Employment Standards TRIBUNAL

An appeal

- by -

Air Products Canada Ltd.
("Air Products")

- 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.: 2001/471

DATE OF DECISION: September 28, 2001

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Air Products Canada Ltd. ("Air Products") of a Determination that was issued on June 4, 2001 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that Air Products had contravened Part 8, Section 63 of the *Act* in respect of the employment of Don Laroque ("Laroque") and ordered Air Products to cease contravening and to comply with the *Act* and to pay an amount of $2,112.68.

Air Products says the Determination is wrong because Laroque was dismissed for just cause.

ISSUE

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

FACTS

There is no dispute on the facts. The Determination set out the following background information and undisputed facts:

> Laroque was employed from 03/01/1995 to 18/10/2000 by Air Products. On October 16, 2000 Laroque handed his supervisor Ian Black (Black) a letter of resignation, providing the company with 5 weeks notice of termination of employment. Laroque informed Black he had accepted employment with a competitor, (BOC). Black immediately phoned his District Supervisor, Stephen Kennedy (Kennedy), who in turn asked to speak to Laroque. Kennedy informed Laroque that his employment was terminated as of that moment and told him to hand in the keys to the building, Dangerous Goods Certificate, alarm code card, and then asked him to leave the building.
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> The employee was paid 2 weeks wages.
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> . . .
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> The following facts are not in dispute:
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> Laroque was employed with Air Products Canada Ltd. from January 3, 1995 until October 18, 2000 as a Customer Service Representative.
>
> It is accepted that the companies, that is Air Products and Laroque's new employer, compete with each other.

> Ms. Jill Martin, Human Resources for Air Products Canada Ltd., on behalf of the employer has said they have no knowledge of Laroque copying any of Air Products's confidential information or otherwise misusing such information and Laroque denies copying confidential information or misusing it.
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> Laroque filed the complaint in the time period allowed under the Act.
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> The business is within provincial jurisdiction.
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> Laroque gave 5 weeks written notice of termination of employment.
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> Air Products dismissed Laroque immediately upon receipt of his notice.
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> Air Products paid Laroque 2 weeks compensation for termination of employment.
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> Air Products issued an ROE to Laroque which indicated that he "quit".

Air Products took the position during the investigation, and in this appeal, that there was just cause to dismiss Laroque:

> We maintain that [entering into discussions with a direct competitor of Air Products for the purpose of obtaining employment, while working for Air Products] is a fundamental breach of his employment contract with us. As well, the fact that Mr. Laroque subsequently accepted employment with our direct competitor constitutes conflict of interest. His voluntary action made it impossible for him to fulfill his role with Air Products with goodwill and fidelity.

Air Products contended the functions and responsibilities of the position held by Laroque placed him in a conflict if interest and provided justification for his dismissal:

> The Kelowna branch is a small operation where employees wear many hats in order to serve our customers. Mr. Laroque was no exception. He held the position of Customer Service Representative for our Kelowna branch office. In this position he performed inside and outside sales activities on our behalf. During his tenure, he was also in direct contact with our customers when he drove our truck to deliver product. I cannot emphasise enough the significance of Mr. Laroque's access to and knowledge of confidential and proprietary sales information, i.e. customer files, pricing, product lines, marketing strategies, etc.

In outlining the functions and responsibilities of the employee's position, the Determination noted:

> Laroque's duties involved sales and the delivery of products for the Kelowna branch and at times for the Kamloops branch. As a sales consultant, Laroque did not set prices nor did he develop market strategies. The prices were set in head

> office. Laroque could barter with customers within certain ranges directed by the head office. As well, during the summer months, Laroque would act as the branch manager while the other manager was away. At those times, his duties entailed processing customer sales, billing customers, on occasion doing payroll, maintaining and coordinating the driver's routes and dealing with customer inquiries.

The Determination substantially discounted the position taken by Air Products on the conflict of interest:

> Fast food restaurants for example have marketing strategies, promotions and ingredients that they tout as confidential. So merely by working in a fast food establishment one could be viewed as being in conflict if they apply with the competing restaurant down the road.
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> . . .
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> I find that Laroque was not a "key employee". He was not part of the core management of Air Products. Therefore he was not subject to a fiduciary duty. In any event, Air Products has not suggested unethical, dishonest conduct or an improper attitude of any kind on the part of Laroque. . . . As a result, I find that he did not breach his duty of fidelity.

ARGUMENT AND ANALYSIS

Air Products, as the appellant, has the burden in this appeal of persuading the Tribunal that the Determination was wrong, in law, in fact or in some manner of mixed law and fact. That burden is, in effect, to persuade the Tribunal there was just cause for dismissing Laroque. It is trite that an employee cannot be terminated under the *Act* unless the employer is able to establish just cause for dismissal.

The argument of Air Products rests on the premise that Laroque's decision to accept a comparable sales position with a direct competitor placed him in a conflict of interest with Air Products and justified his immediate dismissal. Air Products suggests that Laroque could not, in effect, serve two masters. They identify several factors as supporting a conclusion that Laroque was in a conflict of interest and consequently justify his dismissal:

- Laroque was a key employee, with access to company proprietary information, including pricing, marketing strategies and target sales initiatives;
- Laroque was a participant in formulating and developing strategies aimed at increasing the customer base for Air Products in the Kelowna area;
- Laroque was in a sensitive position, where he had the ability to prejudicially affect the competitive position of Air Products in the market.

Air Products also argues that their operation, and the position of Laroque in the business, is significantly different from the "fast food outlet" analogy set out in the Determination. They submit that the "sensitivity of a sales position is much higher" than a person working in a fast food outlet and:

> Sales employees have access to a higher level of company proprietary information, especially where pricing, marketing strategies, and target sales initiatives is critical to the success of operating a business in a highly competitive market. A sales person in our business needs a lot of technical knowledge in order to sell our products which cannot be learned in a short time.

In his reply to the appeal, Laroque contends he was not in a position as described by Air Products in their submission. He says:

> . . . I was not a sales employee; my job title was Customer Service Representative, which gave me very limited access to direct customer contact. ***My duties were more administrative and shipping/receiving, and occasional relief driving.*** My main contact with customers was in store counter sales, which was a very small percentage of APCL's customer base.

Later, Laroque adds:

> I also deny any integral participation in the formulating or implementation of any sales or marketing strategies as APCL states.

In reply to the appeal, the Director referred to some of the findings of fact made in the Determination:

> As a sales consultant, [the Employee] did not set prices nor did he develop market strategies. The prices were set in head office. [The Employee] could barter with customers within certain ranges directed by the head office.
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> . . . As well, during the summer months, [the Employee] would act as the branch manager while the other manager was away. At those times, his duties entailed processing customer sales, billing customers, on occasion doing payroll, maintaining and co-ordinating the driver's routes and dealing with customer inquiries.

The Director's submission on the appeal addresses several issues that do not relate to the issue raised in the appeal and I do not intend to comment on them. An employer bears the burden of establishing just cause for dismissal and, where the case involves summary dismissal, that burden requires the employer to show the misconduct of the employee is inconsistent with the continuation of employment (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 a fundamental breach, or repudiation, of the employment relationship.

Generally, the position of Air Products is that it had just cause to dismiss Laroque because he breached one of the fundamental conditions of his employment contract by placing himself in a conflict of interest with his Employer. In response to that position, the Director argues that Air Products has not established Laroque committed a fundamental breach of his employment relationship and, hence, just cause has not been established.

The Director notes that the Tribunal has issued two decisions that have addressed the issue of just cause in the context of employees who allegedly placed themselves in a conflict of interest by accepting employment with a direct competitor of their employer. In *Re Unisource Canada, Inc.*, BC EST #D172/97, four employees with "access to confidential information" were leaving to work for a direct competitor of Unisource. All of the employees were terminated by Unisource for a "potential" conflict of interest. The Determination had concluded that in order to establish just cause for the purposes of the *Act*, the employer had to establish an "actual" conflict of interest. The issue considered on appeal in that case was whether the employer, Unisource, was required to establish an actual conflict of interest, or whether the just cause test was met in a potential conflict of interest situation. The Tribunal found, first, that the use of the terms "actual" or "potential" conflict of interest were not helpful, stating:

> Either one is in a conflict of interest vis-à-vis some other party (*i.e*. a relationship) or one is not.

It was accepted in the appeal of that case that the terminated employees were in a conflict of interest with their employer and the Tribunal, allowing the appeal, made the following statement:

> 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.

The Tribunal did place the following caveat on the decision in that appeal:

> 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 the particular employee is a fiduciary with respect to the "current" employer, or when 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.

In the second case, *Re MacMillan Bloedel*, BC EST #D214/99, the employee was an outside sales representative and, according to the decision, had "authority to make pricing decisions (including offering price discounts) on his own motion and had access to proprietary and confidential marketing information" and to information regarding "costs, inventory, profit margins, customer rebate and allowance policies and so forth . . .". The issue before the Tribunal

in *Re MacMillan Bloedel* was whether there was just cause because the employee had placed himself in a conflict of interest with his employer by accepting employment with a competing firm. It is clear from the decision that the Tribunal found the employee occupied a key position with MacMillan Bloedel and had access to sensitive confidential or proprietary information. The Tribunal concluded that the employee was in a conflict of interest:

> The fact that Carter had, at that point when he tendered his resignation, already entered into an employment relationship with a MacMillan Bloedel competitor does not, of itself, create a conflict of interest. However, given that Carter was taking up employment in a position that was very similar to that which he held with MacMillan Bloedel, a position where he would be selling similar products to a similar customer base, I must conclude that if Carter had continued his employment with MacMillan Bloedel throughout the notice period he would have been in a position of conflict of interest because he then would have been in the untenable position of having to serve two competing masters both of whom were entitled to demand his undivided loyalty.

As the Tribunal noted in *Re Unisource Canada, Inc.*, however, there is no 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 *Re Unisource Canada, Inc.* decision identifies two circumstances where the dismissal of an employee who agrees to be employed by a direct competitor of his current employer would be justified: first, if the employee is a fiduciary; and second, where the employee has access to confidential proprietary information.

The first circumstance descends from the long standing general rule of equity that an agent, who is at law a fiduciary, must not, without the knowledge of his principal, acquire any profit or benefit from his agency other than that contemplated by the principal. In *Canada Aero Services Ltd. v. O'Malley and others*, [1974] S.C.R. 592, the Court said the following about the obligations of a fiduciary in the context of an employment relationship:

> . . . O'Malley and Zarycki stood in a fiduciary relationship to Canaero, which in its generality betokens loyalty, good faith and the avoidance of a conflict of duty and self-interest.

Such duty is, as noted by the Court, a "more exacting duty" than that owed by "a mere employee", whose duty is to serve his employer honestly and faithfully during the term of his employment.

The Director submits that Laroque was not a fiduciary, that he was, in the words of the Court in *Canada Aero Services Ltd.*, a "mere employee" – a servant, rather than an agent. I agree.

In *Frame v. Smith*, [1987] 2 S.C.R. 99, the Court provided some guidelines for identifying relationships in which a fiduciary obligation arises. While the case arose in a family law situation, the guidelines provided have frequently been applied to employer/employee

relationships (see, for example, *Gary Rupert v. The Board of School Trustees of School District No. 61 (Greater Victoria)*, [2001] B.C.J. No. 1130, and *Crain-Drummond Inc. v. Hamel*, [1991] O.J. No. 75). In the latter case, the Court was considering an application by Crain-Drummond to enforce a restrictive covenant against Hamel, who had formerly been employed by them as a sales representative. A key consideration in the application was whether Hamel was in a fiduciary position while employed with Crain-Drummond. The decision stated the following about fiduciary relationships in the employment context:

> . . . the . . . decision in *Lac Minerals Ltd v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 . . . gives some guidance as to what relationships will give rise to fiduciary duties. The Court makes it quite clear that it is the nature of the relationship and not the specific category of actor involved that gives rise to the fiduciary duty. The Court refers to Wilson, J. in dissent in *Frame v. Smith*, [1987] 2 S.C.R. 99 where she states at 136:
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> > Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:
> >
> > (1) The fiduciary has scope for the exercise of some discretion or powers.
> >
> > (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
> >
> > (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or powers.
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> The Court in *Lac Minerals* goes on to comment:
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> > It is possible for a fiduciary relationship to be found although not all of these characteristics are present, nor will the presence of these ingredients invariably identify the existence of a fiduciary relationship.
> >
> > The one feature, however, which is considered to be indispensable to the existence of the relationship, and which is most relevant in this case is that of dependency or vulnerability. In this regard, I agree with the statement of Dawson, J. in *Hospital Ltd. v. United States Surgical*, *supra*, at p. 488, that:
> >
> > There is, however, underlying all the cases of fiduciary obligation that inherent in the nature of the relationship itself is a position of disadvantage or vulnerability on the part of one of the parties which causes him to place reliance upon the other and requires the protection of equity acting upon the conscience of that other.

An employee who holds a directorial or senior management position will normally be found to be in a fiduciary relationship *vis.* his employer. Laroque was not in such a position and may not be held to the "strict ethic" imposed on those persons. Employees who are key employees or hold unique positions may also be found to be fiduciaries, provided the nature of the relationship justifies that result. The Determination concluded Laroque was not a key employee. In their appeal, Air Products takes issue with that conclusion, stating:

> . . . Mr. Laroque was a key employee. As stated in our submission dated February 14, 2001, "The Kelowna branch is a small operation where employees wear many hats in order to serve our customers. Mr. Laroque was no exception. He held the position of Customer Service Representative for our Kelowna branch office. In this position, he performed inside and outside sales activities on our behalf". In fact, at the time of Mr. Laroque's resignation, there were three (3) employees working directly for the Kelowna branch. Two in branch sales (Laroque was one of the two) and one (1) driver. All members had access to information as they were responsible for the sales and operation of the branch.

There is, however, nothing in the material on file, and nothing has been provided by Air Products in this appeal, that has served to elevate Laroque to a fiduciary position. There is no indication that Laroque had much scope for the exercise of discretion or power. Air Products has not challenged the finding that Laroque did not set prices or develop market strategies; that prices were set in head office and, while Laroque could barter prices with customers within certain ranges, he was directed by the head office on the acceptable range. Air Products says that Laroque was a participant in formulating and developing strategies aimed at increasing the customer base for Air Products in the Kelowna area. Laroque denies any such involvement, but in any event there is still nothing that might suggest such activity could conceivably place Laroque in a fiduciary position. Most importantly, the evidence before me falls far short of establishing that Air Products was dependent upon or vulnerable to the actions of Laroque. Nothing indicates that Laroque was a key employee in the sense required in the context of a conflict of interest. I cannot simply accept the assertions by Air Products that Laroque had "access to and knowledge of confidential and proprietary information". The material does not show that he had access to confidential or proprietary information. If such an allegation is made as the basis for termination, it must be demonstrated on the facts. I will return to this point later.

Because Laroque was not a fiduciary, he may not be held to the "strict ethic" imposed on employees who have a fiduciary obligation to their employer. Accordingly, this appeal will be decided from the perspective of Laroque as a "mere employee". Even as a "mere employee", of course, Laroque had a duty to be honest and faithful in the performance of his 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.

The duty to serve honestly and faithfully also includes an obligation on the employee to avoid any conflict of interest with his employer. The presence of a conflict of interest will almost invariably justify an employee's dismissal. In *Crowley v. Trans Power Construction Ltd.*, [1996] B.C.J. No. 3111, the Court, dismissing an action for damages for wrongful dismissal by a former employee who had competed against his employer during the employment relationship, stated:

> What was done by the plaintiff was conduct of the type that causes an employer to lose trust in an employee. Such conduct is a breach of the implied term of the employment contract that the employee would perform his duty duly and faithfully. The result of such breach is that the employer is entitled to dismiss the employee without notice and for cause.

Based on the above comments, I cannot ascribe to the suggestion made by the Director that the Supreme Court of Canada's decision *McKinley v. B.C. Tel*, [2001] S.C.J. No. 40 has significantly altered the view the Tribunal should take in cases where an employee is shown to be in a conflict of interest with his employer. As noted by the Director, while the decision of the Court advocates a contextual approach to just cause, it also conceded that even applying that approach, some circumstances will continue to lead to a strict outcome:

> . . . I favour an analytical framework that examines each case on its own particular facts and circumstances, and considers the nature and the seriousness of the dishonesty in order to assess whether it is reconcilable with sustaining the employment relationship. Such an approach mitigates the possibility that an employee will be unduly punished by the strict application of an unequivocal rule that equates all forms of dishonest behaviour with just cause for dismissal. At the same time, it would properly emphasize that dishonesty going to the core of the employment relationship carries the potential to warrant dismissal for just cause.

The reality is that the existence of a conflict of interest signifies a breach of perhaps the most fundamental employment obligation -- the duty to act honestly and faithfully during the term of employment. It follows that if Laroque was in a conflict of interest, his dismissal was justified and the Determination was wrong.

Whether an employee is in a conflict of interest is a question of fact. As noted in *Re Unisource Canada Inc.*, a fiduciary employee, or one considered to have fiduciary responsibilities because of their access to confidential proprietary information, who takes employment with a direct competitor is in a conflict of interest and may be summarily dismissed. The material on file and the evidence in this case, however, does not establish that Laroque had access to confidential proprietary information. While Air Products has contended that information about pricing, current customer accounts, upcoming sales and marketing initiatives is confidential and proprietary, there is no general presumption that such information falls within that class of

information generally described as confidential or proprietary information. Air Products has provided no evidentiary basis compelling a conclusion that such information was confidential or proprietary information. I do not know, for example, whether the information could reasonably be regarded as clearly secret or sensitive, whether the distribution of such information is restricted to an exclusive group of employees or is more broadly distributed, and if so, to whom it is made available, whether this information was acquired by Laroque in order that he could do his job and whether Laroque had been given specific instructions that this information, or parts of it, was to be treated as privileged and confidential or proprietary information. Consistent with the requirement that an employer bears the burden of establishing just cause for dismissal, Air Products bears the burden of proving the existence of a conflict of interest in this case. They have not done so in this appeal.

As well, there is no evidence that it would have been impossible for Laroque to fulfill his employment obligations with Air Products. Air Products takes the position that the simple fact of an employee having accepted employment with a direct competitor in the same area is a conflict of interest. No authority is given for that proposition and it has been rejected by the Tribunal in *Re Unisource Canada Inc.* There is no doubt that Laroque, having accepted employment with a competing firm which was not to commence until after completion of the notice period, was obliged not to do anything incompatible with his duty of fidelity and honesty. If he failed to fulfill that obligation, then summary dismissal would be justified. In this case, Laroque was never in direct competition with Air Products during his employment and there is no indication he had breached any of his employment obligations to Air Products.

For the above reasons, the appeal is dismissed. I do not need to address the remaining arguments raised by the Director.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated June 4, 2001 be confirmed in the amount of $2112.68, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal