BC EST # D011/99
Reconsideration of BC EST # D533/98

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration pursuant to Section 116 of the

Employment Standards Act, R.S.B.C. 1996, c. 113

-by-

Peter L. Hunter

("Hunter")

-of a Decision issued by-

The Employment Standards Tribunal

(the "Tribunal")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE No.:	98/800
DATE OF DECISION:	January 18th, 1999

DECISION

OVERVIEW

This is an application filed by Peter L. Hunter ("Hunter") pursuant to section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of an adjudicator's decision to confirm a Determination issued by a delegate of the Director of Employment Standards (the "Director") on August 13th, 1998 under file number 086042 (the "Determination").

Hunter filed an complaint under the *Act* alleging that he had been "constructively dismissed" (see section 66 of the *Act*) by his former employer, Via-Sat Data Systems Inc. ("Via-Sat" or the "employer"), and was, therefore, entitled to compensation for length of service under section 63 of the *Act.* The delegate dismissed Hunter's complaint finding that: "A temporary layoff due to a shortage of work does not constitute a constructive dismissal" and noted that Hunter had, in fact, terminated his employment prior to a point when his "temporary layoff" would have been deemed to be a termination under section 63(5) of the *Act.*

Hunter then appealed the Determination to the Tribunal; the appeal hearing was held on November 24th, 1998 and a decision confirming the Determination was issued on December 8th, 1998.

FACTS

According to the facts set out in the adjudicator's decision, Hunter was employed by Via-Sat as a data technician for nearly eight years. The work is seasonal with the bulk of the work being undertaken during the summer months. Thus, Via-Sat employees "banked" hours in excess of 40 per week to be drawn down in "slack" periods. As a result, Hunter was generally paid 8 hours per day, 5 days per week, 52 weeks per year (including paid vacation).

On February 28th, 1997, Via-Sat laid off Hunter and issued him a Record of Employment citing the reason for layoff as "shortage of work"; Hunter's expected recall date was stated to be unknown. Upon layoff Hunter commenced a search for new employment which proved to be successful; on May 29th, 1997 he was offered a position with another firm which he accepted the next day. He informed his employer on May 30th that he had found new work and asked that his employment benefits (which I take it had been continued during his layoff) be cancelled. Hunter commenced his new job on June 2nd, 1997.

ANALYSIS

Hunter's request for reconsideration is contained in a letter to the Tribunal dated December 16th, 1998. Both the Director's delegate and the adjudicator found that Hunter's layoff commenced on February 28th, 1997 and thus the "13-week" period would have expired on May 30th, 1997. By reason of section 62 of the *Act*, if in any week during a period when an employee is on "layoff status", the employee earns 50% or more of his regular weekly wages, that particular week does not count as a "week of layoff". A "temporary layoff" is not deemed to be a termination of employment until the employee has been laid off for 13 weeks in any period of 20 consecutive

weeks. In this case, Hunter was recalled for two weeks during his period of layoff in which he earned more than 50% of his regular weekly wages and thus, so found the delegate and the adjudicator, he was still on "temporary layoff" when he resigned from his employment with Via-Sat.

In his testimony before the adjudicator, Hunter asserted that he was, in fact, laid off as of February 10th, rather than February 28th, 1997 and, accordingly, the relevant 13-week period had already expired when he resigned. This assertion was rejected by the adjudicator who found that Hunter:

> "...was paid 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."

In his reconsideration request, Hunter asserts that his layoff commenced the week of February 9 to 15, 1997; he applied for employment insurance benefits on February 10th. He says that he worked no hours during the week of February 9th, 2 hours during the week of February 16th to 22nd, and 61.5 hours during the week of February 23rd to March 1st, 1997. He says that on the February 21st payday, he was not paid for the 2 hours that he worked in the two-week period February 9th to 22nd but was paid 63.5 hours, on the March 1st, 1997 payday, for the period February 23rd to March 1st plus the 2 hours worked during the previous pay period.

However, even accepting these assertions as face value, I fail to see how Hunter can claim to have been terminated under section 63(5) of the *Act*. If he was laid off, as he asserts, on February 10th (and there is ample evidence to support the employer's position that he was not laid off until February 28th), there still are 13 or fewer weeks prior to his resignation where he was paid less than 50% of his regular wages (*i.e.*, less than 40 hours per week). Thus, Hunter remained on "temporary layoff" as of his termination date and therefore no compensation for length of service is owed to him.

ORDER

The application to vary or cancel the decision of the adjudicator in this matter is refused.

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Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal