

An appeal

- by -

Fayner Enterprise Corporation operating as Canadian Wholesale
Thermographers
("Employer")

- 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: Ib S. Petersen

FILE No.: 2002/143

DATE OF DECISION: June 25, 2002

DECISION

APPEARANCES:

Mr. Joe Fayner

on behalf of the the Employer

OVERVIEW

This is an appeal by the Employer, pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), of a Determination of the Director’s Delegate issued on February 28, 2002 in the amount of \$1,020.76 plus interest (the “Determination”). In the Determination, the Director’s Delegate found that Ms. June Tham did not resign her employment and was terminated without cause on March 9, 2001. The Delegate awarded her compensation for length of service under Section 63 of the *Act*.

FACTS AND ANALYSIS

The Employer, as the Appellant, has the burden to persuade me that the Determination is wrong. For the reasons set out below, I am of the view that the Employer has not met that burden.

Ms. Tham was employed as a typesetter work with the Employer from May 4, 1998 until March 9, 2001. On that day, which was a Friday, she left a message on the Employer’s answering service that she was ill and would not be in for work. The Employer’s Mr. Fayner, who admitted to a degree of suspicion with respect to Ms. Tham’s absences on sunny Fridays and Mondays, telephoned Ms. Tham. There was no answer and he telephoned a few more times and finally left a message. Mr. Fayner agreed he was angry when he left the message. He operates a small business and depends on his employees being there.

In large measure, in my view, the resolution of this case turns on this message. According to the Determination, Mr. Fayner’s message was to the effect that Ms. Tham need not come back to work. The Delegate apparently interviewed two of Ms. Tham’s roommates and they confirmed that was the gist of the message. At the hearing, Mr. Fayner denied that he used those, or any other words, to convey the message that Ms. Tham was terminated. Rather, he explained, he left a message that she call him and that she needed a doctor’s note to confirm her illness and the duration of her absence. He candidly agreed that he did not remember the exact words used.

The following workday, Monday March 12, 2001, according to Mr. Fayner, Ms. Tham called the Employer. During that conversation Mr. Fayner requested that Ms. Tham provide the doctor’s note, which she said she had. Ms. Tham stated, according to Mr. Fayner, “but you fired me.” Ms. Tham agreed to provide the doctor’s note but she subsequently changed her mind and the note was not provided to the Employer until the Delegate’s investigation. As well, the Employer sent an e-mail to her reiterating the need for a doctor’s note in order for her to return to work. A few days later, on March 15, Ms. Tham came to the work place to pick up her final pay cheque. Mr. Fayner says that she spoke briefly with him, and had a longer conversation with his wife, who did not testify. From the conversation with Ms. Tham it was apparent to the Employer that Ms. Tham did not wish to continue her employment with the Employer. There is no dispute that Mr. Fayner offered--at least once between March 9 and March 15--to re-hire Ms. Tham.

Having considered all of the circumstances, I am not persuaded that the Delegate erred in her conclusions that the Employer terminated Ms. Tham. In considering the difference in the statements apparently made to the Delegate, and those presented at the hearing, I am troubled by the Employer's own evidence that Ms. Tham called him on March 12 and stated that she had been "fired." If, as Mr. Fayner says, he simply left a message requesting her to confirm her absence with a doctor's note, why would she be of the view that she had been terminated. In my view, this does not make sense. In my view, it is more probable that Mr. Fayner, who agreed that he was angry when he left the message on March 9, told Ms. Tham that she was terminated or words to that effect. Perhaps the Employer had a change of heart.

I am of the view that the Delegate correctly assessed the facts and the law applicable. The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated February 28, 2002 be confirmed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal