

COURT UPHOLDS RIGHT OF EMPLOYER TO FIRE EMPLOYEE FOR SECRETLY BIDDING FOR WORK IN ANTICIPATION OF COMPETING WITH EMPLOYER

Felker v. Sherman Cunningham & Electro Source Inc.,
An Unreported Decision of the Ontario Court of Appeal dated May 18, 2000

Facts

In 1994, the Plaintiff incorporated a company, JAS Technology Inc. ("JAS"), which he intended to use to start his own business should the opportunity arise.

In 1995, the Plaintiff became the Defendant Electro Source's Toronto area sales manager. Prior to beginning his employment with Electro Source, the Plaintiff informed Cunningham that he had aspirations of starting his own company.

While employed by Electro Source, the Plaintiff learned of an opportunity to become the Canadian manufacturer's representative for a company called Microchip. The Plaintiff and two partners put together a proposal on behalf of the Plaintiff's company, JAS, which they planned to submit to Microchip. If they obtained the Microchip contract, the Plaintiff planned to leave Electro Source to operate his own company in competition with Electro Source.

The evidence indicated that the Plaintiff prepared a presentation to Microchip on the computer he had received from Electro Source under his employment contract. Furthermore, the Plaintiff admitted that he did not devote his full time and attention to his duties at Electro Source and that he was not concerned about advancing the business of Electro Source while he was preparing the presentation to Microchip. The Plaintiff admitted that he was not frank, open and honest with Cunningham when he failed to disclose to Cunningham that he was preparing a proposal for Microchip, and failed to receive Cunningham's permission to do so.

Upon learning that the Plaintiff was planning to make a proposal to Microchip, Cunningham terminated the Plaintiff's employment with Electro Source.

The Plaintiff filed an action for wrongful dismissal against Cunningham and Electro Source.

Trial Court (October 15, 1998)

The Plaintiff was successful at trial. The trial judge found that Cunningham would have known that employees of manufacturer's representatives in the electronics industry aspire to own their own manufacturer's representative companies. Furthermore, the Plaintiff had told Cunningham this fact even before Cunningham had recruited the Plaintiff to work at Electro Source. Cunningham accordingly knew that the Plaintiff would go behind his back to make a proposal such as the proposal to Microchip if the situation presented itself. This did not justify Cunningham terminating the Plaintiff's employment.

Court of Appeal (May 18, 2000)

The Court of Appeal allowed the appeal.

The Court found that the Plaintiff was a fiduciary employee. His duty of loyalty required that he devote his full time, ability and energy to furthering the best interests of Electro Source. It also required that he avoid putting himself in a position where his own interests, or other commercial interests with which he was aligned, would be paramount to Electro Source's interests, or would detract from his ability to work fully and completely for the benefit of Electro Source. Additionally, the Plaintiff's fiduciary duty required him to be open, honest and forthright with Electro Source and make full disclosure of all material facts that his employer would be entitled to know. Electro Source was entitled to know that the Plaintiff was preparing a presentation to Microchip with the intention of acquiring Microchip as a client and thereafter carrying on business in competition with Electro Source. The Plaintiff's activities breached his fiduciary duties.

The Court further concluded that Cunningham was entitled to lose trust in the Plaintiff upon learning of the Plaintiff's activities. Accordingly, Cunningham was entitled to terminate the Plaintiff's employment. The Court found that the fact that Cunningham was aware that the Plaintiff would start his own business if the opportunity presented itself did not relieve the Plaintiff from his fiduciary duties to Electro Source. The Plaintiff's comment to Cunningham prior to beginning his employment with Electro Source did not fulfill his duty of full disclosure.

Conclusion

Employers and employees should take note of the Court of Appeal's closing comments, in which the Court noted that the Plaintiff would have been successful if the Plaintiff had been aware of the Microchip opportunity when his employment with Electro Source was negotiated, if he had disclosed the Microchip opportunity to Cunningham and indicated his intention to pursue it at the time he was negotiating his employment with Electro Source, and if he had been hired by Electro Source despite that disclosure.