EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act, R.S.B.C. 1996, C. 113

- By -

Peter Hunter
("Hunter" or the "Employee")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Ib S. Petersen
FILE NO.:	98/583
DATE OF HEARING:	November 24, 1998
DATE OF DECISION:	December 8, 1998

DECISION

APPEARANCES/SUBMISSIONS

Mr. Peter Hunter	on behalf of himself
Mr. Paul Rocchetti Mr. Dennis Morgan	on behalf of Via-Sat Data Systems ("Via-Sat" or the "Employer")

OVERVIEW

This is an appeal by the Employee pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director's delegate issued on August 13, 1998. The Determination found that Hunter terminated his employment with the Employer before his temporary layoff had expired and, therefore, that he was not entitled to payments on account of compensation for length of service. Hunter appeals the Determination.

FACTS AND ANALYSIS

Section 1 of the *Act* provides:

> "temporary layoff" means
>
> (a) ...
>
> (b) in any other case, a layoff of up to 13 weeks in any period of 20 consecutive weeks;
>
> "termination of employment" includes a layoff other than a temporary layoff;

Sections 62 and 63 of the *Act* provide (in part):

> 62. In this Part, "week of layoff" means a week in which an employee earns less than 50% of the employees weekly wages, at the regular wage, averaged over the previous 8 weeks.
>
> 63(5) For the purpose of determining the termination date, the employment of an employee who is laid off for more than a temporary layoff is deemed to have been terminated at the beginning of the layoff.

Once the temporary layoff expires, without the employee being recalled to work, the employee is deemed to have been terminated and is the entitled to compensation for length of service (Section 63).

Hunter worked for Via-Sat as a data technician for a little under eight years. The Employer's business is seasonal in nature, participating in the construction, service and maintenance of climate stations for, among others, BC Hydro. Rocchetti testified that 75% of the work is done in the Summer. During the season, the employees work hard and long hours. They bank the hours in excess of 40 in a week against periods when there is no work. Hunter was generally paid on the basis of 5 days per week, 8 hours per day, 52 weeks per year (including paid vacation). This arrangement of banking hours was in place between 1988, when Via-Sat started doing business, and 1997.

In 1997, Hunter was laid off. It was the Employer's understanding that this was a temporary layoff, similar to what had happened in previous years. However, Hunter started looking for other employment. On May 29 he was offered other employment which he accepted on May 30. On that date he telephoned Rocchetti and informed the Employer that he had obtained other employment and instructed Rocchetti to cancel his benefits. Hunter started in his new position on June 2, 1997. I agree with the Determination that the 20 week period ends on May 30, 1997. The Determination stated:

> "The ROE states the day of lay off as February 28, 1997, thus the 20 week period begins on the first day of layoff. The 13 week period commenced February 28, 1997 and expired May 30, 1997. Hunter was recalled to work during the weeks of March 30-April 5 and April 20-26, 1997. Hunter earned more than 50% of his regular wages during both of those periods. ... There has not been a layoff exceeding 13 weeks in a period of 20 consecutive weeks. Since the date of layoff, February 28, 1997 there were only 11 weeks in which Hunter received less than 50% of his regular earnings.
> ....
> There was no termination resulting from a temporary layoff exceeding 13 weeks. No claim for compensation for length of service has been established."

The burden to prove that the Determination is wrong rests with the appellant, in this case the Employee. Hunter takes issue with February 28 as the date of the beginning of the layoff. I agree that the date of issuance of the Record of Employment is not determinative of the issue of the date of layoff. That issue must be decided with reference to the *Act*. He says that the layoff began on Monday February 10, 1997 when he filed his application for Employment Insurance. He says that he was informed of the layoff at the end of the previous week. There is no dispute, however, that Hunter was paid by the Employer after that date. As I understand his evidence, he was paid for 65.5 hours for the two weeks ending February 15, though he worked 40 hours in the first week and

none in the second. Similarly, in the following two week period, ending February 28, he was paid for 63.5 hours, though he only worked two hours in the first week of that pay period. I am prepared to accept that Hunter was not paid less than 50% of his regular wages prior to February 28. This was in accordance with the parties' understanding of their agreement (Whether the overtime was calculated at the appropriate rate was not argued before me). The arrangement conforms to Section 17 of the *Act* which provides that at "least semimonthly and within 8 days after the end of the pay period, an employer must pay .. all wages earned .. in a pay period". The exceptions to this include "overtime wages credited to an employee's time bank". The *Act* expressly endorses the establishment of overtime banks (Section 42). According to his own evidence, Hunter was recalled and worked at least the week of April 20-26 for 23 hours, *i.e.*,. Earning in excess of 50% of his regular wages. In the result, at the time Hunter informed the Employer that he had found other employment on May 30, 1997, he was at least one week short of a "deemed" termination (Section 63(5).

Having considered all the circumstances, I am not persuaded that the appeal can succeed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated August 13, 1998 be confirmed.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal