An appeal

- by -

Praxis Technical Group, Inc.
("Praxis")

- 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.: 2001/623

DATE OF DECISION: November 8, 2001

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) by Praxis Technical Group, Inc. ("Praxis") of a Determination that was issued on August 27, 2001 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that Praxis had contravened Part 8, Section 63(2)(a) and (b) and 63(5) of the *Act* in respect of the termination of the employment of Melissa Griswold ("Griswold") and Richard Morley ("Morley"), collectively, the "complainants", and ordered Praxis to cease contravening and to comply with the *Act* and to pay an amount of $5,276.16.

Praxis challenges the conclusion of the Director that Griswold and Morley were entitled to length of service compensation on the ground that those individuals were in a conflict of interest with Praxis and had thus provided Praxis with just cause for their termination.

ISSUE

The issue in this appeal is whether Praxis has shown any error in the Determination sufficient to justify the Tribunal cancelling the Determination and ordering the repayment of monies already paid out to the complainants.

FACTS

In the appeal submission, Praxis has noted that all the information provided to the Tribunal with the appeal has already been presented during the investigation. Their main area of disagreement is that this information was not considered by the Director in making the Determination. the dispute is with the conclusions reached by the Director on the facts.

The Determination provided the following background:

> Praxis is a high technology computer company . . . . Griswold worked from 1988 to July 5, 2000 as a production manager at the rate of $19.25 per hour. Morley worked from May 1994 to July 5, 2000 as a technical illustrator/systems administrator at the rate of $17.31 per hour. . . .
>
> Both complainants started their employment with Praxis and on or around September 1999, Praxis was sold to Net Compliance USA (Net) and both complainants continued their employment with Net. In July of 2000, Net did not have enough business and had to lay off all their employees including Griswold and Morley, on July 5, 2000. At this time Net also failed to live up to the original

> sales agreement with Praxis, and Praxis regained control of the company along with the employees of the company.

Griswold and Morley were laid off for longer than a period of temporary layoff and claimed entitlement to length of service compensation following expiration of that period. The period of temporary layoff expired on October 8, 2000.

Initially, Praxis paid one-half of the complainants' statutory entitlement to length of service compensation. It refused to pay the balance, stating the reason for not doing so was the discovery that Griswold and Morley, along with two other ex-employees, had started their own high technology company in direct competition with Praxis. During the investigation, Praxis provided a copy of a letter, dated July, 5, 2001 to the Director, outlining allegations of misconduct against Griswold and Morley, demanding repayment of amounts already paid to the complainants and claiming damages for the alleged misconduct.

The complainants acknowledged they had started a new company, but said that company was started after the period of temporary layoff had expired and their employment was terminated. Information provided during the investigation showed this company was incorporated on November 17, 2000. They deny any conflict of interest.

While on temporary layoff, both Griswold and Morley were offered part-time employment with Praxis. Griswold did not accept any of the offers, while Morley accepted a few of them. It was admitted by Jonathan Seper, General Manager of Praxis, that the work offered was for less than 50% of the complainants' normal work week and did not change any of the weeks from being a "week of layoff" for the purposes of administering Section 63 of the *Act*.

ARGUMENT AND ANALYSIS

Praxis argues that the Director erred in failing to conclude the complainants were in a conflict of interest and that Praxis was entitled to terminate them under the doctrine of "after acquired cause". Praxis alleges the conflict of interest arose from the complainants' involvement in forming and participating in a company that was competing directly with Praxis. Several documents have been provided with the appeal, including a corporate search record showing Griswold and Morley as directors of the new company, a letter from a representative of Suncor Energy describing a discussion with John Jukes, also a director of the new company, an e-mail communication from Mr. Seper to the principles of Praxis describing information he had received about matters being communicated by Griswold to a representative of a potential client of Praxis' and a copy of the July 5, 2001 letter. None of these documents make reference to either of the complainants being in a conflict of interest during their employment with Praxis. The letter from Suncor Energy does not refer to the complainants at all. It relates discussions with Mr. Jukes and, although it indicates such discussions took place "in the fall", it gives no specific dates that might suggest the new company was competing with Praxis before the complainants were terminated from Praxis. The e-mail is dated December 5, 2000, well after the

complainants had been terminated from Praxis. The July 5, 2001 contains several allegations against the complainants, but once again does not indicate the alleged misconduct occurred until after the complainants had been terminated from Praxis.

In reply to the appeal, the Director has submitted that there was no evidence Griswold and Morley were in a conflict of interest during their employment with Praxis and the concept of "after-acquired cause" was not applicable.

In their reply, the complainants say that they did not become involved in the new company until after they had been terminated from Praxis.

Praxis 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 the complainants. It is trite that the complainants cannot be terminated under the *Act* unless Praxis is able to establish just cause for dismissal. While the existence of a conflict of interest will normally justify termination, the burden of showing the employee is in a conflict of interest is on the employer. Praxis has not met that burden.

Praxis has also complained that the Determination failed to address the question of "after-acquired cause". I agree with the Director that there was no reason to consider that question. Even if the principle of "after-acquired cause" applies to entitlement to length of service compensation under the *Act*, it cannot apply unless Praxis can show just cause for terminating the complainants.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated August 27, 2001 be confirmed in the amount of $5,276.16, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal