

An appeal

- by -

Kit International Transport Inc.  
(the “Appellant”)

- of a Determination issued by -

The Director of Employment Standards  
(the “Director”)

pursuant to Section 112 of the  
*Employment Standards Act R.S.B.C. 1996, C.113* (as amended)

**TRIBUNAL MEMBER:** Yuki Matsuno

**FILE No.:** 2007A/15

**DATE OF DECISION:** June 7, 2007

## DECISION

### SUBMISSIONS

K. Preston	for Kit International Transport Inc.
Johann Buck	for himself
Chantal Martel	for the Director of Employment Standards

### OVERVIEW

1. Kit International Transport Inc. (“Kit International”) appeals a Determination dated January 24, 2007 (the “Determination”), pursuant to section 112 of the *Employment Standards Act* (the “Act”). The Director of Employment Standards (the “Director”), represented by a delegate (the “Delegate”), found in the Determination that Kit International and Karnail Logistics Ltd. (“Karnail”) were to be treated as one employer under section 95 for the purposes of the Act and that they were jointly and separately liable for the amount stated in the Determination. The Delegate found that the employer had contravened sections 18, 58, and 45 of the Act and section 37 of the *Employment Standards Regulation* with respect to the employment of Johann Buck, and found that Mr. Buck was entitled to wages in the amount of \$4,620.96 (including accrued interest under s. 88 of the Act). The Delegate also imposed administrative penalties for contraventions of sections 17, 18, and 45 of the Act, to a total of \$1,500.00. The total payment for which Kit International is jointly and separately liable as an associated employer is \$6,120.96.
2. Kit International disagrees with the finding that it is an associated employer under section 95. It appeals on the grounds that the Director erred in law and that evidence has become available that was unavailable at the time the Determination was being made.
3. I have before me the appeal form filed by Kit International dated March 1, 2007, with one attachment; the Determination; a written submission by Johann Buck dated March 20, 2007; a written submission by the Delegate, dated March 19, 2007, with documents attached in response to the Tribunal’s request for the s. 112(5) record (the “Record”); and a final submission by Kit International dated April 17, 2007. Kit International indicated in its appeal form that an oral hearing is necessary if required. The Tribunal has determined that this matter can be determined on the basis of the written materials alone.
4. By letter dated April 24, 2007, Kit International requested that the effect of the Determination be suspended pending the outcome of its appeal. By letter dated April 25, 2007, the Tribunal informed Kit International that it has been advised that the Director will not engage in any collection action prior to the Tribunal rendering a decision on the appeal, and therefore the Tribunal does not find it necessary to make an order for suspension.

### ISSUES

5. Did the Director’s delegate err in law in the Determination?

6. Should the appeal be allowed on the basis that there is new and relevant evidence which was not available at the time of the Determination?

## **BACKGROUND**

7. Mr. Buck worked as a truck driver delivering lumber from May 29, 2006 to July 26, 2006. He signed a letter of employment dated May 25, 2006, issued by Kit International. Throughout his employment, Mr. Buck's wages were paid by Karnail and he operated a truck that belonged to Karnail.
8. Mr. Buck either quit his position, or had his employment terminated, on July 26, 2006. He filed a complaint with the Employment Standards Branch on August 15, 2006, requesting payment for outstanding wages in the amount of \$4463.99.
9. The Delegate held a hearing into Mr. Buck's complaint on November 9, 2006. Mr. Jerry Kadola appeared for and gave evidence on behalf of Kit International and Karnail. Ms. Kelly Preston gave evidence at the hearing on behalf of Kit International and Karnail. Mr. Buck appeared for and gave evidence on behalf of himself.
10. There were a number of issues raised by the complaint for the Delegate to determine; however, the issue that is relevant to this appeal is whether Kit International and Karnail are associated employers under section 95 of the Act. The Delegate found that this was the case. The Determination and the Record reveal the following evidence regarding the section 95 issue:
- In his complaint to the Employment Standards Branch, Mr. Buck named Kit International as the employer;
  - Mr. Buck received a letter of employment from Kit International, signed by Kelly Preston who is named as "Manager";
  - Karnail paid Mr. Buck's wages;
  - Mr. Buck's pay summaries were issued by Karnail;
  - Kit International Transport Inc. has a BC Company Summary in the BC Corporate Registry. The summary shows that it is an active company with one director, Dharminder Singh Toor, listed.
  - Karnail Logistics Ltd. has a BC Company Summary in the BC Corporate Registry. The summary shows that it was dissolved on August 15, 2005 for failure to file. Jagir Singh Kadola (a.k.a. Jerry Kadola) is listed as a director and Jaginder Dhillon and Daljet Hayre are listed as officers;
  - At the hearing, Mr. Jerry Kadola's verbal evidence included the following:
    - He is Director/Officer for both Karnail and Kit International;
    - He has financial and operational control of both companies;
    - Both companies are being operated out of the same premises on Southeast Marine Drive in Vancouver;
    - He has taken steps to reinstate Karnail with the BC Corporate Registry and that in the future he would be the only Director/Officer listed for Karnail; further, the Registered Office and Records Office would also be the same for Karnail and Kit International;
  - As of the date of the Determination, Karnail had not been reinstated, according to the BC Corporate Registry;

- At the hearing, Mr. Buck's verbal evidence included the following:
  - Kelly Preston is the office administrator and dispatcher for Karnail
- At the hearing, Ms. Kelly Preston's verbal evidence included the following:
  - She provides administrative services for Karnail including payroll, accounts receivable and payable;
  - She interviewed Mr. Buck and hired him as a truck driver at a rate of \$18.00 per hour;
  - The letter of employment should have been issued from Karnail, not from Kit International.

11. In the Determination, the Delegate made these findings of fact regarding the section 95 issue:

Section 95 of the Act permits the delegate of the Director of Employment Standards to associate two or more legal entities for the purpose of rendering them jointly or separately liable for payment of the unpaid wages stated in a Determination. This is precisely the statutory purpose in this instance.

The primary undertaking of the two companies, Kit International and Karnail, is the business, trade or undertaking of transporting and delivering goods locally.

Buck testified that he responded to an employment add [*sic*] and was hired by Kit International. However, his wages were paid by Karnail.

Jerry Kadola testified that he is the managing authority for both businesses. That is, he has common control, notably in the financial areas and direction as to how things were to be done in the operation of Karnail and Kit International.

Both Karnail Logistics Ltd. and Kit International Transport Inc. are separate corporations registered with the BC Corporate Registry. Mr. Dharminder Singh Toor of Kit International Transport Inc. and Mr. Jaginder Dhillon and Mr. Daljet Hayre are copied on this Determination as they are presently listed as Director/Officers and were at the time wages were earned and should have been paid.

In view of the above findings and pursuant to Section 95 of the Act, I determine that Karnail Logistics Ltd. and Kit International Transport Inc. is one legal entity for the purposes of the Act and are jointly and separately liable for payment of the wages owing to Buck.

## ARGUMENT

12. In its appeal form and final submission, Kit International makes the following arguments (I list only the germane points):

- The Director erred in law.
- The Tribunal should change or vary the Determination by removing Kit International as a liable party.
- Mr. Buck never worked for Kit International.
- The employment letter issued by Kit International to Mr. Buck dated May 25, 2006 is not correct and does not have the correct address.

- The company records searches show different officers and directors for Kit International and Karnail.
- The Employer records from Karnail, including four pay summaries from Mr. Buck, prove that Mr. Buck worked for Karnail, not Kit International.
- Mr. Buck's trip inspection reports from July 4 – 26 do not have any company name on them.
- Copies of Mr. Buck's time sheets do not name Kit International.
- Nothing in the Delegate's submissions and documents prove that Kit International should be found to be an employer under section 95.
- Nothing in the Labour Code [*sic*] prevents Mr. Kadola from working for more than one company.

13. Kit International also says that evidence has become available that was unavailable at the time the Determination was being made. In support of this ground of appeal, Kit International appended to its submissions a copy of a ruling by the Canada Revenue Agency dated January 9, 2007 (the "CRA Ruling"), made in response to a request from the Department of Human Resources and Skills Development Canada for a ruling with respect to the insurability, under federal Employment Insurance legislation, of Mr. Buck's employment with Kit International. The CRA Ruling states as follows:

Although a contract of duties was signed between KIT International Inc. and the worker on May 25, 2006, the worker was paid from the bank accounts of Karnail Logistics Inc. Further, all copies [*sic*] of the payroll summaries and the Record of Earnings bear the name Karnail Logistics Inc. Therefore, Karnail Logistics Inc is the deemed employer regardless of which company the duties were actually performed for and there was no contract between KIT International Inc and the worker.

14. Mr. Buck makes the following points in his written submission:

- He has a valid employment contract with Kit International.
- He does not agree with the CRA decision, of which he was not informed, and will be appealing it.

15. In her written submission, the Director's representative (who is also the Delegate who wrote the Determination) makes these arguments (again, I list only the germane points):

- The appellant's submission is for the most part an attempt to re-argue the issue of Kit International and Karnail as being one and the same employer.
- The Delegate understood from Mr. Kadola that both companies operated out of the same premises and he has financial and operational control for both companies.
- Section 95 of the Act allows two or more legal entities to be associated for the purpose of rendering them jointly or separately liable.
- In this case, the association was required given Mr. Buck's employment circumstances.
- If this appeal is granted, the complainant will be unduly prejudiced by a delay in the payment of wages.
- The Tribunal should deny the appeal and confirm the Determination.

## ANALYSIS

16. Section 112(1) of the Act outlines the grounds on which a person may appeal a determination:
- (a) the director erred in law;
  - (b) the director failed to observe the principles of natural justice in making the determination;
  - (c) evidence has become available that was not available at the time the determination was being made.
17. The Employer appeals on the first and third grounds. The burden is on the appellant Kit International to establish the basis of its appeal.

### *Did the Director's delegate err in law in the Determination?*

18. In *Britco Structures Ltd.*, BC EST #D260/03, the Tribunal noted that panels have used the following definition of “error of law”, set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1988] B.C.J. No. 2275 (B.C.C.A.):
1. a misinterpretation or misapplication of a section of the *Act*;
  2. a misapplication of an applicable principle of general law;
  3. acting without any evidence;
  4. acting on a view of the facts which could not reasonably be entertained; and
  5. adopting a method of assessment which is wrong in principle (or, as the Tribunal expressed it in *Jane Welch operating as Windy Willows Farm*, BC EST #D161/05, exercising discretion in a fashion that is wrong in principle).
19. It should be noted that questions of fact alone are not reviewable by the Tribunal. However, in cases where there is a question of mixed fact and law, that is, a question about whether the facts satisfy the applicable legal test, the Tribunal may review a finding of fact as a question of law under the third and fourth factors in *Gemex*. That is, if the finding of fact was made on no evidence, or on a view of the evidence that could not reasonably be entertained, then an error of law may be made out: *Britco Structures*, *supra*.
20. Turning to the appeal, Kit International says that the Delegate erred in law by finding that it is an associated employer of Mr. Buck under section 95 of the Act. This argument presents a question of mixed fact and law, because it raises a question about whether the facts of the case satisfy the legal test associated with section 95, which provides:

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 employer 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, a settlement agreement or an order of the tribunal, and this Act applies to the recovery of that amount from any or all of them.

21. The leading decision with respect to the interpretation of section 95 is *Invicta Security Systems Corp.*, BC EST #D349/96, in which the Tribunal held:

This statutory provision allows the director to pierce the corporate veil and look behind the legal structure, or form, of a business to the relationships of various entities that in reality comprise the substance of the business. There are four preconditions to an application of Section 95 to the circumstances of any matter before the director:

1. There must be more than one corporation, individual, firm, syndicate or association;
2. Each of these entities must be carrying on a business, trade or undertaking;
3. There must be common direction or control; and
4. There must be some statutory purpose for treating the entities as one employer.

22. When these four preconditions (i.e. the legal test) are applied to the facts and evidence contained in the Determination, the result is the following:

1. There are two companies, Karnail and Kit International, each of which are corporate entities with records in the BC Corporate Registry;
2. Each of Karnail and Kit International is operational, carrying on a business, trade or undertaking in transporting and delivering goods locally;
3. Karnail and Kit International are under common control or direction due to Mr. Kadola's financial and operational control of both companies; both companies being operated out of a common office on Southeast Marine Drive; and Ms. Preston's provision of administrative and office services to both companies;
4. The statutory purpose for treating Karnail and Kit International is to ensure that Mr. Buck is paid the wages he is owed.

23. The next question to be considered is whether, under the third and fourth factors in *Gemex*, any material findings of fact were made on no evidence, or on a view of the evidence that could not reasonably be entertained. Such findings of fact would constitute an error of law.

24. Kit International submits that nothing in the Determination or the documents show that it should be found to be an associated employer under section 95. After reviewing the Determination and the Record, I am unable to agree. None of Delegate's findings of fact were based on no evidence, though in some instances, the evidence is scant. Certainly in other instances, there was contradictory evidence before the Delegate, and it may be that Kit International does not agree with the way in which the Delegate assessed and weighed the evidence. However, as long as the Delegate had some evidence on which each material findings of fact is based, which is the case here, the Determination cannot be disturbed on that basis of the third test in *Gemex*, *supra*.

25. Similarly, I find that in applying the fourth test in *Gemex*, supra, I cannot find that the Determination is based on a view the facts which cannot be reasonably entertained. This is especially true when the following re-statement of the fourth *Gemex* test is considered and applied:

... [the test is met where it is shown] that there is no evidence before the Board which supports the finding made, in the sense that it is inconsistent with and contradictory to the evidence. In other words, the evidence does not provide any rational basis for the finding. It is perverse or inexplicable. Put still another way, in terms analogous to jury trials, the Appellant will succeed only if it establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have come to the determination, the emphasis being on the word "could" ... (*Delsom Estate Ltd. v. British Columbia (Assessor of Area No. 11 Richmond/Delta*, [2000] B.C.J. No. 331 (B.C.S.C.) at para. 18, cited with approval in *British Columbia (Assessor Area No. 27-Peace River) v. Burlington Resources*, 2003 BCSC 1272).

26. This re-statement presents a very high standard for the appellant to meet. In this case, Kit International did not establish that no reasonable person, acting judicially and properly instructed as to the relevant law, could have come to the same Determination as the Delegate.

27. I turn next to address Kit International's other submissions:

- Mr. Buck never worked for Kit International.
- The Employer records from Karnail, including four pay summaries from Mr. Buck, prove that Mr. Buck worked for Karnail, not Kit International.
- Mr. Buck's trip inspection reports from July 4 – 26 do not have any company name on them.
- Copies of Mr. Buck's time sheets do not name Kit International.

28. It is not necessary for the employee to have worked for an associated employer. In fact, section 95 is designed to allow the Director, if all the conditions are met, to find a business that did not employ the employee to be nevertheless liable for the employee's wages.

- The employment letter issued by Kit International to Mr. Buck dated May 25, 2006 is not correct and does not have the correct address.

29. The employment letter, on its face, was issued by Kit International, and the Delegate considered Ms. Preston's evidence that the letter should have been issued by Karnail.

- The company records searches show different officers and directors for Kit International and Karnail.

30. This is correct, and the Delegate had these records before her in making the Determination. She also considered Mr. Kadola's testimony that he was a Director/Officer for both companies. Overall, she found that there was sufficient common control and direction for a finding of associated employers.

- Nothing in the Labour Code [sic] prevents Mr. Kadola from working for more than one company.

31. While it is true that noting in the Act prevents Mr. Kadola from working for more than one company, his evidence that he had financial and operational control of both companies was a factor considered by the Delegate in finding Kit International and Karnail to be associated employers.



32. Overall, Kit International has not met the burden of showing that the Delegate erred in law. Its appeal therefore does not succeed on this basis.

***Should the appeal be allowed on the basis that there is new and relevant evidence which was not available at the time of the Determination?***

33. The evidence that the Kit International says is new and relevant evidence is the CRA Ruling, dated January 9, 2007. When a person appeals a Determination on the ground that evidence has become available that was not available at the time the Determination was being made, all of the following four conditions must be met before the evidence will be considered by the Tribunal:

1. the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
2. the evidence must be relevant to a material issue arising from the complaint;
3. the evidence must be credible in the sense that it is reasonably capable of belief; and
4. the evidence must have high probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

*(Bruce Davies and others, Directors or Officers of Merilus Technologies Inc., BC EST #D171/03).*

34. The CRA Ruling clearly meets the first and third conditions: it came into existence after the Determination was made and therefore could not have been presented to the Director beforehand; further, it is credible. However, the CRA Ruling does not meet the second and fourth conditions, for related reasons. The appellant submits the CRA Ruling for the purpose of showing that Kit International is not Mr. Buck's employer with respect to the Determination, which is made under the Act. However, the Ruling is made under a completely different statutory regime - federal Employment Insurance legislation - and in the absence of any evidence of its relevance to the question of whether Kit International is an associated employer under section 95, I find that the CRA Ruling is not relevant to a material issue arising from the complaint. The CRA Ruling has little probative value for similar reasons; in my view, the fact that Kit International has been found to be an employer under federal Employment Insurance legislation would not have led the Delegate to a different conclusion on the material issue of Kit International's status as an associated employer under section 95. I conclude that I cannot consider the CRA Ruling, and consequently the appeal is denied.

**ORDER**

35. Pursuant to Section 115 of the Act, I order that the Determination dated January 24, 2007, be confirmed with respect to the determination that Kit International and Karnail are to be treated as one employer under section 95 for the purposes of the Act; and that Kit International and Karnail are jointly and separately liable for payment of the amount stated in the Determination.

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**Yuki Matsuno**  
**Member**  
**Employment Standards Tribunal**