

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C. 38

- by -

Dr. Howard Nelson James
("Dr. James")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE NO.: 96/317

DATE OF HEARING: July 10, 1996

DATE OF DECISION: July 19, 1996

DECISION

OVERVIEW

This appeal is by Dr. Howard Nelson James ("Dr. James") pursuant to Section 112 of the *Employment Standards Act* ("the Act") against Determination # 002038 issued by the Director of Employment Standards (the "Director") on April 24, 1996. That Determination was issued as a result of a complaint by Chantelle Marlene Long ("Long"), a former employee of Dr. James. Long claimed a failure to pay for overtime and severance pay and was awarded \$829.50. Dr. James claims that Long was not terminated and that the Determination is in error.

APPEARANCES

Dr. Howard Nelson James	The Appellant
Brana James	Witness For the Appellant
Mary Scoular	Witness For the Appellant
Chantelle Marlene Long	On Her Own Behalf
Audry Long	Observer, In Support of Long
Adele Adamic	For the Director

FACTS

Dr. James operates a medical practice in Vancouver. Chantelle Long worked on a regular part-time basis for Dr. James as a medical office assistant, from some time in February, 1994 until July 28, 1995. She also filled in for others while they were on vacation, a role that had her working seven days a week at times.

In July of 1995 Long worked in place of an employee on vacation. She complained of not being paid overtime for work on July 8 and 9, 1995. She has not worked for the office since July 28, 1995, despite asking repeatedly if work was available.

The parties disagree in respect to why Long never worked beyond July, 1995 but initially it was because there was simply no need for Long, Brana James had replaced Long in the office, working without pay it is said. The appellant says that the office was slow and losing money at the time.

ISSUES TO BE DECIDED

During the course of the hearing Dr. James conceded that overtime pay was owed. Given that and hearing no complaint in respect to the amount calculated in the Determination, I conclude that Long is owed \$67.50 as calculated in the award.

Remaining is the issue of whether Long quit or was dismissed by Dr. James.

ANALYSIS

The appellant argues that Long quit, but the evidence does not support such a conclusion. Quite the contrary. The evidence is that Long needed the work and continued to look to the office for work, contacting the office as she did, and that she only gave up on the idea of returning to the office after weeks of getting no work. That is just not consistent with the idea that she quit. I conclude that Long did not quit.

The Director's delegate found, as is clearly set out in the Determination, that Long "was constructively dismissed as her hours of work were abruptly, and without explanation, reduced to zero, her position was filled by a 'temporary volunteer' and her period of zero hours was extended well beyond thirteen weeks". The appellant, Dr. James, argues that it is wrong to conclude that she was dismissed because no one ever told Long that she was dismissed and it was his intention to have her back at some point. After hearing from the parties, I accept that no one told Long that her employment was being terminated but I am not prepared to accept the notion that there was a plan to have Long back. But having said that, I want to make it clear that even if I were to accept the doctor fully on that point, the basis for the Determination remains. The facts remain, Long was replaced, 'temporarily' or not, and she received no work for a period of more than 13 consecutive weeks. The latter alone calls for the paying of severance pay.

A layoff of more than 13 consecutive weeks is not a 'temporary layoff' as defined by the *Act*. A 'temporary layoff' is "a layoff of up to 13 weeks in any period of 20 consecutive weeks", Long not being covered by a collective agreement. 'Termination of employment' includes "a layoff other than a temporary layoff". The *Act* is clear, should a layoff stretch beyond 13 consecutive weeks, as Long's did, the employee is to be considered terminated and the employer is liable for compensation for length of service. It is not necessary for Long to have been told that she is dismissed.

The Director's delegate has found that Long is owed severance pay as a result of her being "constructively dismissed". I agree. Hearing nothing from the appellant in respect to the investigating officer's calculation of severance pay and related vacation pay and interest, I conclude that Long is owed \$829.50 as set out in the Determination.

ORDER

Pursuant to Section 115 of the *Act*, I order that Determination # CDET 002038 be confirmed.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal
LDC;jel