

An appeal

- by -

Karnail Logistics Ltd.  
(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/18

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

## DECISION

### SUBMISSIONS

W. Brandt, Kelly Preston

for Karnail Logistics Ltd.

Chantal Martel

for the Director of Employment Standards

### OVERVIEW

1. Karnail Logistics Ltd. (“Karnail” or the “appellant”) 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 Karnail was jointly and separately liable, as an associated employer with Kit International Transport Inc., for the amount stated in the Determination. The Delegate found that Karnail 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 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, for a total of \$1,500.00. The total amount jointly and separately payable by Karnail is \$6,120.96.
2. Karnail disagrees with the amount of the payments ordered in the Determination. It appeals on the ground 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 Karnail dated March 5, 2007; an undated letter from Karnail, received by the Tribunal on March 20, 2007; and a letter dated March 27, 2007 from Karnail (collectively, “Karnail’s submissions”); 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; and an email dated April 23, 2007 from the Delegate to the Tribunal indicating that her March 19, 2007 submission applies to this current appeal. . Karnail has indicated that an oral hearing is not required, and the Tribunal has confirmed that the case will be determined on the basis of the written materials before me.

### ISSUE

4. 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

5. Mr. Buck worked as a truck driver delivering lumber from May 29, 2006 to July 26, 2006. Throughout his employment, Mr. Buck’s wages were paid by Karnail and he operated a truck that belonged to Karnail.

6. 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.
7. The Delegate held a hearing into Mr. Buck's complaint on November 9, 2006. The appellant had an opportunity to present evidence and call witnesses, and Mr. Jerry Kadola and Ms. Kelly Preston gave evidence on its behalf. Mr. Buck gave evidence on his own behalf and submitted into evidence some timesheets and his daily truck Trip Inspection Report log books (the "log books"), which recorded the times of pre-trip safety inspections and post-trip inspections. Although the appellant had been served with a Demand for Records, Mr. Kadola and Ms. Preston failed to bring Mr. Buck's timesheets to the hearing and only brought payroll records. During the hearing, Mr. Kadola and Ms. Preston were given an opportunity to respond to the evidence provided by Mr. Buck.
8. In the Determination, the Delegate reviewed the evidence and found that the log books accurately reflected the number of actual hours worked by Mr. Buck. The Delegate found that Mr. Buck was owed wages in the amount of \$3,087.00 and overtime wages in the amount of \$843.75. The Delegate also found that Mr. Buck was not paid for the July statutory holiday (which was in fact admitted by Ms. Preston), leading to a wage adjustment of \$173.17. With annual vacation pay and interest under section 88 included, the total amount that the Delegate found that a total amount of \$4,620.96 was payable to Mr. Buck.

## ARGUMENT AND ANALYSIS

### *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?*

9. 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).*

10. In this case, Karnail indicates in its submissions that the amount outstanding is incorrect; asks that the amount owing to Mr. Buck be calculated on an 8-hour work day, not a 12-hour work day; and suggests that the correct outstanding amounts are \$2,087.00 for wages and \$83.48 for vacation pay. Karnail

submits that it owes nothing with respect to statutory holiday pay and overtime pay, and suggests that accrued interest should be consequently adjusted. Karnail provides no other information or evidence to support its assertions.

11. In her submissions, the Delegate notes that the appellant was given an opportunity to provide its payroll records, particularly timesheets, at the hearing and did not do so. The Delegate also says that her calculations were based on the information available to her in making the Determination, including Mr. Buck's wage statements, his record of hours worked, and log books.
12. I note from the Determination that the evidence provided by Mr. Buck with respect to his hours worked was presented specifically to Ms. Preston at the hearing for her response. I also note that the Determination indicates that Mr. Kadola's verbal evidence was that Mr. Buck worked 12 hours per day and was told to take a lunch break.
13. It must be kept in mind that an appeal to the Tribunal on the basis of new evidence is not an opportunity to have the case re-heard on the merits. In any event, Karnail's submissions contain only bare assertions and no evidence. These assertions do not meet any of the four conditions necessary for consideration as new evidence before the Tribunal. The appeal fails as a consequence.

## **ORDER**

14. Pursuant to Section 115 of the *Act*, I order that the Determination dated January 24, 2007 be confirmed with respect to the amounts jointly and separately payable as associated employers by Karnail Logistics Ltd. and Kit International Transport Inc., together with any interest that has accrued under Section 88 of the *Act*.

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