

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. & Lisa Fu Ping Peter and Robinson Jons Peter
operating as New World Professionals Suppliers
(the “employer”)

- of a Determination issued by -

The Director Of Employment Standards
(the “Director”)

ADJUDICATOR: Lorne D. Collingwood

FILE NOS.: 1999/232

DATE OF HEARING: June 10 1999

DATE OF DECISION: June 28, 1999

DECISION

APPEARANCES

Robinson Jons Peter

For the employer

John Tonndorf

On his own behalf

OVERVIEW

Lilyjohn Enterprises Inc. (“Lilyjohn”) appeals a Determination by a delegate of the Director of Employment Standards which is dated March 25, 1999 and against Lilyjohn Enterprises Inc. and Lisa Fu Ping Peter and Robinson Jons Peter operating as New World Professionals Suppliers (“New World”). The appeal is pursuant to section 112 of the *Employment Standards Act* (the “Act”).

The Determination deals with a Complaint by John Tonndorf. On investigating the Complaint, the delegate rejected the employee’s claim in part but found that he had not been paid as prescribed by the *Act* and is entitled to wages after accounting for what he is owed in the way of regular pay, overtime pay, minimum daily pay, statutory holiday pay and vacation pay. For the purposes of the Determination and the *Act*, the delegate deemed that Lilyjohn Enterprises Inc. and the Peters operating as New World Professionals Suppliers were one and the same, or at least associated companies pursuant to section 95 of the *Act*. The Determination orders the employer to pay Tonndorf \$332.55 including interest.

The employer on appeal claims that it has paid all of the wages that the employee is due. In that regard it complains only of the requirement that it pay overtime pay. On that it is said that Tonndorf agreed to work overtime at straight-time wages. The employer goes on to claim that Tonndorf worked for two entirely separate companies which are not the same, and that as such, it is wrong to add work for one company to work for the other in calculating overtime pay. And the employer also claims that Tonndorf has wrongly kept some of its moneys and it alleges that that has a bearing on the matters before me.

ISSUES TO BE DECIDED

The matter of whether or not the employee is owed overtime pay as set out in the Determination is at issue.

The matter of whether or not Lilyjohn and New World may be considered as one employer for the purpose of the Determination is at issue.

Robinson Peter, appearing for Lilyjohn and New World, claims that Tonndorf has wrongly kept moneys that he was paid by customers. And it says that Tonndorf must first turn over those moneys before it can be expected to pay him his vacation pay and statutory holiday pay.

The employer also raises a number of issues which are to do with the Complaint but have no relevance to the Determination appealed. Peter was advised at the outset of the hearing that I would not be deciding those issues and that my decision will address none of them as they are irrelevant.

FACTS

Lilyjohn is a long distance mover. Robinson Peter is the owner of the company and its President. Lisa Peter, Robinson Peter's wife, along with her husband, operates New World. That company is also in the moving business. Robinson Peter's idea for that company was that it would undertake moves of a local nature, including the hauling of junk.

John Tonndorf was employed by Lilyjohn as a truck driver and he worked for New World also as a driver. His employment began in March of 1998 and it ended on the 25th of October, 1998.

Tonndorf does not distinguish between the two companies. He tells me that he never really knew which of the companies that he was working for, and why he was paid by one company, and then by the other, as it did not seem to bear any relation to his work. Tonndorf was never presented, on being paid, with what is required by the *Act* in the way of a breakdown of pay and deductions.

Lilyjohn and New World both have the same business address and Peter directs the operations of each of the companies.

On filing his Complaint, Tonndorf claimed that he was owed wages. The delegate undertook a detailed calculation of what he was owed under the *Act* and in doing so he relied on the employer's records. The delegate concluded that Tonndorf was owed minimum daily pay, overtime wages and statutory holiday pay.

Peter tells me that Tonndorf was hired on the basis that there would be no overtime pay. Tonndorf agrees that he was never paid overtime wages. According to Peter, Tonndorf would work for both New World and Lilyjohn on some days. Peter says that was to the benefit of the employee in that it allowed Tonndorf to earn extra money. And he claims that any extra work was voluntary.

While it is said that Tonndorf collected money from customers, I am not presented with any evidence of that, nor given a clear accounting, indeed, any accounting, of what is owed, if anything.

ANALYSIS

What I must decide is whether or not the appellant has met the burden for persuading the Tribunal that the Determination ought to be varied or cancelled for reason of an error in fact or in law.

The facts as I have found them are in all important respects just as found by the delegate. I also find that the delegate is correct in his application of the law.

The *Act* does not allow an employee to accept less than the minimum standards of the *Act*. They are just that, **minimum standards**. Section 4 is as follows:

The requirements of the Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect subject to sections 43, 49, 61 and 69.

Sections 43, 49, 61 and 69 refer to employees covered by collective agreements and as such they have no application in this case.

Given the above, it follows that, even if Tonndorf did agree to work overtime hours at straight-time pay rates, he is entitled to overtime pay under the *Act*, nonetheless, because the agreement has no force or effect. The *Act* applies.

It is a requirement of the *Act* that an employer pay overtime wages if the employer in any way allows an employee to work more than the standard work hours of the *Act*. Section 35 is as follows:

*35 An employer **must pay overtime wages** in accordance with section 40 or 41 if the employer requires or **directly, or indirectly, allows** an employee to work*

a) over 8 hours a day or 40 hours a week

(my emphasis).

In allowing Tonndorf to work overtime as it did, the employer contravened an important minimum standard of the *Act*.

The delegate does not differentiate between Tonndorf's work for Lilyjohn and his work for New World but treats the businesses as one. I am satisfied that what the delegate has done is not only consistent with the *Act*, it is required if overtime provisions of the *Act* are not to be circumvented.

It is section 95 of the *Act* that allows the Director and her delegates to treat different businesses or undertakings as a single entity for the purposes of the *Act*. That section of the *Act* is as follows:

95. If the director considers that businesses, trades or undertakings are carried on by or through more than one corporation, individual, firm, syndicate or association, or any combination of them under common control or direction,

(a) the director may treat the corporations, individuals, firms, syndicates or associations, or any combination of them, as one person for the purposes of this Act, and

(b) if so, they are jointly and separately liable for payment of the amount stated in a determination or in an order of the tribunal, and this Act applies to the recovery of the amount from any or all of them.

For businesses, trades or undertakings to be associated under section 95 there must, therefore, be;

- more than one corporation, individual, firm, syndicate or association;
- the carrying on of business, a trade or an undertaking;
- common control or direction; and
- a statutory purpose for treating the entities as one employer.

I am satisfied that in this case that a business or undertaking was carried on through a corporation, Lilyjohn; and individuals, Lisa Peter and Robinson Peter, operating as New World; and that Lilyjohn and New World are directed and controlled by Robinson Peter and his wife. I am also satisfied that the Director has a statutory purpose in treating the different entities and individuals as one. It is the enforcement of the overtime provisions of the *Act*.

I find that the delegate applies the *Act* as it is intended to be applied. Tonndorf is owed the full amount of the Determination.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated March 25, 1999 be confirmed in the amount of \$332.55 and to that amount, I add whatever further interest has accrued pursuant to Section 88 of the *Act* since date of issuance.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal