Employment Standards TRIBUNAL

An appeal

- by -

Nedco A Division of Westburne Industrial Enterprises (WIEL) Ltd.
("Nedco")

- 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: Carol L. Roberts

FILE No.: 2001/529

DATE OF DECISION: October 17, 2001

DECISION

This is a decision based on written submissions by Tim Charron, of Charron Favell, counsel for Nedco, Jason Turyk, and Adele J. Adamic, counsel for the Director of Employment Standards.

OVERVIEW

This is an appeal by Nedco, A Division of Westburne Industrial Enterprises (WEIL) Ltd. ("Nedco"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued June 26, 2001. The Director found that Nedco contravened Section 63 of the *Act* in terminating Jason Turyk ("Turyk") without just cause, and failing to pay him compensation for length of service. The Director Ordered that Nedco pay $1,483.44 as compensation for length of service and interest to the Director on Turyk's behalf.

ISSUE TO BE DECIDED

Whether the Director erred in determining that Turyk was dismissed without cause. More specifically, the issue is whether the giving of notice by an employee who intends to work for a competitor, gives the employer the legal right to terminate the employee immediately for cause.

FACTS

Turyk has been a commissioned salesperson of electrical supplies for 13 years. Nedco, an electrical wholesale distributor, employed Turyk as a sales representative from September 23, 1999 to January 5, 2001, in Prince George, B.C.

In October, 2000, Turyk's wife was offered a job transfer to Houston, B.C., which she accepted. At the end of October, Turyk advised Nedco that he would be moving to Houston with his wife. There was some negotiation between the parties regarding Turyk's continued employment with Nedco in Houston, but in early January, Turyk also advised Nedco that he was going to work for EECOL, which is also an electrical wholesale dealer.

Nedco immediately terminated Turyk's employment. There is no dispute that he did not receive compensation for length of service, nor did he work out his notice period.

Nedco argued that Turyk was in a conflict of interest by accepting employment with a company that handled the same products and sold to the same customer base as Nedco, and that Nedco was under no obligation to allow Turyk to work out his notice, nor compensate him for length of service because of this conflict of interest.

Nedco contended that, after learning about Turyk's wife's transfer, it attempted to accommodate Turyk and keep him as part of the team by offering a job. It contended that Turyk gave his notice

in the midst of negotiating the new employment arrangements. Nedco claimed that Turyk was in the process of negotiating a position with EECOL at the same time he was negotiating with them.

Turyk argued that, when he advised Nedco of his wife's transfer, he asked whether he could continue his employment with them in Houston. He advised the delegate that the offer he received from Nedco was significantly less money than his position in Prince George, so he declined the offer. Turyk claimed that he called EECOL only after he was not satisfied with Nedco's final offer. His position with EECOL was a full time position, and based out of Smithers, 45 kilometres away from Houston.

Following an investigation of the Turyk's complaint, the delegate concluded that Turyk was entitled to compensation for length of service. He concluded as follows:

> There is no evidence or even suggestion of an intention to breach confidence or dishonesty or abuse of the employer's resources.
>
> ….
>
> There is no evidence that Turyk copied, acquired used or planned to use any information or knowledge he acquired while employed by Nedco. Such evidence would be essential in order to find that Turyk had placed himself in a conflict of interest situation. There is no suggestion or evidence that Nedco lost any customers, there is no suggestion or evidence that Turyk did anything that would breach confidence....

The delegate concluded, on a balance of probabilities, that Nedco did not have just cause for terminating Turyk's employment, and found that Turyk was entitled to compensation for length of service in the amount equal to 2 weeks wages.

ARGUMENT

Nedco argues that Turyk put himself in a position of conflict, that is, in a situation where he had a legal obligation to serve two competing masters. It contends that Turyk had a duty of loyalty and fidelity to EECOL upon the acceptance of employment with that company on January 5, 2001, which placed him in a conflict of interest with Nedco, even though he had not commenced his duties with EECOL, and that his continued employment with Nedco was untenable.

Nedco acknowledged that not every case of acceptance of employment with a competitor constitutes just cause for termination. However, it argues that central to the ability to protect the relationship with customers is the right to expect absolute loyalty and fidelity in the protection of the confidential information base upon which the business relationship has developed and in reliance upon which it is continued.

Nedco relies on the Tribunal's decisions in Unisource Canada Inc. (BC EST #D172/97) and MacMillan Bloedel Limited (BC EST #D214/99) in support of its appeal.

Turyk contends that he was up front at all times with Nedco, and expressed an interest in continuing to work with it. He submitted that Nedco counter-offered his employment terms only after 4-5 weeks of discussions about whether he could continue to work for it in Houston. Turyk contends that, after demonstrating to Nedco why he could not accept its offer, it suggested employment terms and conditions that were unacceptable to him. Turyk stated that it was only after he was told that he could not get a full time job with Nedco that he contacted EECOL, which offered him a full time position in Smithers. Upon receipt of that offer, Turyk contends that he contacted Nedco to say that if it could not match EECOL's offer, he would give notice for February 1. Turyk maintains that, after initially agreeing with this proposition, his boss called him to tell him that he would be let go that day for securing a position with a competitor.

Turyk argued that Nedco has no business in Houston or Smithers, and therefore, it cannot be claimed that he is "stealing business".

The Director relies upon the Tribunal's decision in Telephone Maintenance Services Inc. (B.C.EST #D510/98), in which the Tribunal held

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

The Director argues that the mere assumption of conflict, without an examination of the facts and circumstances of each case, or proof of dishonesty, is in opposition to the spirit and intent of the legislation. The Director contends that an assumption of dishonesty by an employer when an employee accepts employment with a competitor, is entirely inconsistent with the Section 2 purposes of the *Act*.

ANALYSIS

In my view, all cases of dismissals for cause must be now be viewed in light of McKinley v. BC Tel [2001], S.C.C. 38. In McKinley, the Court found that a contextual approach must be taken in assessing whether an employer is justified in dismissing an employee for misconduct:

> ...whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically, the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship (at para. 48)

The Court held that, in the absence of an examination of the nature and circumstances of the dishonesty, "it would be impossible for a court to conclude that the dishonesty was severely fraudulent in nature and thus, that it sufficed to justify dismissal without notice." (at para. 51)

Underlying this approach, the Court said, was the principle of proportionality, seeking to strike a balance "between the severity of an employee's misconduct and the sanction imposed". The concept underlying this balancing approach is the "sense of identity and self-worth of individuals frequently derive from their employment" (at para 53). The Court went on to cite its decision in Wallace v. United Grain Growers Ltd., [1997] 3 S.C.R. 701:

> ...not only is work itself fundamental to an individual's identity, but "the manner in which employment can be terminated is equally important". (at para. 53)

The Court said:

> Given this recognition of the integral nature of work to the lives and the identities of individuals in our society, care must be taken in fashioning rules and principles of law which would enable the employment relationship to be terminated without notice. (at para 54)
>
> ...
>
> Absent an analysis of the surrounding circumstances of the alleged misconduct, its level of seriousness, and the extent to which it impacted upon the employment relationship, dismissal on a ground as morally disreputable as "dishonesty" might well have an overly harsh and far reaching impact for employees. (at para. 56)

The Court concluded that only conduct going to the core of the relationship would amount to cause for dismissal.

Although the issue before the Court in McKinley was whether an employee's dishonesty provided just cause to end an employment relationship, in my view, the contextual analysis set out by the Court is appropriate for assessing dismissals for an alleged conflict of interest. An employee's duty to serve honesty and faithfully includes an obligation to avoid any conflict of interest with his employer. However, while the existence of a conflict of interest is a breach of a fundamental term of any employment contract, the conflict of interest must be established, not merely alleged.

The Tribunal has issued three recent decisions on facts similar to those at issue here: Re Unisource Canada Ltd. (Yelland) (BC EST #D513/01), Re Unisource Canada Ltd.(Guidi) (BC EST #D514/01), and Air Products Canada Ltd.(BC EST #D523/01).

In Re Unisource Canada Ltd. (Yelland), Unisource argued that an employee who accepted employment with another employer placed herself in a position of conflict, which automatically provided grounds for dismissal for just cause. The Tribunal held as follows:

> I do not accept the proposition that a mere employee.. who has accepted employment with a competitor or 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 Tribunal reviewed the case authority regarding the nature of confidential or proprietary information, and concluded that there was no evidence that the dismissed employee had access to confidential information. The Tribunal concluded that the employer had not demonstrated misconduct amounting to a fundamental breach, or repudiation, of the employment relationship, and that burden did not change simply because a conflict of interest is alleged. The Tribunal held that:

> 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 [the employee] on that ground.

In Re Unisource Canada Ltd. (Guidi), the Tribunal determined that there was no evidence upon which it could be found that the dismissed employee was a fiduciary. The Tribunal held that there was, similarly, no evidence on which the employee could be considered a "key employee", either because of the nature of his position or nature of information to which he had access. The Tribunal concluded that there was no evidence that could give rise to the conclusion that the information that the employee had access to was either confidential or proprietary, and the dismissal was not justified.

In Air Products Canada Ltd., the Tribunal identified 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 Tribunal reviewed the obligations of a fiduciary in the context of an employment relationship, and held that the employee was a "mere employee", not a fiduciary, and that just cause for dismissal had not been established.

In summary then, to establish dismissal of an employee without compensation for reasons of conflict of interest, an employer must demonstrate that an employee is a fiduciary, not a "mere employee", that the employee has access to confidential or proprietary information, that the employee will be employed in a position in which he or she can use that information, and that there will be a real risk of harm to the employer in the event that the employee does use that information.

I turn now to the facts of this case.

The evidence is that Turyk wished to continue to work with Nedco. Indeed, the parties negotiated for several months to arrive at mutually satisfactory terms for Turyk's continued employment. There is no evidence that Turyk intended to take information to a competitor in an attempt to undercut its business. In fact, it is not surprising that Turyk would want to continue to

work in the same industry he had been employed in for 13 years. He took a pay cut and had to travel 45 kilometres each day to work for EECOL, which, presumably, had he been given an option, he would have preferred not to do.

There is no dispute that Turyk would hold the same position with EECOL as he did with Nedco. There is also no dispute that Turyk had access to the identity of Nedco's customers, contact information, product requirements and pricing. However, as in Air Products Canada, Inc., there is no evidence upon which I conclude that such information is confidential or proprietary. There is no evidence whether such information could reasonably be regarded as sensitive or secret, whether the distribution of such information is restricted to an exclusive group of employees or is more broadly distributed, or whether Turyk had been given specific instruction that this information, or parts of it, was to be treated as privileged and confidential or proprietary.

There is also no dispute that Turyk is selling essentially the same products for EECOL as he was with Nedco. There is, however, no evidence that Nedco had a customer base in either Houston or Smithers, or that he failed to protect confidential information. Consequently, Turyk is not, at least in the Smithers area, working for a competitor firm. As a result, there is no evidence, even had Turyk been in possession of confidential or proprietary information, he was in a position to use it to harm Nedco.

In conclusion, I am unable to find that Turyk's acceptance of a position with EECOL went to the core of the employment relationship. Nedco has failed to discharge the burden of substantiating that the Director's determination is incorrect, and the appeal is dismissed.

ORDER

I Order, pursuant to Section 115 of the *Act*, that the Determination dated June 26, 2001 be confirmed in the amount of $1488.35, plus whatever interest might have accrued since the date of issuance.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal