

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 -

Mina D. Ton, operating as Education Fund Network Society Services, also known
as New Educations Network and Language Services
("Education Fund")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: C. L. Roberts

FILE No.: 2000/649

DATE OF DECISION: December 19, 2000

DECISION

This is a decision based on written submissions by Mina D. Ton and Theresa Robertson, a delegate of the Director of Employment Standards. This decision is on the issue of the timeliness of the appeal only.

OVERVIEW

This is an appeal by Mina D. Ton operating as Education Fund Network Society Services, also known as New Educations Network and Language Services ("Education Fund"), pursuant to Section 112 of the Employment Standards Act ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued July 27, 2000. The Director found that Education Fund contravened Sections 17(1), 18(1), 40(1) and (2), and 58(1) and (3) of the Act in failing to pay Hua (Cecile) Feng ("Feng") wages, overtime wages and vacation pay, and Ordered that Education Fund pay \$1,888.91 in wages and interest to the Director on Feng's behalf.

Education Fund had until August 21 to deliver an appeal of the Determination to the Tribunal. The appeal was not received by the Tribunal until September 20, 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 delegate made the following findings of fact, which were not disputed.

Ms. Feng was employed as a secretary by Education Fund, a non-profit education foundation operated by Ms. Ton, from January 31, 2000 to April 10, 2000. Ms. Ton did not dispute Ms. Feng's entitlement to wages. At issue was the amount owed, arising from a dispute over hours worked, the rate of pay, and Ms. Ton's ability to pay.

Following an investigation, the Director's delegate determined that Feng was owed wages in the amount determined above.

ARGUMENT

Ton contends that she was unable to file her appeal on time because she misplaced the Determination. She states that she had an assistant helping her with the case, and that they misunderstood the appeal deadline. She also contends that she thought Revenue Canada and Employment Standards were the same agency.

Ms. Ton states that she attempted to contact her accountant, who had a copy of the letter, (which I assume is the Determination) to find out what the appeal deadline was, but was unsuccessful.

She states she also attempted to contact Randy Voon at the Burnaby office of Revenue Canada, but that no one there knew who he was. She states that she then got a telephone call from an employee at the Surrey office of Revenue Canada who was able to supply her with the name of the Director's delegate. Ms. Ton further states that, on that same day, she was able to contact her accountant, and discovered that the appeal deadline had expired.

Ms. Ton states that, on August 23, 2000, she contacted the delegate in an attempt to extend the appeal deadline. The delegate was on vacation until September 5. When the delegate returned the call, she advised Ms. Ton that only the Tribunal had the authority to extend the appeal deadline. Although Ms. Ton's letter of appeal was dated September 5, the appeal documentation was not received by the Tribunal until September 20.

Ms. Ton states that she disagrees with the number of hours and wages determined owing to Ms. Feng by the delegate. She claims that those figures "do not match up with the calculations that my accountant has kept records of." Ms. Ton also alleges that Ms. Feng came to work when she had already laid her off.

The Director's delegate states that the registered mail receipt confirms that Ms. Ton received the Determination on July 28. Attached to the Determination was information setting out, in clear language, the steps to be taken for an appeal.

The delegate further states that she received two messages on her answering machine on August 23, 2000 from Ms. Ton's assistant stating that Ms. Ton had lost the Determination, even though the appeal expiry date was August 21. The delegate states that she assumed Ms. Ton had located the Determination by this point, with all the information on how to appeal it. The delegate states that, even though her voice mail indicated that she would be on vacation until September 5, Ms. Ton did not attempt to seek information on how to appeal from anyone else in the Employment Standards Branch.

The delegate states that she contacted Ms. Ton on September 5, advising her that she had no authority to extend the appeal deadline, and to contact the Tribunal. The delegate states that Ms. Ton advised her that she had already done so, and had been given an extension until some time in September. The delegate also attempted to discuss a payment plan with Ms. Ton, without success. The delegate advised her that she would commence collection proceedings. Having heard nothing further from the employer after September 6, the delegate commenced collections on September 13.

The delegate argues that the Tribunal should not exercise its discretion to extend the time to allow an appeal.

Ms. Ton, in response, contends, in essence, that she is in financial difficulty, and is unable to satisfy the Determination.

ANALYSIS

Section 112 provides that a person served with a determination may appeal the determination by delivering a written request to do so, with reasons for the appeal, to the tribunal office within 15 days of service, if served by registered mail, or 8 days after service, if served personally.

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 am unable to find that Ton has demonstrated a bona fide intention to appeal the Determination. She states that she "misplaced the Determination". However, there is no evidence to suggest that she took any steps to file the appeal upon receiving it.

Furthermore, and most critically in my view, even though there is clear evidence Ms. Ton knew that the appeal deadline had passed on September 5, she took no steps to file the appeal documentation until September 20, 15 days later, and several days after the Director's delegate had commenced collection proceedings.

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

I am unable to conclude, on the submissions presented, that there is a reasonable explanation for the one month delay in filing the appeal. Ms. Ton contends that she misplaced the Determination and was uncertain of the deadline for the appeal. She suggests that she made a number of attempts to determine how to file the appeal, and by the time she discovered the proper agency, the appeal deadline had passed.

I accept that, in many employers' minds, Revenue Canada and the Employment Standards Branch may become one and the same. However, there is nothing in the employer's submission that supports her argument that she made all reasonable efforts to file an appeal in the time period provided by the Act. There is no supporting evidence from the accountant indicating that

he or she had the Determination and was unavailable to the employer until after the appeal deadline had passed.

Furthermore, there is no evidence Ms. Ton contacted the Tribunal seeking an extension upon being advised by the delegate on September 5 that she had the right to do so.

Strong prima facie case

Ms. Ton argues that she disagrees with the Determination. However, the arguments she makes on appeal are the same as those she made before the delegate. The dispute is over hours of work and rate of pay. Ms. Ton now takes the position that she is in financial difficulty and unable to satisfy the Determination. There is no evidence of a strong prima facie case that the Determination is incorrect in respect of either of the first two issues, and the latter argument is not a basis for appeal.

Prejudice to the Respondent

The Director has already commenced collection proceedings and has incurred costs enforcing the Determination. Although no submissions were made on this point, I am prepared to accept that there would be some prejudice to the Respondent if the extension were allowed.

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.

ORDER

I deny Education Fund's application for an extension of time to file the appeal.

C. L. Roberts

C. L. Roberts
Adjudicator
Employment Standards Tribunal