An Application for Reconsideration

- by -

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

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2002/085

DATE OF DECISION: June 4, 2002

DECISION

INTRODUCTION

This is an application filed by Westburne Industrial Enterprises (WIEL) Ltd., operating as "Nedco" ("Nedco"), pursuant to section 116 of the *Employment Standards Act* (the "Act"). Nedco applies for reconsideration of an adjudicator's Decision issued on October 17th, 2001 (BC EST # D547/01). The Adjudicator confirmed a Determination, issued on June 26th, 2001 by a Delegate of the Director of Employment Standards, ordering Nedco to pay its former employee, Jason Turyk ("Turyk"), the sum of $1,483.44 on account of 2 weeks' wages as compensation for length of service and section 88 interest (the "Determination").

This application is part of a single "omnibus" reconsideration application involving four separate Tribunal decisions, four employees and two separate employers. The four applications are contained in a single submission filed by legal counsel for the two employers dated February 21st, 2002. Although the individual facts of each case differ, all four appeals involved a common factual scenario, namely, summary dismissal of an employee who had resigned in order to take up employment with an alleged competitor of their current employer. In each case, the Tribunal adjudicator held that the employer did not have just cause for termination [see section 63(3)(c) of the *Act*] and, accordingly, the employee was entitled to compensation for length of service under section 63 of the *Act*.

BACKGROUND FACTS

Prior to his dismissal, Mr. Turyk had been employed by Nedco (an electrical wholesale distributor that has business locations throughout western Canada) in Prince George, B.C. for about 1 1/2 years as a commissioned sales representative. Turyk's wife accepted a job transfer to Houston, B.C. and Mr. Turyk, not surprisingly, planned to relocate to Houston with his wife. Negotiations ensued between Turyk and Nedco but ultimately those negotiations broke down and in early January 2001 Turyk accepted a position with another electrical wholesale dealer in Smithers, B.C. (about 45 kilometers from Houston). Turyk suggested to Nedco (apparently in a telephone conversation) that he would continue to work until February 1st, 2001, which was initially acceptable to Nedco. However, a short time later Nedco took the position that since Turyk was planning to go to work for a competitor, he was being dismissed effective immediately (the dismissal occurred on January 5th, 2001).

As recorded in the Determination, Nedco's position before the Delegate was that Turyk placed himself in a conflict of interest when he accepted a position with another firm "that handles the same products and sells to the same customer base as Nedco" (Determination, page 2). Turyk's position, *inter alia*, was that there was no conflict of interest since "Nedco had no business in either Houston or Smithers at the time of his notice, nor do they have any business there now" (Determination, page 4). The Delegate determined that Turyk was not in a conflict of interest and thus Nedco did not have just cause for dismissal.

Nedco appealed the Determination to the Tribunal. As noted above, that appeal was dismissed and the Determination confirmed. The adjudicator was unable to conclude, based on the evidence before her, that Turyk had access to confidential information that might be used, in his new job, to the detriment of Nedco. More fundamentally, the Adjudicator concluded that, in fact, the new employer was not a Nedco competitor.

The key portions of the Adjudicator's Decision (found at page 7) are reproduced below:

> "There is no dispute that Turyk would hold the same position with [the new employer] as he did with Nedco. There is also no dispute that Turyk had access to the identity of Nedco's customer's, contact information, product requirements and pricing. However, as in *Air Products Canada, Inc.* [see BC EST # D523/01], *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 [the new employer] 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 [the new employer] 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."
>
> (my italics)

THE TIMELINESS OF THE APPLICATION

The application for reconsideration, as it relates to the Nedco/Turyk appeal decision, was filed more than 4 months after the Adjudicator's Decision was issued. The Tribunal, in a letter to the parties dated February 22nd, 2002, requested that they file submissions with respect to the timeliness of the application as well as submissions regarding its substantive merit.

Legal counsel for the Director, in a submission dated March 21st, 2001 (and which addresses all four Tribunal decisions), does not seek to have this application dismissed as untimely, however, counsel for the Director does submit that the application should be dismissed because it does not meet the initial threshold for reconsideration established in *Milan Holdings Ltd.* (BC EST # D313/98).

Turyk has not filed any submission with respect to either timeliness or the substantive merit of Nedco's application.

Counsel for Nedco, in his submission dated March 26th, 2002 (which addresses all four decisions), while acknowledging that "We share the concerns of the Tribunal that parties to proceedings under the *Employment Standards Act* are entitled to some certainty and finality in such proceedings" nonetheless submits that this application should not be dismissed as untimely. Counsel submits that "It is impractical to challenge these decisions on a case-by-case basis" and that "Because these amounts are not great, and because all of the employees involved commenced remunerative employment shortly after termination, there is no real prejudice being suffered by any of the employees". Counsel also says that he was awaiting the outcome of one of the four appeals before filing this omnibus application and that a consolidated application is the most efficient way to proceed with this matter.

Is the application timely?

Although strict time limits govern the appeal process (see section 112 of the *Act*), there is no statutory time limit governing reconsideration applications. Nevertheless, the Tribunal has held that applications for reconsideration must be filed within a reasonable time in light of the particular complexities of the case at hand; a party who fails to request a reconsideration within a reasonable time must provide a cogent explanation for their tardiness. In the absence of a reasonable excuse for filing a tardy application, the Tribunal may exercise its discretion to simply refuse to reconsider the decision in question. In other words, the application may be dismissed without an inquiry into the merits of the application (i.e., the second of the two-stage *Milan Holdings* test).

In my view, this is not a complex case and further, the substantive argument raised by Nedco in the present application is not materially different from the position that it has maintained virtually from the outset of this dispute. Nedco is simply rearguing the very same case that was before the adjudicator and, indeed, before the delegate. Accordingly, I do not see why this application could not have been filed much sooner that it was. Since conflict of interest cases necessarily involve a detailed examination of the individual facts of the case, I do not see that there are any efficiencies to be gained from amalgamating a number of "conflict" cases into a single application unless the relevant facts are essentially identical (i.e., the employees all have the same position, same former employer, same new employer etc.).

In short, I do not consider this application to be timely.

THE *Milan Holdings* TEST

In my view, even if this application had been filed more promptly, the application does not, in any event, satisfy the first step of the *Milan Holdings* test. At this stage, the Tribunal must determine if the application for reconsideration, on its face, raises a sufficiently serious question to justify the Tribunal exercising its discretion to reconsider a previous decision. The applicant must raise a serious question "of law, fact or principle or procedure [that is] so significant that [the adjudicator's decision] should be reviewed" (*Milan Holdings* at p. 7). The reconsideration provision of the Act is not to be used as a second opportunity to challenge findings of fact made by the adjudicator, unless such findings can be characterized as lacking any evidentiary foundation whatsoever.

Nedco's fundamental submission is as follows:

> "All of the decisions appealed from are challenged on the same basis. Simply stated, it is our position that *an employer has just cause to terminate the employment of an employee who has accepted employment with a direct competitor.*" (my italics)

In my view, counsel's submission overstates the current status of the law--all of the relevant circumstances must be examined (e.g., Is the employee a fiduciary?; A "key" employee?; Has the employee been vouchsafed by their employer with trade secrets or similar confidences?). The employee's mere acceptance of an offer of employment with a competitor does not, of itself, justify summary dismissal without notice. In the context of this case, Turyk's actions must have placed him in a true conflict of interest *vis-à-vis* Nedco.

However, as is clear from the portions of the Adjudicator's Decision that I have reproduced above, Nedco's appeal was dismissed largely because, in fact, Turyk did not accept employment with a direct

competitor. In his February 21st submission, counsel for Nedco suggests that the new employer was a Nedco competitor in Prince George but also says that Nedco "does not challenge the propriety of Mr. Turyk working for [the new employer] in Houston, B.C. whatsoever". However, there is was no evidence before the adjudicator that there was any competitive threat to Nedco as a result of Turyk having accepted a position in Smithers. It bears repeating that reconsideration is not a new factfinding process Given the adjudicator's findings of fact (i.e., there was no conflict of interest), I am unable to conclude that there was any error with respect to the adjudicator's further (and derivative) conclusion that Nedco did not have just cause for dismissal.

I do not find that this application meets the requisite initial *Milan Holdings* threshold, and, in any event, with respect to the merits of the application, I am unable to conclude that the Adjudicator's Decision is incorrect as a matter of law.

ORDER

Pursuant to Section 116 of the Act the application to reconsider Tribunal Decision BC EST # D547/01 is refused.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal