Employment Standards TRIBUNAL

An appeal

- by -

Westburne Industrial Enterprises Ltd.
Les Entrepri Operating as Nedco
(the"Employer")

- 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.: 2001/308

DATE OF DECISION: June 27, 2001

DECISION

FACTS AND ANALYSIS

This matter arises out of a referral back to the Director of Employment Standards (the "Director") in an earlier decision of the Tribunal (*Westburne Industrial Enterprises Les Entrepri Operating As Nedco* , BC EST # D371/00 (the "Original Decision")). The Original Decision was issued on September 15, 2000. The decision arose out of an appeal by the Employer pursuant to Section 112 of the Employment Standards Act (the "Act"), against two Determinations of the Director issued on May 19, 2000. The Determinations concluded that Mr. Reza Amiralai and Mr. Curtis Lappin were owed $2,752.15 and $1,528.91, respectively, by the Employer on account of compensation for length of service. The two employees left the Employer, in one case to start a business, in another, to work for another employer.

The essential part of the original decision is encapsulated in the following quote:

> The Employer argues that the Determination is wrong. The Employer takes issue with the delegate's findings with respect to Amiralai and Lappin's entitlement to compensation for length of service. The Employer agues that the delegate erred in failing to consider the Tribunal's decision in Unisource Canada Inc., BC EST D#122/98. The Employer says that the circumstances at hand are similar to those in Unisource. In that case the Tribunal found that a conflict of interest existed based on the employees in question obtaining employment with a competitor of their employer, Unisource and, therefore, were not entitled to compensation for length of service. The Employer also says that the delegate failed to properly investigate whether the two employees were in such a conflict situation. At the hearing, the Employer requested that the matter be remitted back to the Director for further investigation. The Employer also argued that, should I proceed with the hearing on the merits, that it was entitled to request certain documents disclosed from Amiralai and Lappin. This documentation included customer lists and product lists.
>
> Following submissions from the parties, I decided to accede to the Employer's request...
>
> Moreover, it is clear from the Determination that the delegate did not consider the Tribunal's decision in *Unisourc*e, above. There may well be distinguishing features that make that case inapplicable to the instant case. I do not decide that point. In *Unisourc*e, the Tribunal stated: "In the present case, the complainant employees, who apparently all had access to confidential proprietary Unisource information..., and while still employed by Unisource, entered into employment contracts with a Unisource competitor. Absent some sort of restrictive covenant..., the employees were free to enter into employment contracts 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 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."

In the earlier decision, I decided to refer the matter back to the Director for further investigation on an "expeditious basis."

A letter from the delegate, dated April 17, 2001, i.e., some seven months after the Decision, states the results of the referral back. In the letter, the delegate states that the Employer refused to provide information and that since "the Employer did not participate in the investigation, the circumstances remained the same. Therefore, I am standing by my original determinations ... and asking the Tribunal to reconvene with regard to the appeal."

I am not going to accede to the delegate's request. In the circumstances, I also do not find that there is basis for concluding that the Employer failed to participate in the investigation. In a letter to the delegate, dated March 29, 2001, the Employer's counsel explains, inter alia, that the delegate "expressly stated that regardless of any conclusions you reach with respect to the competitive nature of the current activities of the two former employees, you will re-issue your Determination." According to the Employer's counsel, the delegate requested extensive information and documentation from the Employer. In the letter, the Employer's counsel states: "[y]ou have told both the writer and the Employer that you will re-issue your Determination regardless of the contents of such records or the outcome of your 'investigation'." In a subsequent letter to the Tribunal, dated May 11, 2001, the Employer's counsel states that the delegate informed him that the "Board (sic.) refuses to accept or apply the Unisource decision." In the context, I assume that when the delegate referred to the "Board" he was, in fact, referring to the "Branch," i.e., the Employment Standards Branch. The Employer takes the position that the delegate has "pre-judged this matter" and has conducted himself "so as to prejudice the rights of the employer contrary to both the rule of law and express provisions of the *Employment Standards Act*." The Employer argues that a "pro forma investigation," where the result is

"predetermined," does not meet the requirements of the *Act* or fundamental principles of natural justice. From my review of the file it is clear that the delegate had an opportunity to respond. The delegate does not dispute these factual assertions and I accept them as such.

Section 115 reads in part:

> 115. (1) After considering an appeal, the tribunal may, by order,
>
> (a) confirm, vary or cancel the determination under appeal, or
>
> (b) *refer the matter back to the director*. (Emphasis added)

Section 114 provides in part:

> 114. (2) Before considering an appeal, the tribunal may
>
> (a) *refer the matter back to the director for further investigation*,
>
> (Emphasis added)

Thus, it is clear from the *Act* that the legislature intended that the Tribunal has the power to refer a matter back for further investigation. That power is expressly conferred upon the Tribunal. The general scheme contemplated by the legislature is one where the Director makes a determination which is subject to appeal to the Tribunal. In short, where the Tribunal refers "the matter back," the delegate is required to comply. As argued by the Employer, it is clear from the Original Decision that the delegate was directed to consider whether or not the Tribunal's decision in Unisource applied to the facts at hand. The investigation must be conducted in good faith and in accordance with the principles of natural justice. In the instant case, the delegate indicated to counsel for the Employer that regardless of the outcome of the investigation he was going to re-issue his determination. In my opinion, this creates a reasonable apprehension of bias on the part of the delegate. The words of Lord Denning in *Metropolitan Properties v. Lannon* [1969] 1 QB 577 (CA) are apposite: "... if a right-minded person would think that, in the circumstances, there was a real likelihood of bias ... he should not sit. And if he does sit, his decision cannot stand ..." The delegate did not approach his task with an open mind. In the circumstances, I do not accept the delegate's decision to re-issue his Determination.

While I have some concerns about the Employer's failure to provide the delegate with the information and documentation requested, where it, as in this case, is abundantly clear that the delegate does not intend to carry out proper investigation, I do not fault the Employer.

The matter was referred back to the delegate on an expeditious basis. It is readily apparent that the delegate did not complete his deliberations until some seven months after the Original Decision. In my view, that is not "expeditious."

While I am concerned about the delegates's comments that the "Board (sic) refuses to accept or apply the Unisource decision," for the present purposes, I find it difficult to accept that the Director would not comply with a lawful order of the Tribunal.

While I am generally reluctant to issue specific directions to the Director, I am of the view that I have the authority to give those directions. I agree with the comments of the Adjudicator in Zhang, BCEST #D130/01, where he noted (para. 9):

> "Although Section 115(1)(b) of the *Act*, which empowers the Tribunal to refer matters back to the Director for re-investigation or reconsideration, does not specifically give the Tribunal the authority to refer matters back with directions, the power to give directions can reasonably be implied into Section 115(1)(b)--see Interpretation Act, section 27(2), *Johnston v. Langley School District No. 35* (1979), 12 BCLR 1 (BCSC*), BC (Minister of Health) v. BC (Environmental Appeal Board)* [1996] BCJ 1531 (BCSC*), BC (Liquor Control and Licensing Branch) v. Smillie* [1992] BCJ No. 2883 (BCCA)."

In the circumstances, I refer the matter back to the Director. The Employer raises serious allegations of bias and abuse of process on the part of this delegate. These allegations have not been refuted. Therefore, in order to avoid any apprehension of bias, the investigation must be carried out by a delegate other than the delegate who issued the original Determinations. As well, the investigation must be carried out on an expeditious basis. To avoid further delay to the parties, the investigation must be completed within a reasonable time from the date of this decision. In the circumstances I consider 30 days reasonable. If more time is required, I expect the parties to make written submissions to the Tribunal in that regard.

The Tribunal expects all parties to participate in the process and make every reasonable effort to bring this matter to closure.

ORDER

Pursuant to Sections 115 of the *Act*, I order that matter be referred back to the Director in accordance with the following:

1. The matter is referred back to the Director for further investigation under the terms set out in the Original Decision.

2. The investigation must be carried out by a delegate other than the delegate who issued the original Determinations.

3. The investigation must be carried out on an expeditious basis. The investigation must be completed 30 days from the date of this decision. This time limit may be extended by consent of the parties or by order of the Tribunal.

4. I remain seized of any issues concerning the implementation of this order..

Ib S. Petersen
Adjudicator
Employment Standards Tribunal