An Application for Reconsideration

- by -

Unisource Canada, Inc.
("Unisource")

- 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.: 2002/83

DATE OF DECISION: June 5, 2002

DECISION

INTRODUCTION

This is an application filed by Unisource Canada, Inc. ("Unisource") pursuant to section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of an adjudicator's decision issued on September 26th, 2001 (B.C.E.S.T. Decision No. D513/01) confirming a determination ordering Unisource to pay its former employee, Shannon Yelland ("Yelland"), the sum of $1,693.06 as compensation for length of service.

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 a 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.*

PREVIOUS PROCEEDINGS

The previous proceedings in this particular matter may be very briefly summarized as follows. On May 23rd, 2001, a delegate of the Director of Employment Standards issued a Determination ordering Unisource to pay the sum of $1,693.06 to Ms. Yelland (the "Determination"). The delegate concluded that on July 5th, 1999 Unisource summarily, and wrongfully, terminated Ms. Yelland's employment shortly after she tendered 2 weeks' notice of resignation. Accordingly, Ms. Yelland was awarded 2 weeks' wages as compensation for length of service.

Unisource appealed the Determination, alleging (as it had before the delegate) that it had just cause for termination since Ms. Yelland had resigned to take up employment with a Unisource competitor. The appeal was dismissed by way of a adjudicator's decision (the subject matter of this reconsideration application) issued on September 26th, 2001.

THE TIMELINESS OF THE APPLICATION

The parties' positions

As previously noted, the Determination was issued on May 23rd, 2001; Unisource, through its legal counsel, filed an appeal on June 15th, 2001 and reasons for decision in that appeal (which did not involve an oral hearing) were issued on September 26th, 2001. The application for reconsideration was filed on February 21st, 2002, nearly 5 months after the adjudicator's decision was issued.

In light of the tardy application, the Tribunal, by way of a letter to the parties dated February 22nd, 2002, requested that the parties 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 take any position regarding the timeliness of the application as it relates to any one of the four decisions. Counsel for the Director does submit, however, that the reconsideration application should be dismissed with respect to all four decisions because none of the applications meets the initial threshold for reconsideration established in *Milan Holdings Ltd.* (B.C.E.S.T. Decision No. D313/98).

Ms. Yelland, in her submission dated March 6th, 2002, says that the reconsideration application ought to be summarily dismissed as untimely. Ms. Yelland notes that although she was dismissed some 2 1/2 years ago, she has yet to receive any monies despite two separate decisions in her favour.

Counsel for Unisource, in his submission dated March 26th, 2002 (which also 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 the applications should not be dismissed as untimely. Counsel's principal arguments regarding the timeliness of the instant application are set out below:

> "We note that the amounts involved in any one proceeding are not great. It is impractical to challenge these decisions on a case-by-case basis. 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.
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> We note that we were awaiting the conclusion of the Lappin/Amiralai proceeding [N.B.: one of the four decisions at issue in this omnibus application] before filing the reconsideration applications. This proceeding actually commenced prior to any of the others and was the subject of at least a short formal hearing process [N.B.: that appeal hearing was held on September 11th, 2000]. We had anticipated that it would have concluded prior to the other proceedings. At least a large part of the delay in that proceeding being concluded was the delay of the Director in investigating the proceeding correctly (as determined by the Adjudicator, who referred the matter to be further investigated by a different delegate). In our submission, the Employers ought not to be prejudiced in their preference to seek reconsideration using the reasonable process we have proposed (of consolidating similar matters for review) because of the misconduct of the Director's delegate that caused the delay.
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> Finally, we note that at all times we have advised the Delegates in each case that it was our intention to have the legal issues raised by all of these cases heard by a

> single decision-maker. At no time did any other party suggest that this was anything other than a reasonable process. We submit that this process is also a reasonable one from the perspective of the finite resources of the the Director and, with respect, the Tribunal. Indeed, from time to time the proceedings at the Delegate investigation and Determination stage of these proceedings has been delayed by the Director's delegate in anticipation of the parties being able to rely upon the (hopefully) conclusive decisions that might have been rendered by the Adjudicator in the Lappin/Amiralai proceeding.
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> At all times the Employers have been cooperative in processing these matters through investigation and adjudication. The delay involved is not a function in any way of the desire of the Employers to delay payment. In one proceeding, the funds have been paid in trust. In the others, offers of such payment have been made and declined.
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> In our submission, the applications raise matters of genuine concern and interest for the business community in this province. To the extent that there are some differences in the fact patterns in each of these cases, these differences will guide all employers and employees when these disputes arise in future. We, of course, contend that the differences in the fact patterns are irrelevant. If only one of these cases proceeds to reconsideration, however, cases that have some factual distinctions as are present in the other cases may give rise to further litigation, which might be avoided if the Tribunal proceeds with a comprehensive review of the applicable law in all of these cases."

Findings

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 does not seek reconsideration within a reasonable time period 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 *Director of Employment Standards (Valorosos)*, (B.C.E.S.T. Decision No. RD046/01) a reconsideration panel summarized the Tribunal's jurisprudence regarding the timeliness of reconsideration applications as follows:

> "1. The Tribunal will properly consider delay in deciding whether to exercise the reconsideration discretion;
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> 2. Where delay is significant, an applicant should offer an explanation for the delay. A delay which is not explained will militate against reconsideration.

> 3. Delay combined with demonstrated prejudice to a party will weigh even stronger against reconsideration. In some cases, the Tribunal may presume prejudice based on a lengthy unexplained delay alone.
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> 4. Even in cases of unreasonable delay, the Tribunal ought to consider the merits, and retains the discretion to entertain and grant a reconsideration remedy where a clear and compelling case on the merits is made out."

In my view, a 5-month delay in applying for reconsideration is sufficiently lengthy as to demand an explanation. The Tribunal is under a statutory mandate to ensure that disputes arising under the *Act* are adjudicated in a fair and expeditious manner [see section 2(d) of the *Act*]. The Tribunal has dismissed a number of applications for reconsideration as untimely where the delay involved has ranged from five to six months--see *e.g.*, *Director of Employment Standards (KEA Foods)*, B.C.E.S.T. Decision No. D526/00; *Director of Employment Standards (Athlone Travel)*, B.C.E.S.T. Decision No. RD129/01; *Director of Employment Standards (Unisource Canada)*, B.C.E.S.T. Decision No. D122/98; *Director of Employment Standards (Medowvale Holdings)*, B.C.E.S.T. Decision No. D530/00; and *Director of Employment Standards (Valorosos)*, *supra.* In *Seaman* (B.C.E.S.T. Decision No. RD051/02) a reconsideration application filed 2 1/2 months after the appeal decision was issued was dismissed as untimely.

As noted above, counsel for Unisource submits that the delay should be overlooked since there is no prejudice to Ms. Yelland because the amount involved in comparatively small and she proceeded to another job very shortly after her dismissal. However, Ms. Yelland has waited a very considerable time to be paid, and despite two separate decisions in her favour, that has yet to occur.

Counsel also says that the sum at issue here is small and that "case-by-case" applications are impractical. I disagree at least insofar as this case is concerned. The substantive issue raised by the applicant--namely, whether or not it had just cause to terminate Ms. Yelland since she accepted employment with a Unisource competitor--is the identical issue that was argued before the delegate and again before the adjudicator on appeal. Since the applicant is, essentially, simply rearguing the very same legal issue that was before the adjudicator, this application could certainly have been filed more expeditiously.

Finally, I do not accept that Ms. Yelland's is obliged to stand aside and await the outcome of still further proceedings simply because there are other pending applications. While the legal question raised by the four applications is essentially similar (*i.e.*, Was the employee in a serious conflict of interest?), the cases themselves are not. Conflict of interest cases all turn on their own peculiar facts.

In my view, this application has not been filed in a timely fashion. As previously noted, this application is made approximately five months after the original appeal decision. Certainly, the applicant ought to have been aware of the Tribunal's position with respect to the matter of delay since it was a party to one of the leading cases on this issue [*Director of Employment Standards (Unisource Canada), supra*, where the Director of Employment Standards' application was

dismissed as untimely having been filed some six months after the appeal decision was issued. Unisource, in that case, took the position that a 6-month delay was unreasonable.

Even if it could be said that this application is timely (and I do not accept that notion), this 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. Apart from delay, the Tribunal will also consider whether the application is merely an attempt to challenge findings of fact (that were supported by a proper evidentiary foundation) and if the application raises a compelling question of law or policy.

In my view, this application amounts to not much more than an attempt to reargue the case yet again (this now being the third occasion). The adjudicator addressed his mind to the governing legal principles and, having done so, concluded that Unisource had failed to discharge its evidentiary burden. At pages 6 and 9 of his reasons for decision the adjudicator observed:

> "...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 facts in *Re MacMillan Bloedel, supra*, warranted a conclusion that the terminated employee, Carter, was in a conflict of interest because of the nature of his position and the nature of the information to which he had access. Those considerations do not arise in this case. *Nothing has persuaded me that Yelland had access to the kind or quality of information that could give rise to a conflict of interest. She says the information she received was available to everyone else in the organization. She had no direct contact with customers. Her duties were administrative. Unisource does not contest those assertions of fact*, but have made broad general assertions that Yelland had access to confidential and proprietary information. The assertions made by Yelland are consistent with the findings of fact made in the Determination. The burden is [on] Unisource to show those findings of fact to be incorrect. I accept the submission from the Director that 'conflict of interest requires actual proof of its existence' (*cf. Epic Express -and- Thrasher, supra*)...
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> *There is nothing in the appeal submission made by counsel for Unisource that provides any insight whatsoever into the assertion that Yelland had access to confidential and proprietary information*. As well as not being a de facto conflict of interest, the fact of Yelland taking work with a competitor is not, of itself, evidence of a conflict of interest...
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> The requirements for establishing just cause do not change simply because a conflict of interest is alleged. 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 Yelland on that ground. Having failed to do that, there is no*

> *basis for finding the Determination was wrong in its conclusion that Unisource had not shown their obligation to pay Yelland length of service compensation was deemed discharged.*"
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> (my *italics*)

As noted above, this application is one of four related applications for reconsideration; the applications are related in the sense that all four are grounded on a common legal argument, namely:

> "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."

I am of the view that the above submission does not accurately state the law and that the adjudicator in this case proceeded on correct legal principles. Indeed, although in *Director of Employment Standards (Unisource Canada)*, B.C.E.S.T. Decision No. D172/97, I held that Unisource had just cause to terminate four employees who had all accepted offers of employment with a competitor, I did not accept that such a circumstance created a general right to dismiss for cause in all cases:

> "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 that particular employee is a fiduciary with respect to the "current" employer, or where 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 his reasons for decision, the adjudicator noted that although Ms. Yelland tendered her resignation in order to take up employment with a competitor, she was not a fiduciary; her position with Unisource did not give her access to trade secrets or other truly confidential information; she did not deal directly with customers; and that she was a "mere" or lower-level administrative employee rather than a senior-level or "key" employee. In light of those findings, the adjudicator held that Unisource did not have just cause for termination. Given those findings, I cannot disagree with the adjudicator's conclusion on that latter score.

ORDER

The application for reconsideration is **refused.**

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal