

An appeal

- by -

Lasota Fishing Ltd.
("LFL" or the "Company")

- of a Determination issued by -

The Director of Employment Standards

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

TRIBUNAL MEMBER: Shafik Bhalloo

FILE NO.: 2018A/18

DATE OF DECISION: March 27, 2018

DECISION

SUBMISSIONS

Walter Steve Lasota

on behalf of Lasota Fishing Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*ESA*”), Lasota Fishing Ltd. (“LFL” or the “Company”) has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on July 28, 2017 (the “Determination”).
2. The deadline for filing an appeal of the Determination was 4:30 p.m. on September 5, 2017. The Tribunal received the Company’s appeal form February 5, 2018, approximately five (5) months after the expiry of the appeal period. The appeal included written submissions of the Company’s sole director and officer, Walter Steve Lasota (“Mr. Lasota”), on the merits of the appeal and a request for an extension of time to file the appeal.
3. The Determination concluded that LFL contravened Part 3, section 18 (wages) of the *ESA* in respect of the employment of Steve O. Hrad (“Mr. Hrad”), and ordered LFL to pay Mr. Hrad wages in the amount of \$14,780.51 including accrued interest. The Determination also levied administrative penalties under section 29 of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$1,000.00 for breaches of section 18 of the *ESA* and section 46 (production of records) of the *Regulation*. The total amount of the Determination is \$15,780.51.
4. In its Appeal Form, LFL has checked off a single ground of appeal, namely, new evidence has become available that was not available at the time the Determination was being made. LFL is seeking the Tribunal to vary the Determination.
5. In correspondence dated February 8, 2018, the Tribunal sent the Company’s appeal and request to extend the appeal period to Mr. Hrad and to the Director for informational purposes only. The Tribunal informed Mr. Hrad and the Director that no submissions were being requested from them at this time. In the same letter, the Tribunal requested the Director to provide the section 112(5) “record” (the “Record”) to the Tribunal.
6. On February 20, 2018, the Director sent the Record to the Tribunal.
7. On February 21, 2018, the Tribunal disclosed the Record to LFL and Mr. Hrad and afforded both parties an opportunity to object to its completeness. However, no objections were received from either party by the deadline of March 7, 2018. Therefore, I find the Record, as produced by the Director, to be complete.
8. On March 12, 2018, the Tribunal informed the parties that the appeal would be decided by a Tribunal Member. I have decided this appeal is an appropriate case for consideration under section 114 of the *ESA*. Therefore, at this stage, I will assess the appeal based on the Appeal Form, written submissions of Mr. Lasota

and my review of the Record that was before the Director when the Determination was being made. Under section 114(1) of the *ESA*, the Tribunal has discretion to dismiss all or part of an appeal without a hearing of any kind for any of the reasons listed in that subsection. If satisfied the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114(1), the Tribunal will invite Mr. Hrad and the Director to file a reply to the question of whether to extend the deadline to file the appeal, and may request submissions on the merits of the appeal. LFL will then be given an opportunity to make a final reply to those submissions, if any.

ISSUE

9. The issue to be considered at this stage of the proceeding is whether the appeal should be dismissed under section 114 of the *ESA*.

THE FACTS AND THE REASONS

10. LFL is a company incorporated under the laws of British Columbia.
11. A BC Online: Registrar of Companies — Corporation Search conducted by the delegate on May 5, 2017, current to April 10, 2017, indicates that it was incorporated on December 27, 1990 .
12. Mr. Lasota is listed as the sole director and officer.
13. LFL operates a commercial fishing business and employed Mr. Hrad as a deck hand on its fishing vessel Lofoten II (the “Lofoten”) from January 27, 2017, to March 1, 2017.
14. On May 5, 2017, Mr. Hrad filed a complaint under section 74 of the *ESA* against LFL alleging that LFL contravened the *ESA* by failing to pay him wages (the “Complaint”).
15. The delegate of the Director conducted her investigation of the Complaint and spoke with Mr. Hrad and Trevor Tomlin of the Department of Fisheries but was unable to speak with Mr. Lasota although she made a few attempts to contact him before issuing her Determination.
16. In the Reasons for the Determination (the “Reasons”), the delegate summarizes the evidence she obtained in her investigation including her attempts to contact the Company.
17. The delegate notes Mr. Hrad’s evidence as follows:
 - In the summer of 2016, he was fishing in Winter Harbour when he was approached by Hans Holland, the skipper of the Lofoten.
 - Mr. Holland asked him if he would be interested in fishing in the winter for LFL. He indicated that he would be interested and provided Mr. Holland with his contact information.
 - In January 2017, Mr. Holland contacted him and offered him “a full crew share amounting to 10% of the net landed catch”.
 - He fished with LFL from January 2017 until March 1, 2017, when he resigned his position.

- During the fishing trip, the crew off-loaded black cod and halibut in the Village of Masset, in British Columbia. There is no record of how much fish was off-loaded in Masset, or what, if anything, LFL was paid for the off-loaded fish.
 - After leaving Masset, the crew continued to fish until they reached Richmond, BC.
 - On reaching Richmond, the majority of the catch was seized (the “Seized Fish”) by the Department of Fisheries (the “DFO”) on the basis that it was illegal catch.
 - The fish that was *not* seized by the DFO was sold to a fish buyer in Richmond. The fish buyer issued cheques to the crew members for their respective shares of the catch including a cheque to him.
 - The catch that was seized by the DFO was eventually sold at an auction.
 - While the DFO initially issued an Appearance Notice to him to attend court, along with other crew members, he was later notified that DFO was not proceeding with charges against him.
 - He attempted to obtain his wages from Mr. Lasota, the owner of the Lofoten, and the director and officer of LFL.
 - After a series of texts (contained in the Record) between him and Mr. Lasota, where he requested payment for his share of the Seized Fish, Mr. Lasota paid him \$500.00. He did not receive any further monies for his share of the Seized Fish.
 - He did not have any involvement in, or knowledge of, any illegal activities of LFL on the fishing trip.
 - Subject to the \$500.00 Mr. Lasota gave him, he states he is entitled to be paid 10% of the proceeds of the Seized Fish which were sold below market value.
18. The delegate also spoke with Mr. Tomlin of the DFO who was involved in the seizure of the catch from the Lofoten. His evidence is as follows:
- The Seized Fish consisted of 7,924 pounds of halibut and 139 pounds of ling cod, and 7,894 pounds of sable fish.
 - The Seized Fish sold at auction for \$151,236.50 (the “Proceeds”).
 - The Proceeds are being held by the Receiver General pending the outcome of the hearing.
19. On July 4, 2017, the delegate sent a letter (the “Letter”) to LFL at both the address provided for Mr. Lasota in the Company search on Labieux Road in Nanaimo, and to the Company’s Registered and Records office address in Pitt Meadows, British Columbia. The Pitt Meadows address is the same PO Box address that appears on the Appeal Form of LFL and which Mr. Lasota, in his written submissions in support of his application for an extension of time to appeal the Determination, confirms as his mailing address.
20. In the Letter, the delegate notifies LFL of the investigation. The letter also contained a Demand for Employer Records (the “Demand”) with a deadline for response by July 19, 2017.

21. LFL did not respond to the Letter or the Demand.
22. Additionally, during the course of the investigation, between June 28, 2017, and July 17, 2017, the delegate left several messages for Mr. Lasota requesting a call back but to no avail as she did not receive a response from Mr. Lasota.
23. Based on the undisputed evidence of Mr. Hrad, the delegate proceeded with her assessment of the Complaint.
24. In the Reasons, she noted that section 1 of the *Regulation* defines a fisher as a person who is employed on a vessel engaged in commercial fishing and whose remuneration is a share or portion of the proceeds of a fishing venture. She also noted that section 37 of the *Regulation* excludes fishers from entitlement to minimum wages, overtime, statutory holiday pay, annual vacation pay, and compensation for length of service. Although Mr. Hrad is a fisher, as defined in section 1 of the *Regulation*, and he is excluded under section 37 of the *Regulation* from many of the requirements of the *ESA*, the delegate noted that he is still entitled to be paid all wages owing under the terms of his employment agreement with LFL. She then went on to determine the wages owed to him stating as follows:

I accept the Complainant's evidence which is unrefuted, that there was a verbal agreement that his wages would be a full crew share calculated as 10% of the net catch. The Complainant performed the work under the agreement. There is no evidence that the Complainant was involved in the alleged illegal fishing activities. As a result, he had a reasonable expectation that he would be paid the wages for work performed under the employment agreement. This is not a case where the contract was frustrated due to unforeseen circumstances. Rather, it was reasonably foreseeable that if the Employer was involved in illegal fishing activities, as alleged, that the fish would be seized. This does not impact the Complainant's entitlement under the Act to be paid the wages for the work he performed. The texts between the Complainant and Mr. Lasota support a finding that the Employer acknowledged that the Complainant was owed wages for the Seized Fish. Further, there is clear evidence from a third party; namely DFO, of the value of the Seized Fish. Regardless of the outcome of the criminal proceedings and the dispensation of the Proceeds, the Complainant is entitled to be paid wages under the Act.

Based on the above, I find that the Complainant is owed the following wages: $\$151,236.50 \times 10\% = \$15,123.65 - \$500.00 = \$14,623.65$, plus interest under section 88 of the Act.

25. The delegate also levied two administrative penalties of \$500 each against LFL for contravening section 18 of the *ESA* when it failed to pay Mr. Hrad his regular wages within six days of his resignation and for contravening section 46 of the *Regulation* when it failed to produce any records as required by the Demand.

SUBMISSIONS OF LASOTA FISHING LTD.

26. In his written submissions on the merits of the Appeal, Mr. Lasota states:
 - “All I can say is it was a bad trip and in fishing you get those sometimes”.
 - Mr. Hrad was not a full time employee of his but only “wanted to do one trip”.

- Mr. Hrad was working on another boat and simply filling time while on Employment Insurance.
- Mr. Hrad owed him \$150 for “smokes”, \$237.84 for rain gear and gloves and \$500 for an “advance” he made to Mr. Hrad. In total, he paid Mr. Hrad \$887.84.
- The amount awarded to Mr. Hrad in the Determination “is way too much for one trip”.
- His pay for one trip would be somewhere in the \$3,000 to \$4,000 and after deducting for the monies paid to him (\$887.84), he would have “taken home” somewhere between \$2,112.16 and \$3,112.16.
- Mr. Hrad “was only doing the one trip...because he said he had to work on the other boat plus I had my full time guys coming back for the next trip”.
- \$14,846.49 awarded to Mr. Hrad is “way too much” as he himself, as a captain, does not “make that much”.
- “(A)t most [Mr. Hrad] would have made [\$]4000 for the one trip”.

27. In support of his submission that the amount awarded to Mr. Hrad in the Determination is “way too much”, Mr. Lasota attaches copies of documents showing the value of the total catch on each of the three trips preceding the trip Mr. Hrad made on his boat and two trips subsequently.

ANALYSIS

28. The ground of appeal relied upon by LFL is referred to as the “new evidence” ground of appeal and it is found in section 112(1)(c) of the *ESA*. The admission of “new evidence” is discretionary. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST # D171/03, the Tribunal set out four (4) conjunctive requirements which must be met before new evidence will be considered on appeal. These requirements are as follows:

- (a) 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;
- (b) the evidence must be relevant to a material issue arising from the complaint;
- (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
- (d) the evidence must have high potential 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.

29. The Tribunal will not consider evidence, in the context of an appeal, which could have been provided at the investigation stage or before the Determination is made (see *607470 B.C. Ltd.* carrying on business as *Michael Allen Painting*, BC EST # D096/07; *Kaiser Stables Ltd.*, BC EST # D058/97).

30. In this appeal, with one exception, the evidence submitted by Mr. Lasota is not “new evidence”; it existed at the time the Determination was being made. Mr. Lasota simply did not participate in the investigation. In his submissions in support of the Company’s application for an extension of time to appeal the Determination he states “I just got in from ... a long season of fishing”. While it may very well be that he never received the Letter or the Demand or the several voicemails of the delegate during the investigation of the Complaint, the delegate did her part in letting the Company know about the Complaint and provided the Company an opportunity to participate in the investigation process. If Mr. Lasota or the Company failed to monitor their mail and telephone messages during Mr. Lasota’s “long season of fishing” then that is not the delegate’s concern and it does not mitigate the Company’s failure to participate in the Complaint investigation process.
31. Having said this, as indicated above, all of the evidence adduced by Mr. Lasota in the appeal, except one document, existed at the time the Determination was being made and could have been provided to the Director at any time during the Complaint process. On this basis alone the said evidence will not satisfy the first criteria in *Re Merilus Technologies Inc.*, *supra*, for allowing additional evidence on appeal.
32. As for the one document, the “catch value” document for the August 3, 2017, trip on the Loftén, while this document did not exist at the time the Determination was made, I am not persuaded the proposed evidence contained in this document is relevant, credible or probative. Simply because the catch value for the August 3 fishing trip was lower does not mean that the catch value of the trip Mr. Hrad made on the Lofoten should be lower and he should get a lesser wage than in the Determination. Catch value on different fishing trips will fluctuate and the catch value of one trip should not determine the catch value on another trip. The document in question, in my view, fails to satisfy the second, third and fourth requirements for admitting additional evidence on appeal in *Re Merilus Technologies Inc.*
33. In the circumstances, I reject LFL’s appeal on the new evidence ground of appeal. I am satisfied that LFL’s appeal has no presumptive merit and has no prospect of succeeding. The purposes and objects of the *ESA* would not be served by requiring Mr. Hrad and the Director to respond to it and it is dismissed under section 114(1)(f) of the *ESA*.

ORDER

34. Pursuant to section 115 of the *ESA*, I order the Determination dated July 28, 2017, be confirmed together with any additional interest that has accrued under section 88 of the *ESA*.

Shafik Bhalloo
Member
Employment Standards Tribunal