

An appeal

- by -

Unisource Canada, Inc.  
("Unisource")

- 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:** David B. Stevenson

**FILE No.:** 2001/457

**DATE OF DECISION:** September 26, 2001



## DECISION

### OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Unisource Canada, Inc. (“Unisource”) of a Determination that was issued on May 23, 2001 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Unisource had contravened Part 8, Section 63 of the *Act* in respect of the employment of Shannon Yelland (“Yelland”) and ordered Unisource to cease contravening and to comply with the *Act* and to pay an amount of \$1,693.06.

Unisource says the Director wrongly decided that Yelland was not dismissed for just cause.

### ISSUE

The issue in this appeal is whether the Director erred in concluding Unisource had not met the burden of showing just cause for dismissing Yelland.

### FACTS

The Determination set out the following background information:

The Employer is Canada’s largest distributor of printing, imaging, packaging and maintenance supplies to business and government. They have over 1600 employees in Canada, including 250 sales representatives. Its head offices are in Richmond Hill, Ontario and LaSalle, Quebec. The company has 22 warehouses across Canada. In B.C., the employer has offices in New Westminster, Victoria and Prince George.

The complainant started working for the employer approximately twelve years ago (when the company was called Price Daxion). She worked as a Merchandiser and Inventory Analyst and earned \$18.84 an hour.

On July 5, 1999, she gave two weeks written notice of resignation. The resignation letter stated, “This is a notice of my resignation effective today Monday July 5, 1999. I am giving Unisource two weeks notice. I decided to pursue other opportunities.” On the day she submitted her resignation, her employment was terminated. Her new job was to start on July 19, 1999, so she lost two weeks’ wages. When the employer refused to pay these wages, she filed a complaint . . . . She is only seeking length of service compensation.



The Determination set out information provided by Yelland describing her job;

The complainant worked in the merchandising department with three other merchandisers and three inventory control analysts. Her job consisted of many administrative tasks. She had no direct contact with the employer's customers. The merchandising department dealt with the sales representatives and customer service representatives about buying specialty items, dealt with MSDS Sheets, got quotes from the suppliers and talked with buyers back east. Inventory control dealt with controlling stock the stock they had on the floor and expediting stock when the inventory reached zero. They advised the sales and customer service representatives when goods were to arrive. She mostly dealt with Clearance reports, low stock reports, special preprints for certain accounts, helping out with school tenders and submitting requests to head office for new product codes.

In the course of determining the merits of the complaint, the Director considered whether Yelland had access to confidential information, stating:

This complainant had access to confidential information; however, most employees have access to this kind of information. The complaint did not have access to the company's future plans, their marketing strategy, their financial dealing, etc.

In the appeal submission, counsel for Unisource submits the following additional assertions of fact:

2. The complainant had access to substantially all of the confidential and proprietary information of the appellant not available to the competition of the appellant. This information included the identity of customers, contact information, product requirements and pricing. The complainant also had proprietary information with respect to suppliers of the appellant. The appellant disputes the statement made by the Delegate to the effect that the complainant had no dealings with customers of the appellant. Attached is a current job description for the position.
3. The position of Merchandiser is a critical part of the sales support effort. The position required the complainant to have complete knowledge of customer requirements, including conditions of sale (taxes, margins, volume, delivery specifications, forecasts); all of this information is proprietary and confidential.
4. The complainant accepted employment with . . . a competitor of the appellant on or before July 5, 1999.

Other assertions of fact were provided with the appeal, but did not add to or dispute the findings made in the Determination.



In reply to the appeal, Yelland makes the following assertions of fact:

3. Any information I had access to were not trade secrets and the level of information I had access to was available to everyone else in the organization.
4. I did not have direct contact with customers and my tasks were administrative.

Unisource has filed a response to the submissions of the Director and Yelland. No additional assertions of fact were provided.

### **ARGUMENT AND ANALYSIS**

Unisource does not contend that Yelland was a fiduciary, nor do they challenge the statement in the Determination that merely seeking other employment is not just cause for dismissal of an employee. The basis for this appeal is found in the following excerpts from the submission of counsel for Unisource:

We submit the complainant placed herself in a position of conflict as soon as she entered into an agreement that imposed on her the obligations of loyalty and fidelity to a competitor.

A conflict of interest arises as soon as there is any possibility that the interests of the two employers, the appellant and Netpak, will collide.

The Director's argument is extensive and I will do no more than attempt to summarize it:

1. There is no general right of termination once an employee enters into an employment contract with a competitor of the employer.  
*Re Gray*, BC EST #D151/96  
*Re Unisource Canada, Inc.*, BC EST #D172/97  
*Re MacMillan Bloedel Limited*, BC EST #D214/99
2. The "potential" for a conflict of interest does not constitute just cause for dismissal; actual proof of a conflict of interest is required, except in some circumstances where it may be inferred.  
*Re TMSI Telephone Maintenance Services Inc.*, BC EST #D510/98  
*Epic Express -and- Thrasher*, [1998] C.L.A.D. No. 629
3. Yelland was not a fiduciary, nor was she a key employee or one with access to confidential or proprietary information. She was a "regular, or mere employee".  
*Canada Aero Services Ltd. v. O'Malley and others*, [1974] S.C.R. 592  
*Unisource Canada Inc. v. Network Paper and Packaging Ltd.*, [2000] B.C.J. No. 531
4. While Yelland, even as a "mere employee" had a duty to be honest and faithful in the performance of her employment duties, which included a duty to avoid a conflict of



interest, just cause is not established unless it is shown that the duty has been breached. The duty is not breached by inference or implication. There was no evidence Yelland was in competition with her employer at any time prior to her dismissal or that she had, or intended to, misuse information belonging to her employer.

*Re TMSI Telephone Maintenance Services Inc., supra*

*Epic Express -and- Thrasher, supra*

*Barton Insurance Brokers Ltd. v. Irwin*, (1999) 40 C.C.E.L. (2d) 159 (B.C.C.A.)

5. Confidential information is that which has a degree of confidentiality and a quality of confidence. Proprietary information connotes a property right to some device, process, plan or formula used in the operation of the business and which provides the employer an edge over his competitors. Even though it has been accepted that an employee with access to such information is in a conflict of interest upon taking a position with a competitor, the burden is on Unisource to show the information is confidential or proprietary.

*Re MacMillan Bloedel Limited, supra*

*Barton Insurance Brokers Ltd. v. Irwin, supra*

6. The argument of the employer is inconsistent with the stated purpose of the *Act* to encourage open communication between employers and employees.

7. It would not be part of the fair and liberal approach encouraged by the Supreme Court of Canada to adopt an interpretation of the *Act* that dissuaded employees from seeking to advance themselves.

*Machtiger v. HOJ Industries Ltd*, [1992] 1 S.C.R. 986

*Re TMSI Telephone Maintenance Services Inc., supra*

8. Dismissal is no longer an automatic response to conduct that is dishonest. The same holds for conflict of interest, which is grounded in the requirement to be honest and faithful in the performance of one's employment duties. Even where conduct indicating a conflict of interest is established, it still must be shown that such conduct is incompatible with the continuation of the employment relationship.

*McKinley v. B.C. Tel*, [2001] S.C.J. No. 40

In summary, the Director says there is nothing in the material that justifies a conclusion that Yelland had given just cause for termination. As a mere employee without access to confidential or proprietary information, she could only be dismissed upon the employer showing cause and no cause has been shown.

Yelland, in her reply to the appeal, submits that she was not in a conflict of interest. The nature of her job did not provide her with access to confidential information that was not available to everyone else in the organization. She had no direct contact with any customers and, in any event, had no "proprietary" information about them. She says her salary, of \$37,000.00 a year after ten years with Unisource, reflected where she stood in the company hierarchy. Finally, she



says that she demonstrated responsibility and obligation to her employer by providing two weeks notice so she could be involved in training a replacement for her.

In response, counsel for Unisource reiterates that the acceptance of employment with a competitor of Unisource placed Yelland in a conflict of interest and justified her summary dismissal.

This appeal must be dismissed.

