

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 -

Sheila Lali Pangalia Operating Rangeela Dance School

("Rangeela")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR: C. L. Roberts

FILE No.: 2000/614

DATE OF DECISION: November 29, 2000

DECISION

This is a decision based on written submissions by Sheila L. Pangalia, Amandip Johal, and Judy Reekie on behalf of the Director of Employment Standards. This decision is on the issue of the timeliness of the appeal only.

OVERVIEW

Amandip Johal (“Johal”) filed a complaint with the Director of Employment Standards (“the Director”) alleging that Sheila Lali Pangalia, operating Rangeela Dance School (“Rangeela”) owed her compensation for length of service, compensation for paying a part of the employer’s business cost, and overtime wages. A delegate of the Director investigated Johal’s complaint, and on July 19, 2000, issued a Determination finding that Rangeela contravened the *Employment Standards Act* (the “Act”). Rangeela was ordered to pay Johal the sum of \$3,317.90 plus interest.

The time period to file an appeal of the Determination expired 4:30 p.m. August 11, 2000. The Tribunal received Ms. Pangalia’s Notice of Appeal on September 1, 2000.

The grounds of appeal include an allegation that the delegate erred in concluding that Johal was not a manager, and that Rangeela ought not be obligated to reimburse Johal’s expenses since Johal unlawfully took property belonging to Rangeela.

ISSUE TO BE DECIDED

Whether the Tribunal should exercise its discretion under Section 109(1)(b) of the *Act* and allow the appeal even though the time period for seeking an appeal has expired.

FACTS

Ms. Pangalia stated that the Determination was not received until August 28 because she was out of the City.

The Director’s delegate argues that Tribunal ought not exercise its discretion to extend the time to allow the appeal.

The delegate states that, on July 13, she sent a letter to Rangeela by fax, setting out her findings with respect to Johal’s complaint. The employer was to advise her, by fax or by telephone, if he did not agree with her decision, by July 17. The letter indicated that, if the matter was not resolved by July 18, a Determination would be issued. The employer did not respond. The Determination was issued on July 19 and sent by registered mail to the employer that day. The same day, July 19, the delegate received a fax from Suki Pangalia acknowledging her fax of July 13, and requesting information on appeals.

On August 8, Pangalia's July 19 fax was re-faxed to the Director. On August 9, an appeal form was faxed to the employer, along with the information on the appeal deadline and the Tribunal's address, telephone and fax numbers.

The Determination was returned to the Employment Standards Branch on August 14, marked "unclaimed".

On August 28, the employer contacted the Branch office advising that he wished to appeal the Determination. He was told that the appeal deadline had expired, and he indicated that he had been out of town.

The delegate notes that, during the investigation of this complaint, the employer was served with a Demand for Employer Records by registered mail. That demand was returned to the Branch as being "unclaimed", and the Demand was hand delivered to the employer. At that time, the delegate asked him why he had not picked up the registered mail. The employer indicated to her that he was probably out of town, and that none of his employees were allowed to sign for the mail. The delegate told him that Canada Post would have left a card advising him of attempted delivery, to which the employer had no response.

The delegate argues that the employer was aware that a Determination was being issued, both as a result of the July 13 fax, the July 19 fax in response, and the appeal information which was sent on August 9.

The employer's response is that mail is delivered to a post box, not to the office. It contends that it could not have known who the sender of the mail was, since the pick up notice, which was the only thing they received, does not contain this information. The employer states:

The letter was addressed to Sheila Pangalia not to Rangeela Dance School and as she was off on maternity or out of town this pick up notice was overlooked without intention. Ms. Reekie at any time also could of (sic) called our office and let us know about the status..."

ANALYSIS

Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.

The Tribunal has established a number of criteria for the exercise of discretion extending the time to file an appeal. The party seeking an extension must satisfy the Tribunal that:

- (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, ongoing bona fide intention to appeal the determination;

- (3) the respondent party as well as the director has been made aware of this intention;
- (4) the respondent party will not be unduly prejudiced by the granting of an extension; and
- (5) there is a strong prima facie case in favour of the appellant.

(see: *Niemisto v. British Columbia (Director of Employment Standards BC EST #D099/96)* and *Pacholak v. British Columbia (Director of Employment Standards BC EST#D526/97)*)

Furthermore, extensions will only be granted where there are compelling reasons present.

Bona fide intention to appeal the determination and notice to the parties of this intention

I find no bona fide intention to appeal the Determination. I accept that the employer received notice, by fax, that a Determination was pending, and what that Determination would be if the matter was not resolved by July 18. The delegate states that she notified the employer both by fax and in writing of the contents of the Determination. The documents support this assertion. On July 19, the delegate received a fax from Rangeela Dance School, signed by Surila Kumar (for Suki Pangalia) stating “we disagree with the decision that was faxed to us and hereby would like to appeal it.” I find that the employer knew about the Determination as of July 19, and had all the information on the appeal deadline by August 9 at the very latest.

Reasonable explanation for the failure to request an appeal within the time limits

Rangeela discloses no explanation at all for the delay. Although there appears to be an argument that the employer was “out of town”, as noted above, I find that the employer was aware of the Determination and had the necessary information on how to appeal it by August 9.

The Determination was sent by registered mail Sheila Lali Pangalia o/a Rangeela Dance School on or about July 19. Section 122 of the *Act* provides that service is deemed 8 days after the Determination is deposited in a Canada Post Office. I find that service was affected in accordance with the *Act*. Indeed, the employer does not appear to dispute that, only that the mail was “overlooked without intention”.

Strong prima facie case

The employer does not present any evidence that could not have been presented to the delegate at first instance supporting its argument that Johal was not a manager. Even if this information supports the grounds of appeal, the Tribunal will not consider evidence on appeal that was available at the time of the investigation and ought to have been presented to the delegate at that time.

In reviewing the criteria to be applied in determining whether an extension of time ought to be allowed, I find, on balance, that the extension should not be granted.

I deny the application for an extension of time to file the appeal.

C. L. Roberts

C. L. Roberts
Adjudicator
Employment Standards Tribunal

CLR/bls