

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 -

Dynasty Kitchen Cabinets Ltd.
("Dynasty")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE NO.: 96/447

DATE OF HEARING: October 18, 1996

DATE OF DECISION: October 31, 1996

DECISION

APPEARANCES

Joe Ayache	Owner of Dynasty Cabinets
Douglas J. Mackay	Of Dynasty Cabinets
Mustapha Yassine	Of Dynasty Cabinets
Kelli L. Jennings	On her own behalf
Brenda Steer	Witness for Jennings
Lynne Egan	For the Director

OVERVIEW

The appeal is by Dynasty Kitchen Cabinets (“Dynasty”) pursuant to Section 112 of the *Employment Standards Act* (“the Act”) against Determination # CDET 003325 of the Director of Employment Standards (the “Director”), a decision dated July 12, 1996. The Determination, issued as a result of a complaint by Kelli L. Jennings (“Jennings”), finds that Dynasty failed to pay for overtime as required by the Act and is liable for compensation for length of service, as well as vacation pay on the latter amount and interest. Dynasty argues that Determination is in error, that Jennings was laid off and then recalled so that it does not now owe severance pay.

FACTS

Kelli Jennings was employed by Dynasty Kitchen Cabinets as its Shipper/Receiver from January 16, 1995 until March 13, 1996.

The parties disagree on whether Jennings was laid off or terminated. Jennings says that it was her understanding that she was terminated. The employer says that she was laid off. A note in payroll records for Jennings uses the words, “*layoff - shortage of work*”.

It is the testimony of Dynasty’s book-keeper, Brenda Steer, that Joe Ayache told her at the end of March or early in April, 1996, that the position of Shipper/Receiver had been eliminated. It is the testimony of Ayache that he was misunderstood.

Joe Ayache of Dynasty sent a letter to Jennings dated May 28, 1996. The letter states, “*Please contact me at your earliest convenience to set up an appointment. I would like to discuss with you the possibility of you returning to work for my company.*” Jennings responded to the letter and as a result Jennings and Ayache agreed to meet on June 5, 1996.

Jennings went to the meeting but Ayache did not. Jennings was told that Ayache had other matters to attend to.

Jennings called Ayache on June 7, 1996 and they agreed to meet at 6:30 p.m. on June 10, 1996. On the afternoon of the 10th, a letter dated June 7, 1996 and signed by Ayache was hand delivered to an address where Jennings worked part-time. She was not there but that employer contacted her and read her the letter. The letter in part states, *“Please report to work on June 11th, 1996 at 7:55 a.m.. If there is any problem please inform me in writing /fax me, prior to this date.”* Jennings did fax Ayache a reply. She said that she understood from Ayache’s letter that he was cancelling their 6:30 meeting, she asked of the terms and conditions of the work that he saw her doing, and she said that she could not resume work on such short notice given certain commitments. In reply to the fax, Ayache telephoned Jennings in the evening and pay was discussed and other terms of employment, including the matter of whether the offered job was permanent. According to Jennings, during the course of their conversation Ayache told her that one reason for her being laid off was her personality.

Jennings never did return to work for Dynasty.

In giving reasons for the Determination, the Director’s Delegate noted that while the layoff was said to be due to a shortage of work, no other employees were laid off. The employer was found to have terminated Jennings, to have later initiated but then frustrated discussion of a return to work and to have eventually called Jennings back to work but failed to give reasonable notice of ‘recall’. Two weeks’ compensation for length of service was awarded Jennings.

The appellant argues that Jennings was asked to return to work prior to delivery of the letter dated June 7, 1996. In its written submission, Dynasty states that *“the phone call on June 10th was made because Egan (the investigating officer) had indicated that without it Jennings’ temporary lay-off would become permanent”*. In essence what the employer argues is that Jennings was laid off and then recalled, before the 13 weeks was up, but the employee refused the work.

ISSUE TO BE DECIDED

Is Jennings entitled to compensation for length of service, that is the issue raised by the appeal.

ANALYSIS

The Director’s Delegate found that compensation for length of service is owed Jennings. I agree.

Dynasty argues that Jennings was merely laid off. Even accepting the employer’s position for a moment, it remains that Jennings is entitled to compensation for length of service. The *Act* is clear, should a layoff stretch beyond 13 consecutive weeks, the employee is to be considered terminated and the employer is liable for compensation for length of service. Dynasty did call Jennings back to work but she did not to return to work before the ‘layoff’ became permanent. Importantly, her failure to report for work on the 11th was through no fault of her own and neither was it

unreasonable, she receiving the short notice of recall that she did, in the afternoon of the June 10th I conclude, nor was it because she quit. In the latter regard, while it is clear that, eventually, Jennings chose not to work again for Dynasty, the evidence indicates that was later. The employer simply fails to show that Jennings' failure to report on the 11th was for any reason other than the lack of notice given by Dynasty.

Having found the above, no one should labour under the misconception that I accept this notion that Jennings was laid off on March 13, 1996. The evidence supports a conclusion that Jennings' employment was terminated by Dynasty on that day, not laid off. I refer to the testimony of Brenda Steer, the bookkeeper, who I found to be a credible witness; the fact that no other employee was laid off; Ayache's stating that Jennings' personality was a reason for her 'layoff', and the erratic way in which Dynasty went about discussing her return to work, an approach which leads me to conclude that its interest in Jennings' return was less than genuine, that it was in main concerned with avoiding the need to pay severance pay.

Compensation for length of service is owed Jennings. The Determination is confirmed.

ORDER

I order, pursuant to Section 115 of the *Act*, that Determination # CDET 0033325 be confirmed.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal

LDC:jel