I do not accept the proposition that a mere employee, in this case Yelland, who has accepted employment with a competitor of her employer is automatically in a conflict of interest and may be summarily dismissed. No authority has been given for that proposition and, to the best of my knowledge, none exists. In fact, the Tribunal, in *Re Unisource Canada, Inc.*, has rejected the existence of any general proposition that an employee who enters into an agreement to be employed by a competitor provides just cause for dismissal. In every case, it is a question of fact. The facts in *Re MacMillan Bloedel, supra*, warranted a conclusion that the terminated employee, Carter, was in a conflict of interest because of the nature of his position and the nature of the information to which he had access. Those considerations do not arise in this case. Nothing has persuaded me that Yelland had access to the kind or quality of information that could give rise to a conflict of interest. She says the information she received was available to everyone else in the organization. She had no direct contact with customers. Her duties were administrative. Unisource does not contest those assertions of fact, but have made broad general assertions that Yelland had access to confidential and proprietary information. The assertions made by Yelland are consistent with the findings of fact made in the Determination. The burden is Unisource to show those findings of fact to be incorrect. I accept the submission from the Director that “conflict of interest requires actual proof of its existence” (*cf. Epic Express -and- Thrasher, supra*).

The Determination and the submission of the Director have attempted to capture what has been considered by the Courts and other tribunals to be confidential or proprietary information. The Determination noted a perceived distinction made by the Courts between information that has the quality of confidentiality, such as that obtained by a senior manager of the structure and philosophy of the company, as opposed to the piecemeal and compartmentalized information available to an ordinary employee (*cf. Barton Insurance Brokers Ltd. v. Irwin, supra*). The submission of the Director elaborates on the meaning attributed to the two concepts of confidential information and proprietary information by the Courts. What is noteworthy in that effort is the difficulty the Courts have had in capturing the meaning of those concepts with any precision. In *Ebco Industries Ltd. v. Kaltech Manufacturing Ltd. and others*, [1999] B.C.J. No.2350 (BCSC), the Court considered a number of authorities that had defined trade secrets and confidential information. I do not perceive there to be any significant difference between what had been termed “trade secret” and what has been referred to as proprietary information. In respect of trade secrets, or proprietary information, the Court stated:

In *RI Crane Limited v. Ashton*, [1949] O.R. 303, Chevrier J. accepted the following definitions of trade secrets, at 388-89:



1<sup>st</sup>. “A trade secret . . . is a property right, and differs from a patent in that as soon as the secret is discovered, either by an examination of the product or any other honest way, the discoverer has the full right of using it. . . . *Progress Laundry Co. v. Hamilton*, 270 S.W. 834, 835, 208 Ky. 348.”

2<sup>nd</sup>. “A trade secret is a plan or process, tool mechanism or compound known only to its owner and those of his employees to whom it is necessary to confide it. *Cameron Mach. Co. v. Samuel M. Longdon Co.*, N.J. 115 A. 212, 214; *Victor Chemical Works v. Iliff*, 132 N.E. 806, 811, 299 Ill. 532.”

3<sup>rd</sup>. “The term ‘trade secret’, as usually understood, means a secret formula or process not patented, but known only to certain individuals using it in compounding some article of trade having a commercial value, and does not denote the mere privacy with which an ordinary commercial business is carried on. *Glucol Mfg. Co. v. Shulist*, 214 N.W. 152, 153, 239 Mich. 70.”

4<sup>th</sup>. “A trade secret may consist of any formula, pattern, device, or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. A trade secret is a process or device for continuous use in the operation of the business. The subject matter of a trade secret must be secret. Restatement, Torts, 757.”

In *Faccenda Chicken Ltd. v. Fowler*, [1986] 1 All E.R. 617 (C.A.), it was stated that the obligation not to use or disclose information clearly covered such things as secret processes of manufacture or designs or special methods of construction and other information which is of a sufficiently high degree of confidentiality as to amount to a trade secret, but it was impossible to provide a list of matters which could qualify as trade secrets. However, as to trade secrets, certain facts could throw light on the status of the information and its degree of confidentiality. *These include the nature of the employment, whether the employer impressed on the employee the confidentiality of the information or restricted its dissemination and whether the relevant information could be easily isolated from other information which the employee was free to use or disclose.*

(emphasis added)

The Court said the following about what is confidential information:

