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 -

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

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE No.: 2000/397 and 2000/398

DATE OF HEARING: September 11, 2000

DATE OF DECISION: September 15, 2000

DECISION

APPEARANCES/SUBMISSIONS

Mr. Tim Charron	on behalf of the Employer
Mr. Reza Amiralai	on behalf of the himself
Mr. Curtis Lappin	on behalf of himself

FACTS AND ANALYSIS

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against two Determinations of the Director of Employment Standards (the "Director") issued on May 19, 2000 which found that Mr. Reza Amiralai ("Amiralai") and Mr. Curtis Lappin ("Lappin") were entitled to $2,752.15 and $1,528.91 respectively on account compensation for length of service.

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, which Amiralai did not oppose, and order the matter remitted back to the Director for further investigation. Lappin, on the other hand, opposed the Employer's request. Below I set out my reasons for, nevertheless, referring the matter back.

In my view, there is very little analysis and consideration of the facts in the Determinations. It is clear that the two employees resigned and gave two weeks' notice: in one case, that of Amiralai, to start a business; in the other case, that of Lappin, to become employed as a salesperson with another firm. The Employer's contention is that the business and the new employer, in Lappin's case, were competing with it. The relevant portion of the Determination simply states, in Amralai's case, that

> "Mr. Amiralai stated that his product lines was different from those carried by the employer. The employer did not address this aspect. Simply because that [sic] an employee was about to start his own business in the same field does not constitute a conflict even if the product lines are the same."

With respect to Lappin, the Determination states:

> "Mr. Lappin started with another company and Mr. Lappin stated that the base of clientele is completely different. The employer did not address this issue. I am of the opinion that the employer has not clarified and specified enough to raise the argument of conflict of interest...."

There is nothing in the Determinations to suggest that the delegate considered whether or not the customers and the products were similar. The statement attributed to Amiralai may well be correct and the products lines may well be different. As well, the statement attributed to Lappin may be correct. However, in my view the delegate is obligated to investigate the assertions made by the parties and consider the evidence that may be uncovered in the process. It is not sufficient to simply rely on the factual assertions of one party when those assertions are in dispute. The delegate must consider and determine the relative merit of the parties' assertions. In this case, it appears to me that the delegate simply accepted the employees' version and based his Determination on that. In those circumstances, it is appropriate to refer the matters back to the Director. It is not for the Tribunal, as an appellate body, to "investigate" the complaint. In my view, had I decided to proceed with the hearing, I would have been placed in the position of having to do just that.

Moreover, it is clear from the Determination that the delegate did not consider the Tribunal's decision in *Unisource*, above. There may well be distinguishing features that make that case inapplicable to the instant case. I do not decide that point. In *Unisource*, 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 case of Lappin, the delegate found the issue of access to confidential information "irrelevant" because "working for a competitor is without ground [sic]", *i.e.*, not just cause. In Amiralai's case, the delegate similarly rejected the issue of access to confidential information. In the latter case, that conclusion is premised upon the delegate accepting as factual Amiralai's statement that the product lines were different.

ORDER

Pursuant to Section 115 of the Act, I order that the Determinations in this matter, dated May 19, 2000 be referred back to the Director for further investigation on an expeditious basis.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal