

**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 -

Lilyjohn Enterprises Inc.  
("Lilyjohn")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Lorne D. Collingwood

**FILE NOS.:** 1999/105

**DATE OF HEARING:** June 10 1999

**DATE OF DECISION:** June 28, 1999

**DECISION**

**APPEARANCES**

For Lilyjohn Enterprises Inc.  
Appearing on her own behalf  
Appearing on his own behalf

Robinson Jons Peter, President  
Mei-Hing Wong  
Vijay Kumar Tyagi

**OVERVIEW**

Lilyjohn Enterprises Inc. (“Lilyjohn”, also, “the employer”) appeals a Determination by a delegate of the Director of Employment Standards dated February 5, 1999. The appeal is pursuant to section 112 of the *Employment Standards Act* (the “Act”).

The Determination deals with the separate complaints of two of Lilyjohn’s former employees. It orders Lilyjohn to pay Mei-Hing Wong vacation pay and interest totalling \$57.93. It also orders Lilyjohn to pay Vijay Kumar Tyagi \$290.54 in wages, overtime pay and interest.

On filing the appeal, Robinson Peter, President of Lilyjohn, stated that he was sending Wong a cheque for the amount that Lilyjohn had been ordered to pay. Lilyjohn’s appeal at that point consisted of a claim that Tyagi is owed less than the amount of the Determination for three reasons. The delegate is said to overstate hours worked. Lilyjohn claims an error in respect to the rate of pay. And Lilyjohn claims that it is entitled to deduct for lost moving dollies.

Lilyjohn did not pay Wong as it said it would. It now seeks to appeal the order to pay Wong as well as the order to pay Tyagi.

**ISSUES TO BE DECIDED**

The facts are in dispute. Lilyjohn says that the Determination is wrong in that Tyagi did not work 16.5 hours but 13. It also claims that the delegate is wrong on the rate of pay.

The matter of whether the employer is or is not entitled to deduct for lost equipment is at issue.

And the employer is now seeking to appeal the determination that it must pay Wong. What Lilyjohn claims in that respect is that Wong is entitled to less than her regular wage under an agreement which is said to call for reduced pay in the event that the employee quit, as Wong did, soon after being employed. Before deciding that matter, I must first decide

whether or not to allow Lilyjohn to raise such an issue as it is not part of the appeal as originally filed.

## **FACTS**

Lilyjohn is in the moving business. On the 29<sup>th</sup> of August, Lilyjohn was in desperate need of a truck driver. Lisa Fu Ping Peter, Robinson Peter's wife, telephoned the Tyagi residence in attempting to reach a person known to work as a driver. She reached Tyagi's wife and she was told that the driver that she was seeking was not available but that Vijay Tyagi was free and could drive for Lilyjohn. That led to Tyagi's employment. He started work the very next day.

Tyagi's rate of pay is a matter of dispute. The delegate has accepted that the rate of pay is as claimed by Tyagi, namely, \$12.00 an hour. Lilyjohn denies agreeing to pay him at that rate. It shows me that it paid another driver \$8 and \$9 an hour. It offers to pay Tyagi at a rate of \$7.15 an hour. But the employer does not submit evidence showing that Tyagi's rate of pay is clearly less than \$12.00 an hour.

Tyagi, assisted by a swamper named Mike, carried out 4 separate moving jobs on the day he was employed. The Determination has Tyagi starting work at 8 a.m. on 30<sup>th</sup> of August, 1998 and working right through to 12:30 a.m. on the 31<sup>st</sup> for a total of 16.5 hours of work. Lilyjohn's claim that only 13 hours were worked reflects what Lilyjohn billed its customers for labour and travel time. It neither claims, nor shows, that Tyagi began work later than 8 in the morning and it has Tyagi stopping work only 15 minutes earlier than the Determination. What the employer is saying is that Tyagi took breaks between his four moving jobs of 3.25 hours in total. According to Tyagi, he reported for work at 7:30 a.m. and he worked continuously from that point until he finished work for the day at 12:30 a.m. on the 31<sup>st</sup>. The parties agree that when Tyagi finished work on the 31<sup>st</sup>, Lilyjohn's office was already closed for the day.

While Tyagi reported for work on the 31<sup>st</sup>, he was told that Lilyjohn had no further work for him to do. Lilyjohn then refused to pay him for his work, complaining of damage to a tire and a lost moving dolly. The delegate refers to the loss of a dolly and its later recovery. Lilyjohn on appeal begins speaking of two lost dollies. It says one of those two was recovered. It does not seek reimbursement for the damaged tire.

## **ANALYSIS**

### *The Appeal of the Order to pay Tyagi*

The employer claims that the delegate is wrong on the facts. It alleges that Tyagi worked 13 hours, not 16.5 as set out in the Determination. But the evidence falls well short of establishing that there was less than 16.5 hours of work. The employer shows me billing records but they are the employer's own records, they are not recognized or accepted by

the employee, and it is not clear that they are an accurate depiction of the work. No one who was in a position to know exactly what hours were worked steps forward and tells me that there was less than 16.5 hours of work. I find Lilyjohn's allegation that Tyagi took 3 hours off in the midst of working rather unlikely. It is much more likely that if Tyagi were not actually engaged in moving a customer's belongings, that he was at least standing by. If he had taken breaks as the employer alleges, that would only have pushed back the point when he was going to be finished for the day. He would not have wanted to do that.

The employer claims that the delegate is wrong on the rate of pay but it fails to show that as well. It alleges a rate of pay which is less than \$12 an hour but the allegation is unsupported. I find that it is at least conceivable that Lilyjohn paid Tyagi quite a bit more than it normally would pay a driver in that Lilyjohn was desperate for driver on the night that it hired Tyagi. And I find that Tyagi's recollection of matters is clear, consistent, and logical and to be preferred over the employer's version of events.

I satisfied that the delegate has correctly applied the law.

Section 18 (1) of the *Act* requires that an employer pay an employee his or her wages promptly. And sections 21(1) and (2) of the *Act* restricts what an employer may make in the way of deductions from an employee's pay.

18 (1) *An employer must pay all wages owing to an employee within 48 hours after the employer terminates the employment.*

21 (1) *Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.*

(2) *An employer must not require an employee to pay **any of the employer's business costs** except as permitted by the regulations.*

(my emphasis)

Lilyjohn claims that Tyagi lost two moving dollies. But that is not shown. First there was one lost dolly and now it is said that there were two. And if any dolly was lost, it remains possible that it is Mike, the swamper, that left the dolly or dollies behind, not Tyagi. But even if Tyagi is responsible for the loss of some of Lilyjohn's equipment, the employer may not require that he pay for the lost equipment from his wages. It is inevitable, human nature being what it is, that a moving company will lose the occasional dolly. The loss of a dolly now and then is cost of being in that business.

The Determination is that Lilyjohn owes Tyagi for 16.5 hours of work at \$12.00 an hour and to that has been added interest. I agree with that decision.

*The Appeal in respect to Wong*

Lilyjohn did not say anything about appealing the determination which orders it to pay Wong on filing the appeal of the Tyagi determination which is dated February 22, 1999. Indeed, Peter went so far as to state that he was going to send Wong a cheque for the amount of the Determination. It is only at my hearing that it suddenly announces that it is contesting the Wong determination as well. And from what I can see, it is not until my hearing that the allegation of an agreement which calls for a reduced rate of pay surfaces.

Section 112 (1) of the *Act* states:

**112** (1) *Any person served with a determination may appeal the determination to the tribunal by delivering to its office a written request that includes the reasons for the appeal.*

(2) *The request must be delivered within*

(a) *15 days after the date of service, if the person was served by registered mail, and*

(b) *8 days after the date of service, if the person was personally served or served under section 122 (3).*

As another Adjudicator has noted [*SSC Industries Ltd., Christopher R. Prince and Ronald W.A. Busch*, (1996), BCEST No. 087/96],

The purpose for placing time limits and procedural requirements in the appeal process is twofold: First, it meets the statutory purpose of ensuring a fair and expeditious determination of disputes arising under the *Act*; second, it ensures a closure on the matters in dispute, preventing “open-ended” claims and responses which would ultimately result in an unmanageable review process.

While the delegate deals with the Complaint by Tyagi and that by Wong in a single decision, the Determination dated February 5, 1999, contains, or consists of, different determinations. The time for appealing the determination which is the order to pay Wong passed weeks ago. The appeal is out of time and it is not for that reason allowed. To hear from Lilyjohn on the Wong determination at this point would be to defeat the purpose of section 112.

I will also not allow Lilyjohn to raise, on the back of its Tyagi appeal, the new issues that it attempts to raise. There are two: The matter of whether there was an agreement on reduced pay should Wong quit soon after beginning her employment, and the matter of the order to pay Wong itself. Neither issue formed part of the original appeal request or the reasons for the appeal which were filed by Lilyjohn.

In deciding the above, Lilyjohn should not for a moment believe that its ‘appeal’ would have otherwise succeeded. As matters are presented to me, it is clear that Lilyjohn has no

way or proving the existence of the agreement which is alleged. Its appeal is in all respects groundless.

**ORDER**

I order, pursuant to section 115 of the *Act*, that the Determination dated February 5, 1999 be confirmed.

Lilyjohn must pay Mei-Hing Wong vacation pay and interest totalling \$57.93, plus whatever further interest has accrued pursuant to section 88 of the *Act* since the date of issuance.

And Lilyjohn must pay Vijay Kumar Tyagi \$290.54 in wages, overtime pay and interest, plus whatever further interest has accrued pursuant to section 88 of the *Act* since the date of issuance.

**Lorne D. Collingwood**  
**Adjudicator**  
**Employment Standards Tribunal**