Employment Standards TRIBUNAL

An appeal

- by -

Infolab Marketing Canada Inc.
("Infolab")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Norma Edelman

FILE No.: 2001/805

DATE OF DECISION: January 15, 2002

DECISION

OVERVIEW

This is an appeal by Infolab Marketing Canada Inc. ("Infolab") under Section 112 of the Employment Standards Act ("the Act") against a Determination issued by delegate of the Director of Employment Standards on the November 1, 2001. The Determination requires Infolab to pay compensation for length of service to Terry Cook ("Cook") in accordance with Section 63 of the Act.

ISSUE TO BE DECIDED

Is Cook entitled to compensation for length of service?

FACTS

Cook worked at Infolab, a telemarketing company, from August 1, 2000 to December 15, 2000.

Cook filed a complaint at the Employment Standards Branch alleging his employment was terminated without notice, cause or compensation for length of service. He advised the delegate that the company closed for the holidays on December 15, 2000 and employees were expected to return on January 8, 2001. On December 27, 2000, he received a Record of Employment indicating that he was laid off due to shortage of work and the expected date of recall was unknown. On January 30, 2001 he wrote the company regarding his wages, and the company replied that his layoff was permanent.

The delegate said he sent Infolab two letters regarding Cook's claim, but he received no reply. The letters were not returned as unclaimed and he was not able to contact the company by phone as its telephone numbers were out of service.

The delegate concluded, based solely on information provided by Cook, that Cook was laid off on December 15, 2000 and he was never recalled back to work. He further concluded that given the company confirmed the layoff was permanent, Cook's employment was terminated without any notice, cause or compensation, and consequently he was entitled to one weeks wages as compensation for length of service.

Shawn Toloui ("Toloui"), on behalf Infolab, filed an appeal of the Determination on November 20, 2001. Toloui stated that the only letter he received from the delegate was the Determination and it was received via a former director of the company. He said Infolab ceased operations on January 15, 2001, therefore, "…any correspondence should have been sent to the new address shown on the form.". He also stated that two former directors of the company also received the

Determination, but since both ceased to be directors as of May 30, 2000 they should not be receiving any correspondence relating to Infolab's former business activities.

Toloui also said a letter was prepared and given to Cook on December 11, 2000, which stated: "…we will be closing for the holiday season as of closing Dec. 15. In January we might call you to confirm a new start date based on the available business campaigns and project requirements. I appreciate your hard and dedicated work and we will be in touch with you by Jan 8 regarding the progress at InfoLab". He said a meeting was held on the same date explaining the letter and the status of the company and whether a recall would be made or not. Further, when Infolab closed on December 15 it anticipated more telemarketing projects in the coming year, therefore the Record of Employment was marked as "unknown". When it was determined there was not sufficient work to carry on the business it was decided that operations would cease and the doors would be officially closed on January 15, 2001. According to Toloui, Infolab fully complied with the Act by giving Cook one weeks notice in writing and therefore it does not owe compensation for length of service.

Both the delegate and Cook replied to the appeal.

The delegate said the two letters he sent to Infolab prior to the issuance of the Determination were mailed to the company's last known office address and neither was returned to the Branch. Further, neither he nor Cook was aware of the closure of the business or the change of address. He also said that the December 11 letter said that the business was a "closing for the holiday season " and this is not a notice of termination of employment.

Cook stated that he did not recall receiving the December 11th letter. He said he remembers several of the employees individually meeting with the office manager and receiving a general office staff memo on letterhead regarding holiday closing and that they would be contacted on January 8 for the startup date. He said that the December 11 letter would appear to be due notice. However, he does not recall receiving it and he was not contacted in January as to the company's progress. Regardless, he believes that since he was not called back after the 13 week waiting period, his layoff became permanent, and thus he is entitled to one weeks pay in lieu of notice for full-time employment of three months or longer.

ANALYSIS

The Tribunal has consistently held that failure to cooperate with a delegate, and in particular failure to produce relevant documentation during the investigation process, without good reason will preclude production of such documentation on appeal of a Determination (see Kaiser Stables Ltd. BCEST #058/97).

The December 11, 2000 letter produced by Infolab on appeal was not produced to the delegate during the investigation stage. Toloui says the only document he received from the delegate was the Determination and further, the company ceased operations on January 15, 2001 and any

letters should have been "sent to the new address shown on the form". It is not clear to me what "form" Toloui is referring to, but in any event, I have decided to admit the December 11, 2000 letter.

I am not entirely satisfied that Toloui or the company was advised of, and given an opportunity to respond to, the investigation prior to the issuance of the Determination. The delegate says he sent two letters to the company's last known address prior to issuing the Determination and the letters were not returned. However, it appears the letters were sent by regular mail and therefore there is no way to be certain what happened to the letters. They could have been received or not, or they could have been unclaimed or forwarded to a new address. The delegate says he was not aware the company had closed or changed its address, yet he says he knew the company's phone was out of service, which should have alerted him to the possibility that mail sent to that address may not be claimed. Given these circumstances, the fact that the delegate made no further efforts to contact the company, such as sending copies of the letters to the officers and directors of the company and the Registered and Records office (like he did with the Determination) or visiting the work site to determine if the company was in business or not or whether there was a forwarding address on the door of the company, plus the absence of any evidence suggesting the company willfully declined to participate in the investigation it would, in my view, be unfair to disallow the letter on the appeal.

Under Section 63 of the Act, an employee is entitled to compensation for length of service on termination of employment and the amount payable ranges from one to eight weeks wages based on the employee's tenure at the point of termination.

An employer's obligation to pay compensation for length of service can be avoided in a few limited circumstances, including the giving of the appropriate amount of written notice.

The burden is on Infolab to prove that it gave Cook written notice of termination of employment. Infolab asserts it gave the appropriate amount of written notice to Cook by way of the December 11, 2000 letter. However, there is no clear and unequivocal evidence to show Cook was actually "given" the letter. He says he never received it and there is no signature on the letter showing Cook's receipt of the document.

I should note that even if I accepted that Cook received the letter, I agree with the delegate that it does not constitute notice of termination of employment. The letter does not state that Cook's employment would permanently cease on December 15. Rather, it states the company is closing for the holidays and by January 8 the company will contact Cook about any further work. The letter is notice of a temporary layoff with an indication that come January 8, Cook may or may not have further work. Notice of temporary layoff is not equivalent to notice of termination of employment. The Act does not require notice of layoff or temporary layoff. It does require notice of termination of employment. The purpose of notice of termination of employment is to provide an employee with a reasonable opportunity to seek out alternative employment. If an

employer means to terminate the employment of an employee, then the notice should not indicate that the employee might be recalled back to work.

In this case, I accept that Cook was placed on a layoff. Cook was never recalled and his layoff exceeded 13 weeks in a 20-week period and thus his employment is deemed to have been terminated. Further, he was never given proper notice of termination of employment and therefore he is entitled to compensation for length of service.

ORDER

Pursuant to Section 115 of the Act I order that the Determinations dated November 1, 2001 be confirmed.

Norma Edelman
Adjudicator
Employment Standards Tribunal