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 -

Paul and Amy Leung
(the " Employers ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE No.: 2000/384 and 2000/466

DATE OF DECISION: September 25 , 2000

DECISION

SUBMISSIONS

Paul and Amy Leung	on behalf of themselves
Mr. Paul Harvey	on behalf of the Director

FACTS AND ANALYSIS

This case arises out of an appeal of two penalty Determinations, both dated May 11, 2000, and both in the amount of $500. One of the Determinations found that the Leungs had contravened Section 46 of the *Employment Standards Regulation* (the "*Regulation*") as they had failed to produce proper payroll records; the other found that the Leungs had contravened Section 28 of the *Employment Standards Act* (the "*Act*") as they had failed to keep proper payroll records.

The factual background is quite straightforward. As I understand it from the submissions, Meliana Kadatuan was employed as a caregiver by the Leungs. Her wages were $800 net per month, paid semi-monthly. She also received room and board. When she quit, the Leungs claimed that she owed them $53.00 on account of long distance telephone calls. The Leungs put a stop payment order on a cheque for $100. That gave rise to a complaint to the Employment Standards Branch. The Leungs claim that Kadatuan's hours of work were regular, from 9 a.m. to 5 p.m. on week days–40 hours per week. According to some of the correspondence from the delegate to the Leungs, Kadatuan claimed that she worked longer hours, from 8 a.m. to 8 p.m. She did not keep a record of those hours. In any event, that dispute is not before me.

On February 22, 2000, the delegate telephoned the Leungs, requesting information regarding the complaint filed by Kadatuan. On March 9, the delegate followed up with a letter requesting employer records and requested that the Leungs "forward all records of hours worked and wages paid" to enable her to determine what wages, if any, were owed to Kadatuan. The letter enclosed a Demand for Employer Records (in essentially the same terms as set out below). The Leungs did not receive this Demand. They were overseas and did not return until after March 27. At that time they received the Demand together with the second demand sent on March 28, 2000. On May 11, 2000, the delegate issued the Determinations.

On June 5, 2000, the Leungs filed an appeal. It is clear that they appealed one of the Determinations. The appeal form is date stamped by the Tribunal on June 5, 2000. It is less clear if they appealed the other in a timely fashion. That is the first issue I will deal with. It appears that only one of the Determinations—relating to the contravention of Section 28 of the *Act*—was attached to the appeal form. The information supplied to parties indicates that the form must be used and the Determination under appeal must be attached. However, the appeal submission, attached to the appeal form delivered on June 5, clearly stated that the Leungs took issue with the conclusions that they failed to keep and deliver records. In any event, it appears that the Tribunal and the delegate understood that the Section 28 contravention was under appeal

and on June 20, 2000, the delegate garnished the penalty amount from the Leungs' bank account. Some time later, the Leungs realized that and took steps to file another appeal form. They state, however, that they did file an appeal of both Determinations and couriered both to the Tribunal in a timely fashion. They say that it is not fair that they be penalized for a mistake made by the Tribunal and seek an order under Section 109 of the *Act*.

I agree with the Leungs. Accordingly, I treat this as an application for extension of time under Section 109(1)(b) of the "*Act*". In *Blue World It Consulting Inc*. (BC EST #D516/98), the Adjudicator summarized the considerations applicable to a request for an extension of the appeal period:

> "1) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
>
> 2) there has been a genuine and ongoing *bona fide* intention to appeal the Determination;
>
> 3) the respondent party (*i.e.*, the employer or the employee) as well as the Director of Employment Standards, must have been made aware of this intention;
>
> 4) the respondent party will not be unduly prejudiced by the granting of the extension; and
>
> 5) there is a strong *prima facie* case in favour of the appellant."

The delegate opposes the request for an extension of time.

In the circumstances, I am prepared to grant the extension. In my view, the Employer's application meets the criteria discussed in *Blue World*. I accept that there is a reasonable and credible explanation for the failure to appeal in time. It is clear from the correspondence that the appellant Employers had a *bona fide* intention to appeal and that they advised the delegate of that intention. It is clear on the face of the appeal document filed with the Tribunal within the time for filing an appeal that the Leungs took issue with both the conclusion that they had failed to keep records and that they had failed to produce records. Even if I accept that both appeals were not filed in the technically required correct fashion, *i.e.*, attaching both Determinations, I am still prepared to entertain the appeals. I am not satisfied that there is any undue prejudice to the respondent.

With respect to the merits of the dispute, the imposition of the penalties, I am of the view that the material facts are not in dispute and I can, therefore, deal with them without a hearing.

I turn first to the Determination dealing with Section 28 of the *Act*. On March 28, 2000, the delegate issued a Demand for Employer Records. There is no dispute that the Demand was properly delivered and that:

"The employment records required to be disclosed, produced and delivered for each employee listed in this Demand [Meliana Kadatuan] include:

1. all records relating to wages, hours of work, and conditions of employment.

2. all records an employer is required to keep pursuant to Part 3 of the Employment Standards Act and Part 8, section 46 and 47 of the Employment Standards Act Regulations.

You are required to disclose, produce, and deliver the employment records specified in this Demand on:

Wednesday, April 5, 2000 by 4:30 p.m."

This was not the first Demand. The delegate had issued a first Demand on March 9, 2000. The Leungs did not receive this Demand as they were away overseas until after their return on March 27. I understand that they delivered certain records on March 31, 2000, *i.e.*, within the time specified in the Demand. In any event, a second Demand was issued on March 28. It was this Demand which forms the basis for both penalty Determinations. The Determination was based on the Leungs' failure to keep proper records of daily hours. In fact, according to the Determination, on April 7, 2000, the Leungs advised the delegate in writing that "we do not keep daily records of hours worked. This is a house, not a factory or restaurant." In my view, this amounts to an admission that they did not comply with the *Act*. In their appeal, the Leungs argue that they, in fact, kept proper payroll records. They now say that they keep track of the days the employee works on a calendar. This calendar, however, is not part of the material submitted by the Leungs in support of their appeal. In the circumstances, I am of the view that the penalty was properly imposed.

The second Determination was based on the Leungs' failure to deliver records, contrary to Section 46 of the *Regulation*. The basis for the Determination was the Demand for Employer Records sent on March 28. On the same date, the delegate also wrote a letter to the Leungs explaining that this was her "third attempt to resolve this complaint without further investigation or litigation." The Determination states that the records produced were incomplete. The only record that was produced was a copy of a caregiver application to the federal government. The Leungs say that they were confused about what records the delegate was "really looking for" and that they thought the delegate meant something different, like time cards etc. However, it is clear from the face of the Demand that the delegate was seeking "all records relating to wages, hours of work, and conditions of employment" and all records required to be kept under the *Act* and *Regulation*. The record—the caregiver application—was produced within the time specified in the Demand. It is arguable that they, therefore, produced "when", *i.e.*, in timely fashion. However, as is now clear from the Appellants' submission, they were, in fact, in possession of other records, principally, the calendar which in their own words contain information of days of work, days off work etc. In my view, therefore, they did not produce records in response to the Demand properly delivered to them.

In my view, their appeal cannot succeed.

ORDER

The application to extend time to file an appeal of the Determination dated May 11, 2000 is granted and the Determinations dated May 11, 2000 are confirmed.

Ib Skov Petersen

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal