

Applications for Reconsideration

- by -

Westburne Industrial Enterprises Ltd. Les Entrepri operating as Nedco
("Nedco")

- and -

Reza Amiralai

- 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.: 2002/086

DATE OF DECISION: June 4, 2002

DECISION

OVERVIEW

I have before me two applications for reconsideration both filed pursuant to section 116 of the *Employment Standards Act* (the “*Act*”). The first application was filed by Westburne Industrial Enterprises (WIEL) Ltd. operating as “Nedco” (“Nedco”); the second application was filed by Mr. Reza Amiralai (“Amiralai”).

Nedco and Amiralai both apply for reconsideration of an adjudicator’s Decision issued on January 22nd, 2002 (BC EST # D037/02). By way of this latter appeal decision, the Adjudicator confirmed a Determination, issued on May 19th, 2000 by a Delegate of the Director of Employment Standards, ordering Nedco to pay its former employee, Mr. Curtis Lappin (“Lappin”), the sum of \$1,528.91 on account of compensation for length of service and section 88 interest (the “Lappin Determination”). The Adjudicator also cancelled a separate Determination, similarly issued on May 19th, 2000, ordering Nedco to pay Amiralai the sum of \$2,752.15 on account of compensation for length of service and interest (the “Amiralai Determination”).

I propose to address each application in turn commencing with the Nedco application.

NEDCO’S APPLICATION FOR RECONSIDERATION

Background Facts

Mr. Lappin was employed by Nedco from March 1998 to May 31st, 1999 as an “inside” sales clerk at an annual salary of \$36,000. When Lappin submitted two weeks’ notice of resignation, Nedco immediately terminated him--allegedly for just cause--since Nedco considered Lappin to be in a conflict of interest as a result of having accepted employment with a Nedco competitor. Mr. Lappin’s position before the Delegate was that his new employer was not, in fact, a competitor of Nedco. The Delegate was not satisfied that Lappin’s new employer was a Nedco competitor and, in any event, Lappin did not have access to confidential information that could have been used to Nedco’s detriment by Lappin in his new position.

The Appeal Decision

Nedco appealed the Lappin Determination to the Tribunal. The Adjudicator quite properly observed that “conflict of interest” cases turn on the unique facts of each case and that the relevant facts in this case were not seriously contested. The real issue before the adjudicator was the correct legal inference to be drawn from the facts. As noted above, the Adjudicator confirmed the Lappin Determination.

It is clear, and the Adjudicator so found, that Lappin was not in a fiduciary relationship *vis-à-vis* Nedco. The relevant portions of the Adjudicator’s Decision regarding Mr. Lappin are reproduced below (see adjudicator’s reasons for decision at pp. 8-9):

“There is, in my view, nothing in the submissions of the parties that would serve to elevate Lappin to the position of a ‘fiduciary’ of Nedco...”

The emphasis of [Nedco's] submissions is on Lappin's position and his ability to influence customers, rather than the confidentiality of the information to which Lappin had access. Presumably, however, any sales person seeks to influence customers to purchase his or her employer's products or services. On balance, on the facts of this case, I am not satisfied that Lappin had access to confidential [information?] to the degree, for example, that Amiralai had. From my review of the information on file, Amiralai had greater access to the information said to be confidential, including pricing, margins and strategies. Amiralai had the ability to print out hard copies of the information, Lappin did not. I also find it hard to accept that as a telephone--or inside--salesperson, without his own accounts, serving as Amiralai's 'back-up', [Lappin?] is in a similar position to Amiralai. The burden is on [Nedco] to satisfy the burden that it had cause for termination. In this case, on balance, I am not persuaded that [Nedco] had met that burden."

The application

Nedco's application with respect to Mr. Lappin 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*.

Counsel for Nedco states that the adjudicator, having found that Amiralai was in a conflict of interest (as a result of having entered into a partnership to establish a competing business), should have also concluded that Lappin was in a conflict of interest (as a result of accepting an employment offer with a competing firm). Counsel's February 21st, 2002 submission continues (at page 8):

"We acknowledge that Mr. Lappin had less direct contact with customers than Mr. Amiralai. Mr. Lappin had substantial direct contact with customers and was a commissioned sales representative. He therefore was in a position of conflict. The law requires that one look not to the likelihood of harm but to the potential for harm. The potential exists whenever an employee who has access to any customer or supplier relationships, or information about these relationships not generally known outside the business, accepts employment with a competitor."

Analysis

This application is timely but does not, in my view, otherwise satisfy the initial threshold established by the so-called *Milan Holdings* test (see *Milan Holdings Ltd.*, BC EST # D313/98). At this first 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.

While the Adjudicator reached different conclusions with respect to whether Messrs. Lappin and Amiralai were in a conflict of interest, that is hardly surprising when one considers the very different factual

circumstances relating to each person's employment. For example, Amiralai was characterized as being akin to a fiduciary whereas Lappin was more accurately described as a "mere" (as opposed to "key") employee.

As noted by the adjudicator, Lappin's T-4s (prepared by, or on behalf of, Nedco) show that he was *not* a commissioned salesperson. The Adjudicator made findings of fact--that cannot now be revisited by way of this application for reconsideration--that Lappin's access to Nedco information was limited in scope and routine in nature. Quite simply, Lappin did not pose much, if any, of a competitive threat to Nedco.

In my view, counsel for Nedco has not accurately summarized the law in this area. A "potential" conflict (i.e., one that is yet to--and may never--materialize) is not a proper basis for summary termination. Summary dismissal on the ground of "conflict of interest" can only be justified based on an actual conflict (which may arise from existing circumstances even in the absence of immediate economic harm to the employer; e.g., breach of fiduciary obligation, see *Canadian Aero Services Ltd. v. O'Malley et al.*, [1974] S.C.R. 592).

In *Director of Employment Standards (Unisource Canada)*, BC EST # D172/97 and *MacMillan Bloedel Limited*, BC EST # D214/99, I observed that merely accepting an offer of employment with a competitor does not, of itself, create a conflict of interest. This position is reflected in many other other Tribunal decisions, including all four of the Decisions challenged by the instant "omnibus" reconsideration application. Each case turns on its own facts.

With respect to Mr. Lappin, he was not a fiduciary. Further, he was not a "key" employee but rather a lower-level employee with limited access to important Nedco information. Finally, Lappin's acceptance of an offer of employment with a firm that, as recorded in the adjudicator's reasons, had "very little overlap in customers and suppliers [with Nedco]" did not pose any serious competitive threat to Nedco. In short, the adjudicator concluded there was not conflict of interest. I cannot disagree with that conclusion given the facts of this case.

I now turn to the Amiralai application.

AMIRALAI'S APPLICATION FOR RECONSIDERATION

Background Facts and Previous Proceedings

As noted above, Mr. Amiralai was originally awarded \$2,752.15 as compensation for length of service in a determination that was issued on May 19th, 2000. Nedco appealed the Amiralai Determination which, in turn, ultimately resulted in three separate Tribunal Decisions. In a Decision issued September 15th, 2000 (BC EST # D371/00) the Adjudicator referred both Lappin's and Amiralai's claims back to the Director for further investigation [see section 115(1)(b) of the *Act*]. Subsequently, in a Decision issued on June 27th, 2001 (BC EST # D347/01), the Adjudicator ordered that an entirely new investigation be conducted by another Delegate.

This latter investigation resulted in a report to the Tribunal, dated August 16th, 2001, in which the Delegate concluded that Nedco had just cause to terminate Mr. Amiralai for conflict of interest but did not have just cause to terminate Mr. Lappin on the same ground. The adjudicator, by way of the Decision

now under reconsideration (BC EST # D037/02), confirmed the Delegate's findings and thus cancelled the Amiralai Determination and confirmed the Lappin Determination.

Prior to tendering his resignation to Nedco Mr. Amiralai entered into an agreement with another individual to establish a firm that would compete with Nedco. As recorded in the the Delegate's report and in the adjudicator's reasons, Mr. Mr. Amiralai was in "a position of trust and confidence at Nedco"; "he had direct control and management of [Nedco] customer accounts"; he "had intimate knowledge of the customers and their needs and of the shortcomings in Nedco's ability to meet those needs"; he was Nedco's "face" insofar as its customers were concerned; while there is no evidence of actual harm, Amiralai had the ability to harm Nedco's interests if he wished to do so; he was charged with developing Nedco's business and thus place himself in a clear conflict when he established a competing firm while still on Nedco's payroll. In short, Mr. Amiralai--as noted by the Adjudicator--was very close to being (if he was not in fact) a fiduciary vis-à-vis Nedco.

The Application

Mr. Amiralai's application very obviously appears to have been triggered by a request from the Tribunal for his submission with respect to Nedco's application. In a 1-page letter to the Tribunal filed on March 22nd, 2002 (i.e., the deadline for submissions regarding the Nedco application) Mr. Amiralai reviews some of the incidents of his employment and then simply asks that "the tribunal decision be reconsidered".

The letter does not raise, on its face, any proper basis for varying or cancelling the Adjudicator's Decision. Mr. Amiralai, who maintains that he did not have totally unfettered access to certain Nedco files, undoubtedly believes that he acted honourably throughout his employment with Nedco. His letter very briefly reiterates some of the arguments that were made before, and rejected by, both the delegate and the adjudicator. However, reconsideration is not a fresh factfinding exercise nor is it intended to be a forum where a dissatisfied party can reargue their case yet again. The evidence before the Adjudicator clearly showed that Amiralai placed himself in a conflict of interest with respect to Nedco and, accordingly, Nedco had just cause to summarily terminate his employment.

ORDERS

Pursuant to Section 116 of the *Act*, the applications to reconsider Tribunal Decision BC EST # D037/02 are refused.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal