

**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-

Bayla Foods Ltd.

(“Bayla” or the “employer”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE No.:** 1999/568

**DATE OF HEARING:** November 25th, 1999

**DATE OF DECISION:** December 02, 1999

**DECISION**

**APPEARANCES**

William A. Hamar                   for Bayla Foods Ltd.  
Douglas B. Thomas               n his own behalf  
R.A. Stea, I.R.O.                 for the Director of Employment Standards

**OVERVIEW**

This is an appeal brought by Bayla Foods Ltd. (“Bayla” or the “employer”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on August 30th, 1999 under file number ER 73596 (the “Determination”). The Director’s delegate determined that Bayla owed its former employee, Douglas B. Thomas (“Thomas”), the sum of \$242.11 on account of one week’s wages as compensation for length of service (including concomitant vacation pay and interest). The delegate found that on January 4th, 1999 Bayla placed Thomas on a temporary layoff but failed to recall him within a 13-week period and, accordingly, Thomas was entitled to one week’s wages pursuant to section 63(5) of the *Act*.

The employer’s appeal was heard in Victoria, B.C. on November 25th, 1999 at which time I heard the testimony of William Hamar (“Hamar”) on behalf of Bayla and of Thomas, on his own behalf. The Director was also represented at the hearing. I might add that prior to the completion of the hearing, Mr. Hamar (who appeared to be quite aggravated) chose to leave the hearing room claiming that he had a “business to run”; he was apparently unwilling to present any response (other than to make wholly unsubstantiated allegations about the fairness of the entire proceedings) regarding my observations with respect to the merits of the employer’s position, as it was advanced during his testimony.

**ISSUE TO BE DECIDED**

Was Bayla obliged to pay Thomas one week’s wages as compensation for length of service?

**FACTS AND ANALYSIS**

Bayla operates a “Subway” sandwich franchise. Hamar, Bayla’s president and director, testified that he hired Thomas on or about August 21st, 1998 as a front-counter server. Thomas’ duties included making sandwiches and acting as cashier. According to Hamar, on two or three occasions during a period of some two to three weeks prior January 8th, 1999, Thomas simply

failed to show up for his scheduled shift. This attendance problem lead Hamar to terminate Thomas' employment on January 8th, 1999.

Hamar's evidence is that Thomas was not "laid off" in early January 1999; Hamar's clear intention was to terminate Thomas' employment and he did so. Although Hamar was prepared to rehire Thomas at some indeterminate future point, the termination was nonetheless final. Hamar testified that: "I said it was not working out" and that "I decided to let him go" and that "I was not going to hold his position".

Hamar did not prepare and issue a Record of Employment ("ROE") for Thomas until March 3rd, 1999 but said that the only reason for the delay was his inability to attend to the matter more quickly. I should not that the ROE was issued based on a "shortage of work" (code "A" on the ROE) although Hamar says that, in fact, the ROE should have indicated code "M" (dismissal). Hamar stated that he recorded code "A" rather than code "M" on the ROE so that Thomas' claim for employment insurance would not be prejudiced. In any event, Hamar says that Thomas' employment was terminated on January 8th, 1999--he did not intend to temporarily lay off Thomas although, as indicated above, Hamar might have been prepared to consider a fresh application for employment at some future point.

As previously noted, the Determination was issued on the basis that Thomas was laid off and not recalled within a 13-week period. The employer appears to have changed its position over time. Its position the delegate's investigation, and as set out in its appeal documents, was that it was unable to recall Thomas because Thomas was a "transient" who did not provide any information as to his whereabouts after being laid off. The employer denied Thomas' assertion that Thomas made several unsuccessful attempts to contact Hamar.

Before me, however, the employer apparently abandoned its former position that Thomas had been laid off in favour of the assertion that Thomas was terminated as of January 8th for cause. The employer concedes that it did not give Thomas one week's written notice of termination or an equivalent amount of termination pay. While an employer is not obliged to give written notice or pay termination pay if it has just cause for termination [section 63(3((c))], I cannot find that the wholly uncorroborated assertion that Thomas failed to report for work on a few occasions shortly before his termination satisfies the employer's burden of proving just cause.

Thomas denies ever having failed to report for a shift; there is no evidence (say, in the form of a shift schedule) which shows that Thomas missed any shifts and not a single other employee appeared before me to corroborate that Thomas missed a shift. Finally, I note that the issue of "just cause" was never mentioned in the employer's appeal documents--the employer's position, as set out in its letter of September 21st, 1999 (appended to its notice of appeal), is that Thomas *was* laid off (rather than being terminated) but that he was not recalled solely because Thomas was not able to be contacted and, further, Thomas made no effort on his own to contact the employer about returning to work perhaps because he had found other work. Regarding this latter assertion, there is no evidence before me that Thomas found other work within the 13-week period following the first week of January 1999.

Thus, even if I accept the employer's position that Thomas was not laid off but terminated in early January 1999, the employer was nonetheless obliged to pay one week's wages as compensation for length of service since the employer cannot prove that it had just cause for termination. If I

accept Thomas' position, namely, that he was laid off and never recalled (although he kept in touch with the employer during the statutory 13-week lay off period), the employer still is liable to pay Thomas one week's wages. Thus, regardless of whose evidence I accept (although I find Thomas' account to be the more credible of the two), the same result obtains.

Accordingly, in light of the foregoing, the employer's appeal must be dismissed. Regrettably, I do not have the authority to award costs against the employer; certainly, this is an instance where a costs award would have been most appropriate.

**ORDER**

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of \$242.11 together with whatever further interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

**Kenneth Wm. Thornicroft**  
**Adjudicator**  
**Employment Standards Tribunal**