

An appeal

- by -

Karnail Logistics Ltd.
("Karnail")

- 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

ADJUDICATOR: David B. Stevenson

FILE No.: 2002/378

DATE OF DECISION: September 25, 2002

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Karnail Logistics Ltd. (“Karnail”) of a Determination that was issued on June 19, 2002 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Karnail had contravened Part 3, Sections 17 and 18, Part 5, Section 58 and Part 8, Section 63 of the *Act* in respect of the employment of five employees, Harjit Billing, Fidel Hernandez, Dhira Sidhu, Thomas Watkins and David Wiesner, and ordered Karnail to cease contravening and to comply with the *Act* and to pay an amount of \$5,763.10.

Karnail challenges the calculation of wages owing to Harjit Billing, Dhira Sidhu and David Wiesner. Karnail disputes the amount found owing to Harjit Billing on the ground that he was not entitled to length of service compensation, having terminated his own employment. Karnail disputes the amount found owing to Dhira Sidhu on the ground that the amount stated on the Determination was incorrect. Karnail disputes the amount owing to David Wiesner on the ground that the Determination incorrectly found he worked at a rate of pay of \$18.00 an hour, rather than \$16.00 an hour and the Determination included days for which he had already been paid or did not work. Karnail says David Wiesner is owed \$388.79.

During the submissions, the Director acknowledged that the amounts found owing to Dhira Sidhu and David Wiesner were wrongly calculated. New calculations were submitted for both. As a result, the amount found owing to Dhira Sidhu was increased from \$2607.72 to \$3316.17 and the amount owing to David Wiesner was reduced from \$798.87 to \$773.25.

ISSUE

The issue in this appeal is whether Karnail has shown the Determination was wrong in a manner that justifies the intervention of the Tribunal under Section 115 of the *Act*.

FACTS

Karnail is a company that hauls wood chips and lumber in the Lower Mainland. The company experienced some financial hardship during 2001 and, as a result, some employees were not paid all wages owing.

The Determination made the following findings of fact relating to each of the individuals whose claims are being appealed:

Harjit Billing

Billing worked for the period of May 27, 2001 to September 1, 2001 as a trucker and was paid by the mile. Billing was unable to state his hourly wage. Billing quit his job because the employer did not pay him on time, therefore it is Billing’s position that the employer terminated the employment relationship because he failed to pay wages that he earned. Billing is seeking one (1) week’s wages for termination pay. He is also seeking

payment of his final wages in the amount of \$1053.38. He states that the employer issued two cheques to him to satisfy his final wages earned, and the employer put a *Stop Payment* on both cheques (copies attached)

August 17, 2001	Cheque 0341	\$526.69
September 5, 2001	Cheque 0342	\$526.69

Dhira Sidhu

Sidhu worked for the period of July 16, 2001 to August 27, 2001 at a rate of \$17.00 per hour. According to Sidhu, cheque 0428 for the pay period ending August 15, 2001 was returned from the bank marked NSF, and Sidhu was not paid for the period August 16 - 31, 2001 (copies of the NSF cheque and payroll for the pay period August 16 - 31, 2001 attached).

David Wiesner

Wiesner worked for the period of January 3, 2002 to January 25, 2002 as a local driver at a rate of \$18.00 per hour. He acknowledges receiving wages in the amount of \$1656.00 for the period of January 3 to 19, 2002. Wiesner claims the he performed 38.5 hours of work between January 20 to 25, 2002 for which he has not been paid. He also claims he is owed annual vacation pay for the period of his employment.

The Determination noted that during the investigation, Karnail did not dispute the wage calculation made by the Director. The Determination concluded, applying Section 66 of the *Act*, that Billing was entitled to length of service compensation because he had been forced to quit as a result of the employer's failure to pay wages.

During the submissions on the appeal, the Director identified two errors in the calculations. First, the Director asserted that calculation of wages owing to Dhira Sidhu should have covered a period from July 16, 2001 to August 31, 2001, an amount \$3074.75 rather than the amount of \$2418.12 set out in the Determination, and the total amount owing, once annual vacation pay and interest was included, should have been \$3316.17. Second, the Director agreed the calculation of wages owing to David Wiesner should be adjusted, based on his representations on the appeal, from a net amount of \$798.97 to \$773.25. The material on file justifies making the adjustments submitted by the Director.

ARGUMENT AND ANALYSIS

The burden is on Karnail, as the appellant, to persuade the Tribunal that the Determination was wrong and justifies the Tribunal's intervention. Placing the burden on the appellant is consistent with the scheme of the *Act*, which contemplates that the procedure under Section 112 of the *Act* is an appeal from a determination already made and otherwise enforceable in law, and with the objects and purposes of the *Act*, in the sense that it would it be neither fair nor efficient to ignore the initial work of the Director (see *World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96)).

Karnail has not met that burden in respect of any of the amounts found owing to any of the individuals. I can find no error in the conclusion that the failure of Karnail to pay wages according to the requirements of the *Act* was a substantial alteration of a condition of employment which entitled the Director to determine his employment had been terminated. Nor has Karnail shown the calculations relating to the

amount owed to Dhira Sidhu was wrong. No material has been provided to support their submission that the amount owed to Dhira Sidhu by Karnail should have been set at \$2251.32.

The amount found owing to David Wiesner has been adjusted, but not on any ground of appeal submitted by Karnail. I do not find the material provided by Karnail supports their submission that David Wiesner, while initially hired at a rate of \$18.00 an hour, had his wage rate reduced to \$16.00 an hour following his probationary period.

The appeal by Karnail is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated June 19, 2002 be varied according to the adjustments made by the Director to the amounts owing to Dhira Sidhu and David Wiesner. In all other respects the Determination is confirmed. The resulting amount owing will accrue interest pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal