

**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 -

Milner Freightways Ltd.  
("Milner")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Norma Edelman

**FILE NO.:** 98/003

**DATE OF HEARING:** March 4, 1998

**DATE OF DECISION:** March 23, 1998

**DECISION**

**APPEARANCES**

Del McLellan	on behalf of Milner Freightways Ltd.
Ronald Tamis	on his own behalf

**OVERVIEW**

This is an appeal by Milner Freightways Ltd. (“Milner”) under Section 112 of the *Employment Standards Act* (the “Act”) against a Determination which was issued on December 10, 1997 by a delegate of the Director of Employment Standards.

The Director’s delegate determined that Milner owed its former employee, Ronald Tamis (“Tamis”), \$3,421.23 on account of unpaid wages.

Milner’s appeal is based on the assertion that it only owes vacation pay in the amount of \$373.52 plus interest to Tamis

A hearing was held at the Tribunal’s offices on March 4, 1998.

**ISSUE TO BE DECIDED**

This issue to be decided in this appeal is what wages are owed to Tamis by Milner.

**FACTS**

In the Determination the Director’s delegate found that Tamis was employed by Milner from November 11, 1996 to May 9, 1997 and was owed regular wages and vacation pay in the amount of \$3,421.23 including interest. This figure is based on the difference between gross wages earned of \$11,326.78 and gross wages paid of \$7,995.72 or \$5981.00 net based on a rate of pay of \$1,825.00 per month. In his reasons, the delegate stated Milner chose to participate in the investigation on a “limited scale” and only produced records for the period January 1997 to April 11, 1997. Consequently, he accepted Tamis’ records over those of Milner.

In its reasons for appeal Milner states that Tamis earned and was paid \$9,337.91 gross or \$7,323.28 net for the period November 11, 1996 to April 11, 1997 when he quit his job. A payroll summary sheet for 1996 and 1997 and a copy of Tamis’ 1996 T4 was submitted on the appeal. Milner does not dispute that it owes Tamis vacation pay in the amount of \$373.52 (which is 4% of \$9,337.91) and any accrued interest. Milner does dispute that

Tamis' last day of work was May 9, 1997. According to Shawn McLellan, Tamis informed him that he was quitting on April 11, 1997, the last day of racing, to haul fertilizer for N. Ruddick. Due to wet weather conditions, however, Tamis was unable to get on the fields to haul fertilizer for his new employer, so he kept showing up at the Milner work site. Shawn McLellan said that Tamis was clearly told that since he had quit, there was no work for him at Milner and he would not be paid beyond April 11, 1997.

In a submission to the Tribunal, Tamis stated that the last day of racing was May 3, 1997 and not April 11, 1997. He attached a program from Fraser Downs which shows May 3, 1997 as the last day of racing. Tamis stated that he informed Milner that he was quitting and going to work for Noel Roddick Fertilizer Ltd., but he would stay on as long as he could. Given the poor spring conditions, he was able to remain at Milner until the end of the race season. He said he was never informed that he was not going to be paid from the date he informed Milner he was quitting and had he known this he never would have worked the rest of that month. He said that the last week he worked at Milner he spent most of his time trying to collect accounts from various horsemen. He said he quit because he was never properly paid by Milner. Tamis also stated that he never received a pay stub from Milner and he was paid a total of \$5900.00 of which \$1200.00 was received in cash and \$4700.00 was received by way of certified cheques.

Del McLellan ("McLellan") attended the hearing on behalf of Milner. He is the Manager of the company and the father of Shawn McLellan. McLellan testified that he only sent 1997 records to the delegate because his accountant told him that was all he needed to do and he didn't think it was necessary to provide 1996 records. The records sent to the delegate were Tamis's 1997 pay stubs and ROE, and a payroll summary sheet. The pay stubs and payroll summary sheet show total gross earnings in 1997 of \$6144.16, net earnings of \$4856.37 (\$1414.67, \$1414.67, \$1414.67 & \$612.36), and total paid to Tamis as \$4856.00. The ROE indicates a start and end date of November 11, 1996 and April 11, 1997 respectively but only shows the 1997 earnings. McLellan said this was an error by the accountant.

McLellan said that after he received the Determination his accountant told him to submit Tamis' 1996 earnings and he did so when he sent the appeal to the Tribunal.

At the hearing McLellan entered Tamis' 1996 pay stubs which were not previously disclosed to the delegate or the Tribunal. These stubs indicated gross pay of \$3193.75 (the same as indicated on the 1996 T4) and net pay of \$2467.41 (\$1052.54 & \$1414.87). Consequently, the employer's records indicated that Tamis earned \$9337.91 gross or \$7323.78 net during 1996 and 1997.

McLellan testified that he paid Tamis a total of \$8620.00. \$3839.00 was paid in cash (\$550.00, \$500.00, \$850.00, \$564.00, \$350.00, \$350.00, \$375.00 & \$300.00). McLellan has no documents to confirm this as Tamis did not sign any chits. \$4781.00 was paid by way of cheques (\$1000.00, \$1500.00, \$1000.00, \$1200.00 & \$81.00). The last cheque

for \$81.00 was paid after the delegate commenced his investigation and is being held in trust by the Director of Employment Standards.

McLellan said that he has no 1997 T4 for Tamis. He also said Tamis received the above-noted pay stubs at the end of each month.

McLellan further testified that Tamis told Shawn on March 28, 1997 that he was quitting on April 11, 1997. After April 11, 1997, however, Tamis continued to show up at their work site. According to McLellan, Tamis told Shawn that since the weather was wet he couldn't get on the fields to start his new job so he decided to work some extra time at Milner. McLellan said he told Shawn that Tamis could not do that, but Tamis continued to show up anyway, although it wasn't every day, and when he did show up, it was not for long. McLellan said during this period he saw Tamis wash his own truck and Tamis might have cleaned one of their trucks.

McLellan entered an undated letter from Shawn which said Tamis gave notice on March 21, 1997 or around the end of March that he was quitting and going to work for his new employer at the end of the race meet on April 11, 1997. Further, Tamis was not needed by Milner after April 11, 1997.

At the hearing, Tamis testified that he could not remember the exact date he told Milner he was quitting, but he thought it was early April when he told the company he would stay until about one week after May 3, 1997. He never gave Milner an exact end date but he wanted to finish after May 3 and as far as he knew Shawn was aware that he wanted to work to at least May 3, 1997. He entered a payroll document which indicates he started work at Noel Roddick Ltd. on May 12, 1997. He said that since he didn't start with his new employer until May 12, 1997 he wanted to stay with Milner at least until that time as he didn't want to lose a month's wages which he would have lost if he left on April 11, 1997 as alleged by Milner. Tamis said during his last week of work there was not much to do so he mainly picked up cheques.

Tamis stated that he never received any other cash from Milner other than \$1200.00, nor did he ever receive pay stubs. He agreed that the \$81.00 cheque being held by the Director should be included in the calculation for total wages received by him from Milner.

## **ANALYSIS**

The burden is on the Appellant, Milner, to show that the Determination is in error. In my view, Milner has not met this burden.

I am satisfied that Tamis worked until May 9, 1997 and not April 11, 1997. There is no dispute that Tamis was on the work site after April 11, 1997. There is also no dispute that Tamis said he was leaving at the end of the race meet and I accept that the meet ended on

May 3, 1997. The racing document that was submitted by Tamis shows an end date of May 3, 1997 and it was not challenged by Milner at any time. Moreover, at the hearing, McLellan stated that Tamis may have cleaned one of the company vehicles after April 11, 1997. When I consider all these factors in conjunction with Tamis' testimony that he did not want to lose one month's wages, I am not persuaded that the Director's delegate was incorrect in concluding that Tamis worked to May 9, 1997.

I also satisfied that Tamis is owed the amount of wages as calculated by the Director's delegate.

The Tribunal has held on a number of occasions that it will not rehear a case on the merits with information that should have been provided to the Director's delegate during the course of the investigation: *Kaiser Stables Ltd.* (BC EST #D058/97). I find that Milner neglected or refused to provide relevant information (specifically 1996 records) to the Director's delegate. The reasons advanced by Milner for failing to provide this information is inadequate. Accordingly, Milner is estopped from raising new information on the appeal.

However, even I accept the new information, Milner still has not provided adequate grounds which would warrant cancelling or varying the Determination as regards *quantum*.

The parties agreed that Tamis received \$4781.00 by way of cheques. McLellan claims he also paid Tamis \$3839.00 in cash but there is no proof that Tamis received cash in excess of \$1200.00. Furthermore, the evidence provided by the employer was inconsistent with respect to the total amount paid to Tamis. When the appeal was filed, Milner indicated Tamis was paid \$7323.28 net, whereas at the hearing McLellan said he paid Tamis \$8620.00 net. As well, the cheques and alleged cash received by Tamis do not match any of the net amounts contained in the pay stubs and payroll summary sheets and no information was offered why these amounts are different. On the whole, I prefer Tamis' evidence with respect to the amount of wages he received from Milner. Therefore, I accept the delegate's calculations as they are based on an employment end date of May 9, 1997 and they reflect Tamis' evidence respecting payments he received from Milner.

## **ORDER**

I order pursuant to Section 115 of the *Act* that the Determination dated December 10, 1997 be confirmed.

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**Norma Edelman**  
**Adjudicator**  
**Employment Standards Tribunal**