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.: 2000/615

DATE OF DECISION: November 29, 2000

DECISION

This is a decision based on written submissions by Sheila L. Pangalia 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

On July 21, 1999, 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 May 26, 2000, issued a Demand for Records pursuant to Section 85(1)(f) of the *Employment Standards Act* ("the *Act*"). The delegate determined that the Demand was necessary because inspection of payroll records was relevant to the investigation, and they had not, to that point, been produced.

On July 19, the delegate issued a Determined finding that Rangeela contravened section 46 of the Employment Standards Regulations by failing to produce the records, and imposed a $500.00 penalty, pursuant to section 28(b) of the Regulations.

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

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

The employer contends that the Determination as not received until August 28th.

The employer also contends that the Demand for Records was not communicated. Rangeela states that telephone calls to Ms. Pangalia at the dance studio could not have been received because she was on maternity leave, and that telephone calls to her home also could not have been received because Ms. Panglia was staying at her parents' home for 6 weeks following the birth of her child.

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

The Determination contains the following findings, which were not disputed by the employer.

A letter containing Johal's allegations was sent to the employer on October 4, 1999. On October 13, the employer responded by saying that Johal had never been employed by Rangeela, and that no

money was owed to her. On March 29, 2000, the delegate contacted Rangeela, and was told that Pangalia was on pregnancy leave. The delegate advised the staff that a Demand for Records was being issued, and three telephone numbers were provided for Pangalia. On March 29, the delegate called each of these numbers, leaving a message about the complaint and indicating that a Demand for Records was being issued. The telephone calls were not returned.

On April 13, 2000, the delegate issued and sent a Demand for Records to Rangeela by registered mail. The mail was returned to the Employment Standards Branch as "unclaimed".

The delegate states that the employer was aware of the requirement to produce records based on the October 4, 1999 letter, the March 29, 2000 telephone messages, and the letter of April 13. As no reasonable explanation was provided to the delegate for the failure to deliver records, the delegate found it appropriate to issue a penalty.

The Determination was issued on July 19. On July 19, the delegate received a fax from Suki Pangalia acknowledging her fax of July 13, and requesting information on appeals. The Determination, along with appeal information, was sent to the employer that morning.

On August 8, Pangalia's July 19 fax was refaxed to the Director, and 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 further 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 employer was hand delivered the Demand. At that time, the delegate asked why he had not picked up the registered mail. The employer indicated to her that 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.

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 thestatutory 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. Further, I accept that the employer was aware 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.

Furthermore, the Determination was sent by registered mail 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".

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.

Strong prima facie case

I accept that the employer received notice, by telephone, letter and registered mail, of the requirement to produce Employer Records. Even if Pangalia was on pregnancy leave in March, the delegate had been seeking the records from October to April, and the employer had several months to provide them to her. I find no prima facie case in favor of the appellant.

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