Employment Standards TRIBUNAL

An appeal

- by -

Transformation Solutions Inc.

- 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: John M. Orr

FILE No.: 2001/645

DATE OF HEARING: November 29, 2001

DATE OF DECISION: December 6, 2001

British Columbia

DECISION

APPEARANCES

Jo Surich On behalf of Transformation Solutions Inc.

Stacy Ginn On her own behalf (by teleconference)

OVERVIEW

This is an appeal by Transformation Solutions Inc. ("TSL") pursuant to Section 112 of the Employment Standards Act (the *"Act"*) from a Determination dated September 7, 2001 by the Director of Employment Standards (the "Director").

TSL terminated the employment of Stacy Ginn effective May 11, 2001 by verbal notice given on April 23, 2001. On April 24th the principal of TSL wrote a letter confirming the verbal notice and sent it as an attachment to an email. On the last day of her employment when she received her final cheque, Ms Ginn declared that she had not received "written notice" as required by the *Act* and demanded compensation for length of service.

The Director determined that the letter had been composed and sent on April 24th and, if Ginn had received it, it would have constituted proper written notice to discharge the employer's liability for compensation. The Director determined that the onus was on the employer to prove that the email had been received and as there was no evidence that Ginn had received it compensation was owing in the amount of $1,208.12.

This decision finds that receipt of the written notice could be confirmed by the actions of the parties. The onus is on the employer to establish that written notice was sent and there must be some evidence to confirm receipt of the notice by the employee. It may not always be possible to prove actual receipt but such receipt may be established on the basis of a reasonable inference arising from the actions of the parties.

ISSUES

The issue in this case is the degree of proof required for an employer to establish that written notice was "given" to an employee in order to discharge the employer's liability for compensation for length of service.

FACTS AND ANALYSIS

There was another issue that arose during the investigation, which is not addressed in this decision. In the determination the Director's delegate referred to section 65(f) of the *Act* and

questioned whether reasonable alternative employment had been offered. TSL advised me at the commencement of this hearing that they would not be relying on section 65(f).

To a large extent the facts in this case are not in dispute. On April 23 2001 Mr Surich gave verbal notice to Ms Ginn that her employment with TSL would terminate on May the 11th 2001. It was contemplated by TSL that Ms Ginn would go to work immediately for another company that was a client of TSL. As it turned out Ms Ginn declined employment with the other company but negotiated a contractual relationship with them.

On April 24th Mr Surich composed a letter that confirmed the termination of employment. As was the practice in this particular corporation, the letter was sent as an attachment to an e-mail transmission. Mr. Surich copied the e-mail to his office manager, Ms. Dianna MacArthur. Ms. MacArthur confirms that she received the e-mail with its attachment. She printed a copy of the attachment and saved that copy in a file.

Ms Ginn confirms that she received the verbal notice but denies that she received any written confirmation. She says that there may have been a problem with the e-mail system.

The Director's delegate also found as a fact that the letter had been composed and sent. However, the delegate says that the act does not simply required the notice of termination be 'sent' to the employee it requires notice to be 'given'. He concludes that for something to be 'given' it must also be received. He finds in the determination that there is no evidence that would confirm that the April 24th letter was ever received by Ginn and therefore the employer had not established that written notice had been given.

TSL submits that the delegate was in error when he says that there was 'no evidence' to confirm receipt. It is submitted that he overlooked some very significant evidence. TSL says, and it is not disputed, that e-mail was the established and standard method of communication within the corporation. Letters confirming employment, promotions, performance reviews, and terminations had been transmitted in this fashion successfully for at least five years. There was no reason for the employer to doubt that Ms Ginn would receive the e-mail. There was no evidence to indicate that she did not receive it e.g. that it was returned or that an error had occurred. Ms MacArthur received a copy of the letter on the day that it was sent.

Unfortunately for both parties it appears that the computer records are now not available in a manner that would establish conclusively whether or not Ms Ginn opened the e-mail.

However, TSL submits that the actions of the parties were all consistent with the fact that the e-mail had been sent and received. TSL made arrangements with another company to offer employment to Ms Ginn. Ms Ginn reviewed the offer of employment and was not satisfied with its terms but she proceeded to negotiate a contractual relationship with the other company to commence on the next workday following her termination from TSL. In the time intervening between notice being given and the date of termination Ms Ginn made arrangements with TSL

for a letter of reference. She also made arrangements for the transfer of her medical plan from the company to herself personally.

TSL's human resources officer testified under oath that she had had several conversations with Ms Ginn after April 24th in which it was clear to her that Ms Ginn was planning for her transition to new employment. Ms Ginn discussed the offer of employment and that she had decided to work on contract with the company until she moved to Vancouver. Ms Ginn advised the other 15 employees that she was leaving TSL on May 11th and arrangements were discussed with regard to appropriate farewell activities.

In my opinion it was an error for the delegate to find that there was "no evidence" that the written notice had been received by Ms Ginn. Ms Ginn testified that she would not have taken the verbal notice seriously unless there was a written confirmation. She said that it was standard practice that verbal communications were followed in writing. She testified that, in the past, verbal instructions were often changed and she had learned to rely only on written instructions. However, it is very clear on the facts of this case that Ms Ginn took very definite and significant actions in regard to her employment status and future employment that she would not have taken based on a simple verbal comment. Based on her evidence it is highly improbable that Ms Ginn would have declined an initial offer of employment and negotiated a contract with the other employer without having received a written confirmation of her termination of employment. It is highly improbable that she would have cancelled her company medical plan. It is highly improbable that she would have advised all of her co-workers of her departure and it is highly unlikely that she would have had several discussions with the director of human resources about her future plans if she had not yet received written confirmation of her termination.

There was a significant amount of behavioural evidence that substantiates the conclusion that not only was written notice sent but also that it was received. The delegate did not consider this evidence although it was there to be considered. In the era of electronic communications and the growing acceptance of such means of communication it is reasonable to conclude that the message that was sent was also received. There was no indication to the sender that the message was not received. It was received by a person to whom it was copied. The alleged recipient acted in all respects as if the message had been received. Apart from the recipient's denial there is no evidence to confirm the non-delivery of the email.

I conclude that TSL has met the onus of persuading me that the determination was in error in not taking into account all of the surrounding circumstances in weighing the evidence and I am satisfied that the written notice was not only sent but also delivered and that therefore Ms Ginn was "given" written notice sufficient to discharge the liability of the employer to pay compensation for length of service in accordance with the Act. I conclude that the determination should be cancelled.

ORDER

I order, under section 115 of the *Act,* that the Determination dated September 7, 2001 is cancelled.

John M. Orr
Adjudicator
Employment Standards Tribunal