In *Pharand Ski Corp. v. Alberta*, (1991), 37 C.P.R. (3d) 288 (Alta. Q.B.), the Court considered a claim for breach of confidence. On the issue of whether the information had the necessary quality of confidentiality, Mason J. stated, at 316:

A list of factors to be considered to determine if the information has a quality of confidence about it may be found in *Ansell Rubber Co. Pty Ltd. v. Allied*



*Rubber Industries Pty Ltd.*, [1967] V.R. 37, and *Deta Nominees Pty Ltd. v. Viscount Plastics Products Pty Ltd.*, [1979] V.R. 167 at p. 193: see Kearney, *op. cit.*, p. 12. \_\_\_ They are:

1. the extent to which the information is known outside the owner's business
2. the extent to which it is known by employees and others involved in the owner's business
3. the extent of measures taken by him to guard the secrecy of the information
4. the value of the information to him and his competitors
5. the amount of money or effort expended by him in developing the information
6. the ease or difficulty with which the information could be properly acquired or duplicated by others [i.e. by their independent endeavours].

These factors are useful, but as Fullager, J. states in *Deta Nominees* [1979] V.R. 167 at p. 193 they are not exhaustive:

“I apprehend that neither he [namely Gowans, J. in *Ansel’s* case] nor McInerney, J. in *Mense v. Milenkovic* [1973] V.R. 784 at 796-8 intended to convey that one should slavishly check off the factors against the information, as if one were counting spots on some strange creature to see if it was indeed the species of leopard illustrated in the picture book.”

To further emphasize their position regarding the sufficiency of the evidence, the defendants rely upon *Caristrap Corp. v. Cordex Ltd.*, [1967] O.J. No. 14 (H.C.), which involved an application for an interim injunction to prevent, first, the use and disclosure of trade secrets and second, the infringement of the patent. On the first issue, Moorhouse J. said the following:

11. I come next to the question of title secrets, names of customers and divulging and disclosing the same. On the hearing I was impressed with the clarity and the apparent reasonableness of the argument for the corporate defendant when he asked “Is what is claimed to be a secret clear and apparent?”.

14. It must surely follow that sufficient of the nature of the secret be disclosed to enable the Court to determine whether what is asked goes further than what is necessary. On the material, I cannot so find.





There is nothing in the appeal submission made by counsel for Unisource that provides any insight whatsoever into the assertion that Yelland had access to confidential and proprietary information. As well as not being a *de facto* conflict of interest, the fact of Yelland taking work with a competitor is not, of itself, evidence of a conflict of interest.

It cannot be overlooked that conflict of interest is an aspect of the duty to be honest and faithful in the performance of one's employment duties. That duty is described in the following passage:

It has long been accepted that there is a fundamental term implied in every contract of employment that an employee is expected to serve his employer honestly and faithfully during the term of his employment. This duty of fidelity and good faith permeates the entire relationship between employer and employee. This duty includes an obligation upon the employee to act in the best interests of his employer at all times. The employee shall not follow a course of action that harms or places at risk the interests of the employer.

It is trite that, under the *Act*, no employee may be summarily dismissed except for reasons that show misconduct by the employee that is inconsistent with the continuation of the employment relationship. (see *Re Grouse Mountain Resorts Ltd.*, BC EST #D143/96). In other words, in order to terminate an employee summarily the employer must show there has been misconduct on the part of the employee amounting to a fundamental breach, or repudiation, of the employment relationship. The burden is on the employer to establish such misconduct on the facts. The requirements for establishing just cause do not change simply because a conflict of interest is alleged. While there are some circumstances where a conflict of interest has been inferred, this case is not one of those and, as indicated above, Unisource must prove the actual existence of a conflict of interest before it may seek to dismiss Yelland on that ground. Having failed to do that, there is no basis for finding the Determination was wrong in its conclusion that Unisource had not shown their obligation to pay Yelland length of service compensation was deemed discharged.

## **ORDER**

Pursuant to Section 115 of the *Act*, I order the Determination dated May 23, 2001 be confirmed in the amount of \$1,693.06, together with any interest that has accrued pursuant to Section 88 of the *Act*.

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**David B. Stevenson**  
**Adjudicator**  
**Employment Standards Tribunal**