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 -

TMSI Telephone Maintenance Services Inc.
("TMSI")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 98/613

DATE OF DECISION: November 16, 1998

DECISION

OVERVIEW

This is an appeal by TMSI Telephone Maintenance Services Inc. ("TMSI"), under Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination which was issued by a delegate of the Director of Employment Standards (the "Director") on August 31, 1998.

The Director determined that TMSI was required to pay wages, including compensation for length of service, to one of its former employees, Conor Monks in the amount of $705.54 (including interest accrued to August 31, 1998).

TMSI submits that there are four aspects of the Determination which support a finding that the Director erred:

(i) the Director concluded that Monks was not in a conflict of interest when he applied to BC Tel for employment while employed by TMSI;

(ii) the Director was mistaken in finding that TMSI was not a competitor of BC Tel;

(iii) Monks did not work on June 6, 1997 and therefore, TMSI does not owe him 4 hours' wages for that day. Only 2 hours' wages is owed; and

(iv) Monks agreed to be an observer for two days prior to accepting employment with TMSI and, therefore, no wages are owed for those two days. Additionally, his complaint is out-of-time on this issue.

As a result, TMSI requests that the Determination be cancelled insofar as it entitles Mr. Monk to compensation for length of service. This appeal proceeded by way of written submissions.

FACTS

Conor Monks was employed by TMSI from August, 1996 to June 5, 1997 at which time his employment was terminated without notice. The letter advising Mr. Monks of that decision was written by Tom MacDonald, President of TMSI, and gave the following reason for terminating his employment:

> It has come to our attention that you have undertaken employment with a competitor while currently under our employment. This provides cause for immediate termination without notice.

(reproduced as written)

The Director made the following finding with respect to Mr. MacDonald's letter:

> I cannot find that there is an issue of conflict of interest for Monks between TMSI and his new employment... I find that Compensation for Length of Service is owing.
>
> (reproduced as written)

Mr. Monks acknowledges that while still employed by TMSI, he applied for employment with BC Tel. He also acknowledges that TMSI is a competitor of BC Tel insofar as TMSI is an "interconnect company" which sells, installs and services business telephone systems.

Mr. Monks was required to visit BC Tel's offices on two occasions as part of the employment recruitment process. On the first occasion he undertook an aptitude test "after work", by which I understand him to mean in the late afternoon/early evening. His second appointment, which was a pre-employment interview, took place during the afternoon. On that occasion he requested and was granted a "personal business" leave by his supervisor, Bob Reilly.

On June 4, 1997 Mr. Monks informed Mr. Reilly that he should expect a telephone call from BC Tel because he had given Mr. Reilly's name "as a reference". The following morning, Mr. Monks' employment was terminated, by way of the letter described above. It was not until June 19, 1997 that Mr. Monks received a written offer of employment from BC Tel. He began his employment with BC Tel as an installer/repairperson on July 2, 1997.

The Director found that Mr. Monks was entitled to be paid 4 hours wages for June 5, 1997. On behalf of TMSI, Mr. Reilly made the following submission:

> Conor Monks' letter says he spent time returning tools, cleaning out the van, and signing papers. I was involved in this process. Conor Monks arrived at the TMSI offices at 8:00 A.M. He was immediately given his letter of termination. The returning of tools and the cleaning out of the van is a misrepresentation of work performed. His tools are kept in one tool bag that was returned to us. As for cleaning out the van, I escorted Conor to the van to remove his personal belongings (coat, lunch, etc.) before locking the van and storing the keys in our office. The signing of papers, I have attached a copy of the paperwork Conor speaks of (Item "G"). A single page document we required from him regarding the return of all TMSI items. The date applied to his signature is June 9, 1997, the Monday following his termination.
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> We agree that two hours compensation is due, but disagree with the four hours, as he did not begin work on Thursday, June 6, 1997.
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> (reproduced as written)

Mr. Monks' recollection of the events of June 5, 1997 was contained in the following written statement:

> I arrived at the office at 8:00 A.M. and was given my letter of termination. A brief conversation ensued and then Bob Reilly accompanied me to the van. While outside I gathered my tools and my tool bag. I went through the van conferring with Bob as to which items, tools and equipment belonged to who. I gathered my personal things and disposed of some garbage and other items. We went back to the office where we itemized and inspected each item and tool. I then cleaned and returned the tool bag. Another brief conversation ensued, and I was on my way.

The Director also found that Mr. Monks was entitled to be paid wages for two days at the beginning of his employment:

> TMSI said they were evaluating Monks to make a good hiring decision and to observe the kind of work in detail that would eventually be expected of him. However the definition of "employee" as per the *Act* includes, "...(b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee, (c) a person being trained by an employer for the employer's business...". I therefore find that Monks was an employee at the time of his evaluation and is owed wages for that period.
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> (Determination, page 2)

TMSI submitted an unsworn, written statement by Chris Farrer, "head technician" employed by TMSI, which states that Mr. Monks "rode with me to see what I thought of him." Mr. Farrer described Mr. Monks as a recent BCIT graduate and a "person with no tools and no knowledge of what I was doing... (who)... was asked to stay out of the way." He also stated that "I wasn't asked to show Conor Monks anything or to train him. He was just to watch and that is what he did."

Mr. Monks' unsworn, written statement describes the two days which he spent with Mr. Farrer as follows:

> During the two days I rode with Chris Farrer, I started my training for the job. I was instructed on company structure and operation, types of equipment and services they provided, benefits and expectations. All this is information pertinent to the job. I was also performing physical work; hauling tools and equipment, cleaning up and aiding wherever possible...

ANALYSIS

Conflict of Interest

I will begin my reasons by first addressing the "conflict of interest" issue. The essence of the "conflict of interest" issue is whether or not Mr. Monks put himself into a conflict of interest by applying for employment with BC Tel while still employed by TMSI and, if he did, whether that established "just cause" for terminating his employment with TMSI.

Section 63 of the *Act* places a liability on employers to pay compensation for length of service, but that liability is deemed to be discharged under certain circumstances, including where an employee is "dismissed for just cause" (Sec. 63 (3)(c)).

The Tribunal dealt with conflict of interest in the employment context where four employees had access to confidential proprietary information (that is, they were fiduciaries) and, while still employed, entered into employment contracts with a competitor of their employer (see: *Unisource Canada Inc.*, BC EST #D172/97). In that Decision, the Adjudicator concluded that the employer, Unisource, had just cause to terminate each of the four employees. Although the Determination had drawn a distinction between a "potential" conflict of interest and an "actual" conflict of interest, the Adjudicator found that distinction to be unhelpful and gave the following reasons:

> Clearly, the employer had reasons 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.

> 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.
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> *Unisource Canada Inc.*, BC EST #D172/97 at page 3

There is no evidence before me which suggests that Mr. Monks' employment with TMSI was of a fiduciary nature. The evidence is clear, however, that Mr. Monks had not entered into an employment relationship with BC Tel at the time (June 5, 1997) that TMSI terminated his employment.

As of June 5, 1997 Mr. Monks had done nothing more than apply, be tested and interviewed for possible employment with BC Tel. It was not until June 19, 1997 that he was offered employment.

TMSI must establish, to succeed in this appeal, that it had 'just cause' to terminate Mr. Monk's employment as of June 5, 1997. 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.

While I do not agree with all of the analysis in *Unisource, supra* I do agree with my colleague's overall conclusion that, under the common law, employees owe a general duty of fidelity to their employer. I also agree that part of that duty includes a duty for employees to avoid conflicts between their personal interest and their employer's interest. However, as in so many areas of the law, it is difficult or impossible to make an absolute statement about how far that duty extends. A review of the cases decided by various courts leads me to conclude that it is not always a ground for summary dismissal when an employee places him or herself in a conflict of interest with his or her employer.

When an employee decides to resign from their current employment so as to seek employment elsewhere, he or she continues to have a duty of fidelity to the current employer. The current state of the law in this province appears to be that an employee does not breach the duty of fidelity to the employer by using knowledge which was gained in the normal course of employment and which is not secret or confidential [see *Tomenson Saunders Whitehead Ltd. v. Baird*, 7 C.C.E.L. 176 (Ont. H.C.)]. However, if the employee has deliberately collected or memorized information for the purpose of taking it to a competitor, the employee will have breached the duty of fidelity and may be dismissed summarily.

The mere fact that an employee indicates that he or she is seeking alternative employment does not, in itself, create a ground for summary dismissal [see: *Mosher v. Twincities Cooperative Dairy* (1984) 5 C.C.E.L. 72 (N.S.T.D.)]. However, an employee who is

planning to resign would be in a conflict of interest under circumstances where there is evidence of an intention to breach confidence [*Leith v. Rosen Fuels Ltd*., (1985) 5 C.C.E.L. 184 (Ont. H.C.)], flagrant dishonesty [*Willis v. Astro Tire Ltd*., (1983) 28 Sask. R. 107 (Sask. Q.B.)] or abuse of the employer's resources [Wilcox v. G.W.G., 8 C.C.E.L. 11 (Alta. C.A.)].

In *Marziali v. Mario's Gelati Ltd*., (1989) 14 ACWS (3rd) 253, the B.C. Supreme Court rejected the notion that the existence of a potential conflict of interest establishes just cause for summary dismissal.

In my view, the position taken by TMSI on this issue would have significant and undesirable consequences if I were to adopt it in interpreting Section 63 of the *Act*. When an employee resigns to accept a new position, it is often in the same industry or sector of the economy. It is also not unusual for an employee to advance his or her career by finding employment with a competitor of their current employer. It would not be a "fair and liberal" interpretation of Section 63 (see: *Machtinger v. HOJ Industries* [1992] 1 S.C.R. 846) if employees were to be deprived of compensation for length of service by virtue of my finding that seeking alternative employment while currently employed creates just cause for dismissal.

There is no evidence before me that Mr. Monks copied, acquired, used or planned to use any information or knowledge he acquired while employed by TMSI. Such evidence would be essential for me to find that he had placed himself in a conflict of interest. The mere fact that Mr. Monks knew TMSI's procedures and sought employment elsewhere does not create a conflict of interest. As I understand the law, an employer must have evidence which establishes, on the balance of probabilities, that the employee has deliberately collected information for the purpose of taking it to a competitor. This is not an automatic presumption that an employee with access to confidential information breaches his or her duty of fidelity merely by seeking and accepting employment with a competitor. In this appeal there is no evidence that Mr. Monks had access to confidential information and, as I understand the law, he is quite entitled to use product knowledge (which is not a trade secret) acquired while employed by TMSI [see *Genesta Manufacturing v. Babey* 6 C.C.E.L. 291 (Ont. H.C.)] in his future career.

In summary, my views on this aspect of TMSI's appeal are:

1. When an employee announces his or her intention to resign and take up an employment opportunity with a competitor, the mere possibility of conflict is not, of itself, grounds to dismiss the employee summarily;

2. There must be some evidence of actual breach of confidence or an intent to breach confidence by the employee;

3. It is not a breach of confidence for an employee to use the knowledge and skills he or she learned in the course of employment for the benefit of a competitor;

4. It is not a breach of confidence to gain access to a former employer's customers through the memory of the employee and other publicly available reference sources; and
5. If an employer wishes to dismiss an employer on the suspicion that he or she will breach confidence but has no evidence to that effect, it must pay compensation for length of service under Section 63 of the *Act*.

For all these reasons I find that his ground of TMSI's appeal must fail.

Minimum Daily Pay

Section 34 of the *Act* establishes the requirement for an employer to pay wages to an employee for a minimum number of hours for each day. In particular, Section 34(2) of the *Act* states:

> 34 (2) An employee is entitled to be paid for a minimum of
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> (a) 4 hours at the regular wage, if the employee starts work unless the work is suspended for a reason completely beyond the employer's control, including unsuitable weather conditions, or
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> (b) 2 hours at the regular wage, in any other case unless the employee is unfit to work or fails to comply with the Industrial Health and Safety Regulation of the Workers' Compensation Board.

Thus, the central question which I must answer in this appeal is whether the Director erred in determining that Mr. Monks was entitled to wages for 4 hours on June 5, 1997 (his last day of employment with TMSI).

There is no dispute that Mr. Monks reported for work at the usual time as required by TMSI on June 5th. TMSI acknowledges that it is required to pay at least 2 hours wages under Section 34(2)(b) of the *Act*. Thus, the issue in dispute is narrowed to whether the Director erred in determining that Mr. Monks is entitled to 4 hours wages under Section 34(2)(a) of the *Act*. Specifically, the question becomes one of whether Mr. Monks started work on June 5th. "Work" is defined in Section 1 of the *Act* as meaning "... the labour or services an employee performs for an employer whether in the employee's residence or elsewhere." That is, "work" is defined in very broad terms. In my view, the definition of "work" is sufficiently broad to include the activities undertaken by Mr. Monks (at Mr. Reilly's request) on the morning of June 5, 1997. If Mr. Monks had not been required to remove his personal belongings and other materials from the van, I have no doubt that another of TMSI's employees would have carried out those tasks. Also, the requirement to confer with Mr. Reilly and to sign a release ("termination certification") brought the activities of June 5th within the statutory definition of "work."

For all these reasons I find that this ground of TMSI's must fail.

Two days' wages

Section 1 of the *Act* defines "employee" and "employer" as follows:

> "employee" includes
>
> (a) a person, including a deceased person, receiving or entitled to wages for work performed for another,
>
> **(b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,**
>
> **(c) a person being trained by an employer for the employer's business,**
>
> (d) a person on leave from an employer, and
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> (e) a person who has a right of recall;
>
> "employer" includes a person
>
> (a) who has or had **control or direction of an employee**, or
>
> (b) who is or was responsible, **directly or indirectly**, for the employment of an employee;
>
> (emphasis added)

The two phrases on which I have placed emphasis in the definitions are of particular relevance to this appeal. When I consider the parties' written submissions and the evidence before me I find that the Director did not err in determining that Mr. Monks is entitled to two days' wages. TMSI had control or direction over Mr. Monks' activities on the two days in question and those activities fall within the ambit of "... being trained by an employer for the employer's business."

Section 74(4) of the *Act* requires that a person who wishes to make a complaint alleging a contravention of Section 8, 10 or 11 of the *Act* must deliver the complaint in writing to the Director within 6 months of the contravention. TMSI seeks to rely on Section 74(4) to establish that the Director erred in finding that Mr. Monks is entitled to two days' wages. However, Mr. Monks did not complain nor allege that TMSI made false representations (Section 8). Rather, he complained and alleged non-payment of wages. That complaint was made in a timely manner as it was made within 6 months of this employment being terminated (Section 74(3) of the *Act*).

ORDER

I order under Section 115 of the *Act*, and for all of the reasons given above, that the Determination be confirmed together with whatever interest may be payable under Section 88 of the *Act*.

Geoffrey Crampton
Chair
Employment Standards Tribunal