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.: 2002/84

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. D514/01). 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, awarded the employee compensation for length of service under section 63 of the *Act.*

BACKGROUND FACTS

On May 31st, 1999 Robert Guidi ("Guidi"), who was employed by Unisource as a "Customer Service Representative", tendered his resignation effective June 11th, 1999. Unisource did not accept Guidi's tender, however, and immediately terminated him without notice, allegedly for cause [see section 63(3)(c) of the *Act*]. Unisource's termination letter reads, in part, as follows:

> "You have advised that you are leaving employment with us to go to Enterprise Paper, a direct competitor of Unisource Canada, Inc. As a result, we will consider your resignation effective today, in light of a potential conflict of interest."

Guidi filed a complaint with the Employment Standards Branch and, by way of a Determination issued on May 23rd, 2001, a delegate of the Director of Employment Standards ordered Unisource to pay Guidi the sum of $795.19 on account of compensation for length of service. The delegate determined that Mr. Guidi's employment was summarily, and wrongfully, terminated.

Unisource appealed the Determination alleging (as it had before the delegate) that it had just cause for termination since Mr. Guidi had already accepted an offer of employment with a Unisource competitor. The appeal was dismissed by way of a decision (the subject matter of this reconsideration application) issued on September 26th, 2001.

THE TIMELINESS OF THE APPLICATION

The parties' positions

The Determination was issued on May 23rd, 2001; Unisource's appeal was dismissed by way of a written decision issued on September 26th, 2001. The instant 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, in way of 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.

Guidi has not filed any submission with the Tribunal regarding in this matter.

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).

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 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.

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 and reiterated the long-standing rule that an unexplained delay in

making application, standing alone, might be a sufficient justification for refusing reconsideration.

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.*

As noted above, counsel for Unisource submits "case-by-case" applications--especially where the amounts involved are not large--are impractical. However, the substantive issue raised by Unisource in this case--namely, whether it had just cause to terminate Guidi because he was in a "potential" conflict of interest after having accepted employment with a Unisource competitor--is the identical issue that was argued before the delegate and once again before the adjudicator on appeal. By way of this application, Unisource is simply rearguing the very same case that was before the adjudicator and, indeed, before the delegate. I do not see why this application could not have been filed much sooner.

As previously noted, this application was filed 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. In my view, this application has not been filed in a timely fashion and I am not fully satisfied with its explanation as to why this application was not filed more promptly.

Does this application meet the first step of the Milan Holdings test?

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.

Unisource's position with respect to conflict of interests is set out below:

> "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 (especially at pp. 4-5) the adjudicator noted that Guidi dealt with Unisource customers primarily in an administrative capacity. He was not an outside sales representative and he did not do any "telemarketing"--simply put, he was not much more than an telephone "order taker". Guidi was not a fiduciary. The adjudicator noted that there was no evidence of an actual conflict of interest (recall that Guidi was dismissed based only on a *potential* conflict) nor was there any evidence that Guidi had access to confidential or proprietary information. Guidi was not a so-called "key employee" but a "mere" employee [see *Barton Insurance Brokers Ltd. v. Irwin* (1999), 40 C.C.E.L. (2d) 159 (B.C.C.A.)]. Given those findings of fact, I do not see any principled reason for disagreeing with the adjudicator's decision.

ORDER

The application for reconsideration is **refused.**

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal