiedenman.

Bill Bonter came looking for a VHF radio. On arranging to lease an Icom unit through EPS and Kolbuck, he expressed an interest in purchasing a CB radio as well, one with P.A. features. Kolbuck then introduced Bonter to Wiedenman. Skulsky complains that Wiedenman showed Bonter the CB that EPS had in stock and one of his own units, and promoted the latter over EPS's unit. He describes that as a conflict of interest, "not a big conflict but a conflict". Bonter writes to say that he was told by Kolbuck that EPS did not have a CB with P.A. features and that he should deal with Wiedenman. There is nothing to suggest that the facts are anything but just as Bonter describes.

As Wiedenman went about his work for EPS, he would get a certain number of telephone calls for Tac-1. Skulsky complains that Wiedenman spent far too much time on his telephone conducting Tac-1 business. That interfered with his work for EPS and is, as Skulsky sees it, the major conflict of interest. And he complains that, even though he told Wiedenman that he was conducting too much Tac-1 business while at work for EPS, the practice continued unabated. As the facts are presented to me, nothing confirms any of that.

Approximately two weeks prior to the termination, Skulsky overheard a telephone conversation between Wiedenman and a Mr. Sharma. Sharma was looking to buy a radio for his truck. Wiedenman told him that "If you can't get here by 3:05 p.m., you might as well keep going down the road". According to Skulsky, as a result of that comment Sharma went to a competitor for his radio. Wiedenman says the comment was in jest and, moreover, that he offered Sharma another time for installation of his radio. I find neither reason to believe that there was anything really wrong with the comment, nor evidence that it caused Sharma to look elsewhere for a radio. Skulsky would have immediately complained of the comment, had Wiedenman said something which was obviously offensive or clearly inappropriate. Yet he did not. And, clearly, Sharma might have bought from a competitor for any one of a number of reasons. There is no evidence which points, never mind confirms, that it was due to something which Wiedenman said.

Skulsky was surprised and upset to learn that Sharma had gone to a competitor. He is convinced that had Wiedenman been more co-operative, EPS would not have lost the sale. On raising matters with Wiedenman, the two men were soon deep in a heated argument. Skulsky complains of being verbally attacked. Wiedenman says he did nothing more than defend himself and explain his actions. During the course of the exchange, Wiedenman began to ask, "Are you going to fire me?" After asking the question 3 or 4 times, Skulsky decided that he had had enough of Wiedenman and he fired him.

The employee's Record of Employment form ("ROE") indicates termination for reason of conflict of interest.

## **ANALYSIS**

Section 63 (3) of the *Act* sets out how an employer's liability for compensation for length of service can be discharged.

- (3) *The liability is deemed to be discharged if the employee*
- (a) *is given written notice of termination as follows:*
    - (i) *one week's notice after 3 consecutive months of employment;*
    - (ii) *2 weeks' notice after 12 consecutive months of employment;*
    - (iii) *3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;*
  - (b) *is given a combination of notice and money equivalent to the amount the employer is liable to pay, or*
  - (c) *terminates the employment, retires from employment, or is dismissed for just cause.* (my emphasis)

As matters are presented to me, it appears that Wiedenman was terminated simply because Skulsky allowed his temper to get the better of him. By no means did it have just cause for the termination.

EPS is not in a position where it may claim conflict of interest as reason for termination. It knew of Wiedenman's CB radio business. There is no evidence which shows any attempt to curtail that business. Where an employer is aware of the potential for conflict of interest and does not nothing to end the conflict, it may not then rely on conflict of interest as a reason for termination.

EPS alleges that Wiedenman acted improperly in dealing with Sharma. But nothing shows that, or what drove Sharma to a competitor. Nothing shows that it was something that Wiedenman said.

Wiedenman may have spent too much time conducting Tac-1 business during work hours. But it is the well established view of the Tribunal [*EPS Communications Ltd.*, BCEST No. D242/98] that before just cause will be found, the employer must show the following where there is that sort of less serious misconduct:

- a) A reasonable standard of performance was established and communicated to the employee;
- b) the employee was clearly and unequivocally notified that his or her employment was in jeopardy unless the standard was met;
- c) the employee is given the time to meet the required standard; and
- d) the employee continued to demonstrate an unwillingness to meet the standard.

I find that EPS never established limits of what Wiedenman was allowed to do in the way of Tac-1 business. It is not even suggested to me that Wiedenman was warned that his job was in jeopardy and that he was then given time to change.

The onus is on the employer to show just cause. EPS claims that it had just cause to terminate Wiedenman but it fails to show that. The result is that it must now pay Wiedenman 2 weeks' compensation for length of service.

The Determination awards compensation for length of service incorrectly in that Wiedenman was paid \$1,360 semi-monthly rather than bi-weekly. The Determination is varied so that it reflects the correct pay rate. Wiedenman is owed compensation for length of service of \$1,255.38 and 4 percent vacation pay on that, \$50.22, for a total of \$1,305.60. To that must be added interest. I leave the calculation of interest to the Director.

**ORDER**

I order, pursuant to section 115 of the *Act*, that the Determination dated February 10, 1998 be varied. Joseph Wiedenman is owed \$1,305.60 plus whatever interest is owed pursuant to Section 88 of the *Act*.

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**Lorne D. Collingwood**  
**Adjudicator**  
**Employment Standards Tribunal**