

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.: 2001/467

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 Robert Guidi (“Guidi”) and ordered Unisource to cease contravening and to comply with the *Act* and to pay an amount of \$795.19.

Unisource says the Determination is wrong because Guidi was dismissed for just cause.

ISSUE

The issue in this appeal is whether the Director erred in concluding Unisource had not met its burden to show just cause for dismissing Guidi.

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 Westminister, Victoria and Prince George.

The complainant started working for the employer on October 1, 1998; he was a Customer Service Representative at the employer’s New Westminister location. He was paid a salary of \$35,000 a year. He submitted his notice of resignation to his supervisor, Paul Getty, on May 31, 1999. This notice stated that his last day of work would be June 11, 1999. He was then given a letter stating that his employment was being terminated immediately. The letter stated:

“You have advised that you are leaving employment with us to go to Enterprise Paper, a direct competitor of Unisource Canada, Inc. As a result, we will consider your resignation effective today, in light of a potential conflict of interest.



The Determination also set out a description of the position as it was provided by Guidi:

As a Customer Service Representative, the complainant was responsible for receiving incoming telephone calls from established customers. He received orders from them and then entered the order into the computer. Most of the calls were from established customers. He would also phone established customers for their orders. He did not do telemarketing or cold calls. The position was very different from that of an outside sales representative. While performing the above tasks, he would have access to the customer's product list, product history, and pricing. He would also have the name of the person at the customer's place of business who would be in charge of ordering product.

The Determination also indicated that counsel for Unisource had been asked for a job description for Guidi or, alternatively, the particulars of his job duties, but had not responded to that request.

In the appeal submission, counsel for Unisource set out the following additional facts:

2. . . . the complainant had direct communication with customers of the appellant as a central part of his work duties;
3. The complainant had access to substantially all of the confidential information of the appellant with respect to customers that is not available to the competitors of the appellant. This information included the identity of the customers, contact information, product requirements and pricing.
4. The complainant accepted employment with, Enterprise Paper, a competitor of the appellant on or before May 31, 1999.

Counsel also says "there is a dispute with respect to the allegations of fact concerning the duties of the complainant".

ARGUMENT AND ANALYSIS

The argument made by Unisource is captured in the following part of the appeal submission:

It is settled law that an employer is entitled to terminate an employee who places himself in a position of conflict with the interests of the employer.

. . .

We submit that the complainant placed himself in a position of conflict as soon as he entered into an agreement that imposed upon him the obligation of loyalty and fidelity to a competitor.



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

I disagree. In a companion case to this decision, *Re Unisource Canada, Inc. (Yelland)*, BC EST #D513/01, I stated:

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.

From a factual perspective, the burden on Unisource in this appeal is to show the conclusions of fact in the Determination were wrong. That burden includes, at least, a requirement to show actual proof of the existence of a conflict of interest. In fact, Guidi was dismissed on the basis of a “potential conflict of interest”, not on the basis of any actual conflict of interest. As the Tribunal stated in *Re Unisource Canada, Inc.*, BC EST #D172/97:

I do not find the phrase “potential conflict of interest” . . . to be helpful. Either one is in a conflict of interest vis-à-vis some other party (*i.e.* a relationship) or one is not.

The Determination concluded there was no evidence that Guidi was in a conflict of interest: Unisource has not provided any basis for rejecting that conclusion. As indicated in the quote above, the Tribunal has rejected any general principle that an employee who accepts employment with a competitor is, from that fact alone, in a conflict of interest. Consequently, the mere fact that Guidi had accepted employment with a competitor is not sufficient to justify his dismissal. A conflict of interest might be established by showing Guidi was a fiduciary, but no such assertion has been made and he quite clearly was not a fiduciary.

Nor has there been any indication that he was a “key employee” and should be considered to be in a conflict of interest because of the nature of his position and the nature of the information to which he had access. Unisource has generally alleged that Guidi had access to confidential and proprietary information. There is, however, nothing in the facts that justifies a conclusion the information to which Guidi had access could reasonably be described as either confidential or proprietary (see the discussion in *Re Unisource Canada, Inc. (Yelland)*, BC EST #D513/01 on what is confidential and proprietary information).



In all the circumstances, the duty owed by Guidi to Unisource is described in the following excerpt from *Unisource Canada, Inc. v. Network Paper and Packaging Ltd. and others*, [2000] B.C.J. No. 531:

[In] *Barton Insurance Brokers Ltd. v. Irwin* (1999), 40 C.C.E.L. (2d) 159 (B.C.C.A.) . . . the Court of Appeal upheld the decision of the trial judge, [1997] B.C.J. No. 2132, that a former salesperson with minor supervisory duties was only an employee, as opposed to a manager, director or “key employee”, and, as such, she owed no fiduciary duty to her former employer. *It was held that she owed her former employer a duty not to take, or divulge, client lists and confidential information*, but that after she left that employment, she was entitled to recall the names of people she had formerly dealt with and to solicit their business. Hall, J.A., for the court, (at p. 166) referred to the case of *Canadian Aero Service Ltd. v. O'Malley* (1973), 40 D.L.R. (3d) 371 (S.C.C.) as a useful case in drawing distinctions among persons who are employed at different levels of responsibility.

(emphasis added)

While the above statement arose in the context of an application to temporarily enjoin former employees of Unisource from carrying on business in competition with them, the obligation described by the Court for a former employee is, in my view, no greater or lesser than the obligation on a “mere employee” who has given notice of resignation in order to take a position with a competitor. In the circumstances, it has not been established that Guidi was in any conflict of interest.

The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated May 23, 2001 be confirmed in the amount of \$795.19, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal