Employment Standards TRIBUNAL

An appeal

- by -

Wichito Marine Services Ltd.
("Wichito Marine")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2014A/124

DATE OF DECISION: January 29, 2015

DECISION

SUBMISSIONS

R. Brian McDaniel	counsel for Wichito Marine Services Ltd.
Stephen J. (John) Nikiforuk	on his own behalf
Chantal Webb	on behalf of the Director of Employment Standards

INTRODUCTION

1. Wichito Marine Services Ltd. ("Wichito Marine") appeals, under subsection 112(1)(a) of the *Employment Standards Act* (the "*Act*"), a Determination that was issued by a delegate of the Director of Employment Standards (the "delegate") on August 14, 2014. By way of the Determination, Wichito Marine was ordered to pay its former employee, Stephen J. (John) Nikiforuk ("Nikiforuk"), the total sum of $16,326.02 on account of unpaid wages (including overtime pay and compensation for length of service) and section 88 interest. Further, and also by way of the Determination, three separate $500 monetary penalties were levied against Wichito Marine based on its contraventions of sections 40 (overtime pay), 45 (statutory holiday pay) and 63 (compensation for length of service) of the *Act*. Thus, the total amount payable under the Determination is $17,826.02.

2. Wichito Marine appeals the Determination on the ground that the delegate erred in law. More particularly, Wichito Marine says that Mr. Nikiforuk was not entitled to any compensation for length of service (he was awarded 6 weeks' wages – $7,656.38 – as compensation for length of service) because he voluntarily quit or otherwise abandoned his employment or, alternatively, if he were dismissed, it was for just cause. Wichito Marine says that Mr. Nikiforuk was not entitled to any overtime pay (he was awarded $6,669.25 on this account) because he was excluded from the overtime provisions of the *Act* by reason of one of more of subsections 34(g), (i) or (n) of the *Employment Standards Regulation* (the "*Regulation*"). These latter regulatory provisions exclude, respectively, "tender vessel workers", certain persons employed on a "towboat", and "the master or crew of a chartered boat" from Part 4 of the *Act* (the "Hours of Work and Overtime" provisions). Wichito Marine also says that apart from the foregoing regulatory provisions, Mr. Nikiforuk was also not entitled to any overtime pay because he was a "manager" (see section 34(f) of the *Regulation*) or because he was "estopped" from claiming overtime.

3. On November 24, 2014, and after a preliminary review of the materials filed by Wichito Marine in support of its appeal, I wrote to the parties advising that I would be summarily dismissing certain aspects of the appeal on the basis that they had no reasonable prospect of succeeding (see subsection 114(1)(f) of the *Act*), namely, the arguments that Mr. Nikiforuk was "estopped" from claiming overtime or was otherwise excluded from Part 4 of the *Act* because he was a "manager" or by reason of subsection 34(i) of the *Regulation*. While I did provide a brief explanation in my November 24 letter setting out my reasons for summarily dismissing these arguments, I also indicated that I would provide more complete reasons at a later point in time. I address these issues in greater detail, below. In my November 24 letter I also invited the respondent parties to file submissions relating to the remaining issues and both Mr. Nikiforuk and the Director of Employment Standards did so. Wichito Marine subsequently filed a reply submission and thus I am now in a position to issue final reasons for decision with respect to this appeal.

4. Mr. Nikiforuk's very brief submission (1/2 page) does not meaningfully address the issues in this appeal and, in essence, simply adopts the delegate's reasons. Counsel for Wichito Marine submits that the Director's submission – not prepared by the delegate who issued the Determination – should be wholly disregarded, indeed excluded from the appeal record, because it is inappropriate "advocacy" and "creates a perception of bias". While I agree that a submission filed by a Director's delegate in an appeal proceeding should simply provide information about the analytical path used to arrive at the Determination and that the delegate should not "enter the fray" and become an advocate for one of the parties, I am unable to characterize the Director's submission in this case as having crossed the line into improper advocacy. As I read the Director's submission, it only highlights the relevant law and evidence as they relate to the issues I invited the respondent parties to address.

5. I also raised one further issue in my November 24 letter. Counsel for Wichito Marine, at paras. 6 and 45 of his appeal submission, suggested that the award in relation to statutory holiday pay should be cancelled but counsel did not provide any argument supporting that position. Accordingly, I also asked counsel to address that point further if it wished to pursue that argument on appeal. In his reply submission dated and filed December 29, 2014, counsel advised that "the award of statutory holiday pay ($803.37) is no longer contested".

6. In addition to reviewing the parties' various submissions, I have also reviewed the Determination and the delegate's accompanying "Reasons for the Determination" (the "delegate's reasons"), and the subsection 112(5) record that was before the delegate when the Determination was being made.

7. By letter dated September 10, 2014, Wichito Marine applied to the Tribunal under section 113 of the *Act* for a suspension of the Determination pending the adjudication of the appeal. Enclosed in the September 10 letter was a cheque in the amount of $17,826.02 drawn on Wichito Marine's legal counsel's trust account and made payable to the Director of Employment Standards – the cheque represents the total amount payable under the Determination. This cheque was subsequently deposited in the Director's trust account and the delegate advised the Tribunal that the funds would be held pending the final adjudication of the appeal. In light of that circumstance, the Tribunal's Appeals Manager wrote to Wichito Marine's legal counsel on September 19, 2014, advising: "Given this undertaking by the Director, the Tribunal does not find it necessary to make an Order on the suspension issue".

8. In the sections that follow, I will summarize the delegate's reasons, outline Wichito Marine's reasons for appeal, address the issues that are being summarily dismissed and then address the remaining issues raised by Wichito Marine in this appeal.

THE DETERMINATION

9. Wichito Marine operates a marine services business and is headquartered in Tofino. Its principal business activity is transporting cargo to and from fish farms along the west coast of Vancouver Island utilizing towboats that haul barges to and from its customers' sites. Its principal client is Cermaq Canada ("Cermaq"), part of a larger global enterprise headquartered in Oslo, Norway, that is heavily involved in the B.C. salmon fish farming industry.

10. Mr. Nikiforuk was employed as a boat skipper from December 20, 2006, until his employment ended sometime in the late summer or early fall of 2013. When Mr. Nikiforuk's employment ended, his wage rate was $37 per hour. On May 29, 2013, Mr. Nikiforuk filed an unpaid wage complaint with the Employment Standards Branch's Nanaimo office. In his complaint he identified himself as a "skipper" and indicated that

he was still employed by Wichito Marine. He claimed approximately $24,000 on account of unpaid overtime pay (about 85% of his total claim) as well as unpaid vacation pay and statutory holiday pay.

11. The complaint was the subject of an oral hearing before the delegate on January 23 and 24, 2014. On August 14, 2014, the delegate issued the Determination along with her reasons. The delegate addressed five discrete issues in her reasons. First, she concluded that Mr. Nikiforuk was an "employee" as defined in section 1 of the *Act* and accordingly was entitled to statutory holiday pay in the amount of $803.37; Wichito Marine does not challenge this finding. Second, she concluded that Mr. Nikiforuk had a valid unpaid vacation pay claim. As noted in the delegate's reasons (page R15), the parties reached an agreement regarding Mr. Nikiforuk's principal vacation pay claim and this amount has now been paid to him – his remaining claim for vacation pay concerns concomitant vacation pay that would be added to any award for other unpaid wage claims (such as statutory overtime pay, statutory holiday pay or compensation for length of service). Third, and this finding gives rise to one of the central issues in this appeal, the delegate determined that Mr. Nikiforuk had a valid unpaid overtime pay claim. On this point, the delegate rejected Wichito Marine's position that Mr. Nikiforuk was exempted from Part 4 of the *Act* (Hours of Work and Overtime) under one or more of subsections 34(g), (i) and (n) of the *Regulation*. Fourth, the delegate rejected Mr. Nikiforuk's complaint that Wichito Marine threatened and/or intimidated him contrary to section 83 of the *Act*; this finding is not under review in this appeal. Fifth, and finally, the delegate determined that Wichito Marine failed to prove that Mr. Nikiforuk quit or otherwise abandoned his employment. The delegate also rejected Wichito Marine's alternative position that it had just cause to dismiss Mr. Nikiforuk and, accordingly, awarded him six weeks' wages as compensation for length of service.

12. Thus, the only wage claims that are presently in dispute in this appeal relate to Mr. Nikiforuk's overtime pay ($6,669.25) and compensation for length of service ($7,656.38) awards as well as concomitant vacation pay and interest on those awards. I should note that there is no issue with respect to the calculation of these claims; Wichito Marine simply says that Mr. Nikiforuk is not entitled to either overtime pay or compensation for length of service.

ISSUES ON APPEAL

13. As noted above, Wichito Marine appealed the Determination on the ground that the delegate erred in law (subsection 112(1)(a) of the *Act*) as follows:

- In rejecting its position that Mr. Nikiforuk "voluntarily terminated his employment by failing to return to work for [Wichito Marine] after May 19, 2013";
- "In failing to find that the behaviour of [Mr. Nikiforuk] gave [Wichito Marine] just cause to terminate [him]"; and
- In failing to find that Mr. Nikiforuk was not entitled to any overtime pay because he was exempted from Part 4 of the *Act* by reason of one or more of subsections 34(g), (i) and (n) of the *Regulation*.

14. In addition, Wichito Marine raised two further arguments that apparently were not argued before the delegate. First, it argued that Mr. Nikiforuk was "estopped" from claiming overtime pay because he "was content with the fact that he did not received overtime for six years from 2006 to 2012...because it was the standard in the industry and he accepted it". Second, Wichito Marine suggested that "it could be argued that [Mr. Nikiforuk] is a 'manager' and caught by subsection (f)".

SUMMARY DISMISSAL UNDER SUBSECTION 114(1)(f)

15. In my November 24, 2014, letter I advised the parties that I was summarily dismissing three aspects of Wichito Marine's appeal under subsection 114(1)(f), namely, the "manger", "estoppel" and "subsection 34(i)" arguments. My reasons for dismissing these three arguments are set out, in turn, below.

16. Wichito Marine never argued before the delegate that Mr. Nikiforuk was a "manager" as defined in section 1 of the *Regulation*:

> "manager" means
>
> (a) a person whose principal employment responsibilities consist of supervising or directing, or both supervising and directing, human or other resources, or
>
> (b) a person employed in an executive capacity;

17. "Managers" are excluded from the hours of work and overtime provisions (Part 4) of the *Act* by subsection 34(f) of the *Regulation*.

18. The Tribunal is an appellate body. In general, where an issue is raised for the very first time on appeal, the Tribunal will not address it unless it raises a fundamental jurisdictional question (*Parcker*, BC EST # D033/04). This particular issue was raised rather obliquely in Wichito Marine's appeal submissions; in the course of advancing an argument under subsections 34(g), (i) and (n) of the *Regulation* relating to "workers who work on various boats", Wichito Marine's counsel suggested: "Indeed, given the nature of the Employee's work it could be argued that he is a 'manager' and caught by subsection (f)". The delegate quite reasonably did not rule on the matter since it was not raised before her and counsel has not directed me to any evidence in the record that would show that Mr. Nikiforuk's duties were principally supervisory in nature or otherwise of an executive nature. In my view, this issue is not properly before the Tribunal on appeal and thus must be summarily dismissed. However, my decision in this regard should not be taken as suggesting that, given a proper evidentiary foundation and argument before the delegate at the initial adjudication stage, it could not be successfully argued that someone in Mr. Nikiforuk's position is a "manager" within subsection 34(f) of the *Regulation*.

19. Alternatively, Wichito Marine says that even if Mr. Nikiforuk was entitled to overtime pay, he was "estopped" from advancing such a claim. The record before me indicates that Mr. Nikiforuk started working for Wichito Marine in 2006 as a deck hand and became a "skipper" (Mr. Nikiforuk's phrase) or a "master" (Wichito Marine's description) in 2013. Wichito Marine concedes that "between the commencement of his employment in 2006 and the termination of that employment in 2013 [Mr. Nikiforuk] was never paid overtime" and that he never raised the matter of overtime pay until April 2012. In light of these assertions (which I will accept as being true for purposes of this argument), Wichito Marine says:

> In this case [Mr. Nikiforuk] was content with the fact that he did not receive overtime for six years from 2006 to 2012. He did so because it was the standard in the industry and he accepted it. He is estopped from alleging in 2013 that he was entitled to overtime.

20. There is an equitable doctrine known as "promissory estoppel", also known as "estoppel by representation" (see *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50; *Ryan v. Moore*, [2005] 2 S.C.R. 53; and *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, [2011] 3 S.C.R. 616) and the doctrine only applies if the following criteria are satisfied:

> The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position. (*Maracle*, *supra* at page 57)
>
> Estoppel by representation requires a positive representation made by the party whom it is sought to bind, with the intention that it shall be acted on by the party with whom he or she is dealing, the latter having so acted upon it as to make it inequitable that the party making the representation should be permitted to dispute its truth, or do anything inconsistent with it. (*Ryan v. Moore*, *supra* at para. 5)

21. I find nothing in the record before me indicating that Mr. Nikiforuk ever affirmatively represented to Wichito Marine that he was "waiving" his statutory right to claim overtime pay – in my view, the mere fact that he did not advance a claim does not, of itself, constitute a promise or assurance that he was foregoing his statutory right to overtime pay. Further, even if it could be said that his inaction in this regard constituted the requisite promise or assurance, in my view, it would have had no legal effect in light of section 4 of the *Act*: "The requirements of this Act and the regulations are minimum requirements and an agreement to waive any of those requirements, not being an agreement referred to in section 3 (2) or (4), has no effect." Finally, I do not see that the requisite requirement for detrimental reliance is present. Indeed, if anything, Wichito Marine *benefitted* from Mr. Nikiforuk's failure to advance a timely claim for overtime pay since the claim was substantially reduced due to the 6-month wage recovery limitation period set out in subsection 80(1) of the *Act*.

22. The third and final argument that I summarily dismissed under subsection 114(1)(f) of the *Act* concerns subsection 34(i) of the *Regulation*:

> 34 Part 4 of the Act does not apply to any of the following: …
>
> (i) a person employed on a towboat other than
>
> (i) a boom boat,
>
> (ii) a dozer boat, or
>
> (iii) a camp tender
>
> in connection with a commercial logging operation; …

23. Counsel for Wichito Marine says that the delegate erred in finding that Mr. Nikiforuk was excluded from the hours of work and overtime provisions of the *Act* by reason of the above regulatory provision. He says that interpreting the provision in its "grammatical and ordinary" sense necessarily "leads to the conclusion that persons employed on tow boats other than a tow boat that is a boom boat, dozer boat or camp tender, is not entitled to overtime". Counsel submits that boom and dozer boats and camp tenders are "types of towboats" and the reference to a "commercial logging operation" only refers to those latter types of towboats. Counsel says that the effect of the provision is to generally exclude *all* persons employed on a towboat (as was Mr. Nikiforuk) and that only persons employed in a commercial logging operation working on either a boom boat, dozer boat or camp tender are entitled to overtime. Since Mr. Nikiforuk worked on a towboat, but not a boom boat, dozer boat or camp tender used in connection with a commercial logging operation, the regulatory exclusion applied to him.

24. The delegate rejected Wichito Marine's interpretation holding that "the wording and organization of this provision clearly indicates that the logging qualification is meant to apply to the section as a whole" and that if the Legislature had intended "to exclude towboat workers as a whole from overtime, it makes little sense to have included a provision relating to other vessels in the logging industry" (delegate's reasons, page R16).

25. In general, statutes and regulations should be interpreted "in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of [the legislature]" and employment standards legislation "can be characterized as benefits-conferring legislation [and] as such…ought to be interpreted in a broad and generous manner [and] any doubt arising from difficulties of language should be resolved in favour of the claimant" (*Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at paras. 21 and 36).

26. In light of these interpretative principles, I am of the view that where there is a genuine ambiguity relating to a regulatory exclusion, the provision should be interpreted in favour of the employee. However, in my view, there is no ambiguity. I agree with the delegate that the grammatical and ordinary sense of subsection 34(i) is to generally exclude towboat employees working in a commercial logging operation from Part 4 of the *Act* but this exclusion does not extend to persons employed on one of the three types of towboats listed in subparagraphs (i) to (iii) of the subsection. Subsection 34(i) has no application here.

27. I now turn to the remaining issues in this appeal concerning the compensation for length of service and overtime pay awards. With respect to the former, Wichito Marine says that Mr. Nikiforuk either abandoned his position or was terminated for cause – either way, he was not entitled to compensation for length of service (see subsection 63(3)(c) of the *Act*). As for the overtime pay award, Wichito Marine says that Mr. Nikiforuk was excluded from Part 4 of the *Act* by reason of subsections 34(g) and/or (n) of the *Regulation* ("tender vessel worker"; "master or crew of a chartered boat").

COMPENSATION FOR LENGTH OF SERVICE

28. The delegate determined that Mr. Nikiforuk did not voluntarily resign or otherwise abandon his employment but, rather, was effectively dismissed from his employment when Wichito Marine had no just cause to do so. Accordingly, the delegate awarded Mr. Nikiforuk 6 weeks' wages as compensation for length of service.

29. A voluntary resignation has two components, namely, a subjective intention to resign coupled with objective evidence showing that the employee actually resigned:

> It is common ground that both a dismissal by an employer and a voluntary resignation by an employee require a clear and unequivocal act by the party seeking to end the employment relationship. There is a distinction, however, in the tests to be met in order to establish each of these methods for ending the employment relationship. A finding of dismissal must be based on an objective test: whether the acts of the employer, objectively viewed, amount to a dismissal. *A finding of resignation requires the application of both a subjective and objective test: whether the employee intended to resign and whether the employee's words and acts, objectively viewed, support a finding that she resigned.*
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> (*Beggs v. Westport Foods Ltd.*, 2011 BCCA 76 at para. 36; my *italics*)

30. The test for assessing whether an employee has abandoned their employment (sometimes referred to as a "constructive resignation") is similar to that relating to a resignation:

> The parties agree that it is an implied term of every employment contract that an employee must attend work. They also agree that when an employee fails to comply with that term he or she will be taken to have abandoned (i.e., repudiated) the contract, entitling the employer to treat the contract as being at an end. Lastly, the parties agree that the trial judge properly stated the *test for determining whether an employee had abandoned his or her employment, namely, whether, viewing the circumstances objectively, would a reasonable person have understood from the employee's words and actions, that he or she had abandoned the contract*: *Assouline v. Ogivar Inc.* (1991), 39 C.C.E.L. 100 at 104 (B.C.S.C.); *Danroth v. Farrow Holdings Ltd.*, 2005 BCCA 593 (CanLII), 47 B.C.L.R. (4th) 56 at para. 8.
>
> (*Pereira v. The Business Depot Ltd.*, 2011 BCCA 361 at para. 47; my *italics*)

31. Counsel for Wichito Marine says that the delegate erred in finding that Mr. Nikiforuk did not effectively "abandon" his employment sometime during the summer of 2013.

32. The evidence before the delegate relating to this matter was as follows. In February 2013, Mr. Nikiforuk gave 3 weeks' notice of resignation but later rescinded his resignation and continued to work through to May 2013 (his last day or work was May 19) by which time he was clearly frustrated with his employment situation and, in particular, the lack of a regular work schedule. Mr. Nikiforuk operated a separate charter fishing business throughout his employment with Wichito Marine and in May 2013 he testified that he told Wichito Marine that he would be taking the summer off to "go chartering" and would return to work in the fall – "[Mr. Nikiforuk] admitted that he did not call Wichito about work after May 2013 as he felt it was Wichito's responsibility to contact him" and that "he had no contact with [Wichito Marine] during June, July or August 2013" (delegate's reasons, page R5). Wichito Marine's evidence was that it agreed to give Mr. Nikiforuk leave to pursue his fish charter boat operations during the summer of 2013 but that he "would come to his senses" and return to work in the fall but the company did not hear from him (delegate's reasons, page R11). In September 2013, Wichito Marine heard that Mr. Nikiforuk "was going to get a lawyer" and this prompted Wichito Marine to send a letter, dated September 11, 2013, to Mr. Nikiforuk. The September 11 letter is reproduced, in full, below:

> In May of this year, you chose to leave the employ of Wichito Marine Services Ltd. to pursue opportunities in the fishing charter business.
>
> As a result of statements made by you since May, it is obvious that you do not wish to be employed by Wichito Marine Services Ltd. and that you have no intention of returning to the employment of Wichito Marine Services Ltd.
>
> In the circumstances, it has been necessary for Wichito to make arrangements to hire replacement staff in order to service its customers.
>
> As you have resigned from your employment with Wichito, we accept your resignation.
>
> We wish you the best in your new venture.

33. On September 15, 2013, Wichito Marine issued a Record of Employment regarding Mr. Nikiforuk in which it stated that his last day of paid work was May 19, 2013, and that he would not be returning to work since he had "quit" (code "E" on the form).

34. The delegate determined that there was insufficient evidence before her indicating that Mr. Nikiforuk voluntarily resigned his employment. I cannot say that the delegate erred with respect to that conclusion. Mr. Nikiforuk never stated that he was resigning (the "subjective" element). Both parties agreed that in May 2013, Mr. Nikiforuk was taking an unpaid leave of absence but that he would be returning to work in the fall. While it is true that Mr. Nikiforuk filed an unpaid wage complaint on May 29, 2013, this was in regard to his overtime pay claim and it did not include a claim for compensation for length of service (which would have suggested that he considered his employment to have ended). In his complaint form he stated that he was "still employed" by Wichito Marine. Wichito Marine did not formalize its position that Mr. Nikiforuk resigned until it issued a letter to him on September 11, 2013, and, a few days later, a Record of Employment. These latter actions appear to have been triggered when one of Wichito Marine's former principals and company founder (Mr. Hudson) told one of Wichito Marine's two current principals (Mr. Bernard), in early September 2013, that Mr. Nikiforuk "was going to get a lawyer". In fact, at the complaint hearing, Mr. Hudson conceded that this conversation actually occurred prior to May 2013 (delegate's reasons, page R9). Wichito Marine, prior to issuing its September 11 "acceptance of resignation" letter, made no effort whatsoever to ascertain whether Mr. Nikiforuk would be returning to work.

35. In my view, there was ample evidence before the delegate permitting her to conclude that i) Mr. Nikiforuk did not voluntarily resign his employment and ii) that he did not otherwise "abandon" his employment prior to September 11, 2013, when Wichito Marine formally severed the parties' employment relationship.

36. In light of my conclusions with respect to the delegate's findings that there was no resignation or abandonment of employment, I must now address Wichito Marine's alternative argument that it had just cause for dismissal. The delegate addressed the "just cause" issue at pages R19 – R20 and I cannot find any error in her legal analysis or in her application of the "just cause" principles to the facts at hand. In my view, it was entirely open to the delegate to conclude that Wichito Marine failed to meet its evidentiary burden of proving just cause. Wichito Marine's position on appeal with respect to this issue is essentially identical to the position it advanced before the delegate. Simply put, there was no culminating incident in a series of behaviours that resulted in progressively more serious sanctions being imposed on Mr. Nikiforuk nor was there any credible and cogent evidence before the delegate of a singular event that amounted to a repudiation by Mr. Nikiforuk of his employment contract.

37. In sum, I cannot find that the delegate erred in law in awarding Mr. Nikiforuk compensation for length of service. I now turn to the two remaining issues relating to Mr. Nikiforuk's overtime pay claim.

REGULATORY EXCLUSIONS: SUBSECTIONS 34(g)/(n)

38. Part 4 of the *Act* (the hours of work and overtime provisions) do not apply to a person employed as a "tender vessel worker" (subsection 34(g) of the *Regulation*). This occupation is defined in section 1 of the *Regulation* as follows: "*tender vessel worker* means a person employed on a vessel to collect and transport fish". I have not been able to find a single decision of the Tribunal interpreting this provision.

39. The delegate rejected Wichito Marine's position that Mr. Nikiforuk's employment fell within this regulatory exclusion (delegate's reasons, page R16):

> While [Mr. Nikiforuk] did spend some part of his working time dealing with "morts" (dead fish), it was clear from both [Mr. Nikiforuk], Mr. Bernard and the other witnesses, that the majority of the work was delivering fish food and fuel. The majority of [Mr. Nikiforuk's] duties did not involve the collection or transportation of fish.
>
> Consequently, I find that [Mr. Nikiforuk] is not a tender vessel worker as defined by the *Act* [*sic*].

40. Counsel for Wichito Marine says that the delegate erred in law by importing a requirement into the definition that the "majority" of the person's work must involve the collection or transportation of fish. Counsel says that since "eighty percent" of Wichito Marine's business involved servicing fish farms owned by Cermaq, and because the transport of smolts and morts "was fundamental to the operation" of the fish farms, there would be no need to transport feed, fuel or other cargo without there also being the need to transport fish. Accordingly, the towboats that Mr. Nikiforuk operated were "tender vessels" and he was a "tender vessel worker". Alternatively, counsel says that when the vessels were transporting smolts or morts (rather than fuel, fish feed or other cargo), Mr. Nikiforuk was a "tender vessel worker" and not entitled to any overtime pay during those occasions.

41. The Director's position is that the evidence before the delegate was that the "primary function" of the vessels operated by Nikiforuk "was to transport goods to and from fish farms" and that the regulatory definition should be interpreted in a manner similar to the "manager" exclusion (see subsections 1 and 34(f) which state that a person's "principal employment responsibilities" must be supervisory in nature) and that a vessel does not automatically become a "tender vessel" simply because there is occasional transportation of fish.

42. The only evidence before the delegate, as recorded in her reasons, regarding the activities of the towboats operated by Nikiforuk was as follows. Mr. Nikiforuk testified "that the tow boats hauled several different items to the fish farms including fuel, fish feed, smolts, machinery and a small amount of logging equipment"; he also testified that the bulk of the deliveries to the fish farms consisted of fish feed and fuel although morts were also occasionally transported (delegate's reasons, page R4). Mr. Nikiforuk called another witness, Jeff Davis, who "described duties on the towboat similar to those described by [Mr. Nikiforuk]" (delegate's reasons, page R6). One of Wichito Marine's witnesses (Mr. Bernard) testified as follows: "the tug boat tows a barge generally containing cargo" (page R10).

43. If Wichito Marine wished to argue that Mr. Nikiforuk was not entitled to any overtime by reason of a regulatory exclusion, it carried the burden of showing that the exclusion applied. While there is nothing in the regulatory definition of "tender vessel worker" stating that the collection and transportation of fish must be the primary function of the vessel or constitute the majority of the cargo transported by the subject vessel, I agree with the delegate that where the transportation and collection of fish is an incidental rather than a significant aspect of the work of the vessel, the regulatory exclusion does not apply. While there was evidence before the delegate that the vessels operated by Mr. Nikiforuk transported "morts" (dead fish) and smolts (live immature fish), it would appear that these items did not represent the bulk of the cargo that was delivered to and from the fish farms. The "Agreement for Services" between Wichito Marine and Cermaq was in evidence before the delegate; the services described in "Schedule A" to that agreement include "feed deliveries", "feed, fuel and other supplies", "clean water", "supply, fuel and feed deliveries", "smolt trucks", "mortality removal", and "bulk supply and equipment delivery". It seems clear from this contract while smolts and morts would be transported, these were not the exclusive commodities being delivered to and from the fish farms.

44. On balance, I believe it was open on the evidence before her for the delegate to conclude that Wichito Marine failed to meet its evidentiary burden of showing that the towboats operated by Mr. Nikiforuk were used to "collect and transport fish" – while that may have been a component of the work of the vessels in question, that was not the exclusive use and, it would appear, not the primary use of the vessels. There is nothing in the record before me to indicate that any of the trips that are the subject of Mr. Nikiforuk's overtime pay award were trips where the cargo was solely, or predominately, fish and thus I am unable to accede to Wichito Marine's alternative argument that at least a portion of the overtime claim should be cancelled on the basis that Mr. Nikiforuk was, at least in some instances, a "tender vessel worker".

45. Part 4 of the *Act* (the hours of work and overtime provisions) do not apply to "the master or crew of a chartered boat" (subsection 34(n) of the *Regulation*). The phrase "chartered boat" is not defined in the *Regulation*. So far as I can determine the Tribunal has issued only one appeal decision relating to this particular provision – *Williston Navigation Inc.*, BC EST # D391/00. The delegate determined, without referring to *Williston*, that Wichito Marine's operations, as defined by the contract between it and Cermaq were akin to a truck transportation firm and that "[w]hile Cermaq/Mainstream directs where and when to deposit cargo, they have not rented or chartered the boat and crew…[and] are not chartered vessels" (delegate's reasons, page R17).

46. Counsel for Wichito Marine says that when the company delivers cargo pursuant to its contract with Cermaq "it does so exclusively and must abide by Cermaq's requests for scheduling and manifests" and that on these occasions Cermaq exercises "substantial control" over the vessel and as such the contractual relationship between the parties is best described as a charter-party.

47. In *Williston*, a successor company to Williston built and operated a vessel, the "Williston Transporter", for transporting logs. Williston had a long-term contract with another company Slocan Forest Products Limited to transport the latter's logs. The vessel operated continuously on Williston Lake picking up logs from various sites

and transporting them to McKenzie for processing. Under the contract, Williston supplied the vessel and the operating crew. "The annual free time of the Williston Transporter, which…is the amount of time available to provide services to other users, is estimated at 60 days" (*Williston*, page 4) and Williston was "allowed under the agreement to provide services to other users involving the carriage of goods if there is space available on the Ferry not being used by [Slocan]" (page 6). Williston argued on appeal that the vessel was a "chartered boat" within subsection 34(n) and Tribunal Member Stevenson ultimately agreed with Williston on this point.

48. In the instant case, the delegate noted that the relationship between the parties was formalized by "an ongoing contract that extends over many years" and that the contract places Wichito Marine "in a position of having short term call out of employees over long periods of time" and that Wichito Marine "abdicated control of the employees' schedules when they went into business with Cermaq/Mainstream" (delegate's reasons, page R17). The delegate appears to have focussed on the fact that these arrangements were consciously undertaken by Wichito Marine and that it could have negotiated a contact that preserved more control over the activities of its vessels and employees – that fact, however, is in my view irrelevant; the key consideration is the nature of the parties relationship not the motivations underlying why one party or another agreed to particular contractual terms.

49. In *Williston*, Tribunal Member Stevenson made several observations that are, in my view, germane to this appeal (pages 12 – 13 & 14):

> The characteristics of the accepted meaning of the term "charter" identify factors inherent in the work performed by a master or crew of a chartered boat and justify their exclusion from Part 4 of the *Act*. The vessel is hired, rented or leased for a period of time. That period of time might be indeterminate, it might be approximately determined by the length of the voyage contemplated by the charter agreement, by the purpose for which the vessel is chartered or it might be a specified period of time determined by agreement between the parties. What is contemplated by a charter is a voyage - a departure from one port and an arrival at another port and could include a series of departures and arrivals over the course of the voyage. A charter could also involve a series of voyages, but in any event, as a practical the master and crew are bound to the vessel and to the work required to be done on, or associated with, the vessel the for each voyage [*sic*]. In the context of the definition of work in the *Act*, the vessel may become the employee's residence, but more probably it would not. The existence of work and the commencement of the work depends on the charterer. As such, the employer may not be able to predict the need for employees to report for work or to organize that work in the manner contemplated by Section 31 of the *Act*. The work is not continual and typically, there will be periods of inactivity between voyages.
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> …
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> …the accepted meaning of the term "charter" is not limited to circumstances where the owner of the vessel gives up control and direction of the crew. That would seem to be an overly restrictive application of the accepted meaning of that term, which, as indicated above, can include an arrangement such as the one between Williston and [Slocan], where the entire vessel is hired by the charterer for a period of time with the crew remaining under the control of the owner of the vessel. The reality is, however, that [Slocan], through the agreement with Williston, does exercise a substantial degree of control over when, and what, work is required to be performed by the complainants.
>
> …
>
> The nature of the employment of the employees on the Williston Transporter is consistent with the basis for the exclusions under Part 4. The Determination includes an overtime calculation report indicating that the employment of the complainants is characterized by periods of work, ranging from 1 day to 18 consecutive days, and periods of time off work, ranging from 1 day to 24 consecutive days. The Determination notes that the periods of work involve the employees travelling from McKenzie to locations on Williston Lake, loading logs and returning to McKenzie. From the commencement of the trip to its completion, the employees do not leave the vessel. It appears from the material that during the

> trips, the employees would regularly work a 12 hour shift. From time to time the employees would work less than that number of hours in a day and occasionally would work longer than 12 hours in a day, but the reasons for those variations are not apparent on the face of the material. The hours and days of work are predominantly determined by the nature of the work being done.

50. I note that Mr. Nikiforuk's overtime claim includes many days where he worked well more than 12 hours and separate claims for shifts of up to 24 hours' and 37.5 hours' duration. When he was on the vessel, he was not permitted to leave the vessel until the trip was concluded. Mr. Nikiforuk testified before the delegate as follows (page R5):

> [Mr. Nikiforuk] described his work as largely "on-call". Wichito would receive cargo requests from Cermaq/Mainstream on a very short notice, often only one or two days. [Mr. Nikiforuk] was very frustrated with this unpredictable schedule; he had no ability to plan vacation, family events etc. Often times the boat would be out for several days up to two weeks. In [Mr. Nikiforuk's] own words: "It seemed crazy to me that we would be called out on short notice, be out for two weeks and not get paid overtime."

51. The contact between Wichito Marine and Cermaq gave Cermaq considerable control over Wichito Marine's operations as it related to the latter's performance obligations. For example, Wichito Marine cannot unilaterally subcontract or assign its delivery obligations; it must comply with Cermaq's "reasonable instructions" regarding the contracted services; it must maintain certain records and make them available for inspection by Cermaq upon demand; Wichito Marine must comply with Cermaq's "standard operating procedures" and its "best management practices"; the contract defines Wichito Marine's "key personnel" who must be utilized as well as specifying the particular barges and tug boats to be used; Wichito Marine is subject to strict confidentiality requirements; and Cermaq solely controls the "manifest schedule". As previously noted, approximately 80% of Wichito Marine's business revenues are attributable to its contract with Cermaq.

52. The delegate determined that Mr. Nikiforuk's statutory overtime claim was not caught by subsection 34(n) on the basis that the relationship between Wichito Marine and Cermaq was akin to a person simply utilizing a truck transport company to deliver its goods (page R17): "Wichito transports cargo for Cermaq/Mainstream in a similar way to land based trucking companies. The client tells a trucking company where and when to deliver goods; this does not mean that they are renting the truck and driver." In my view, however, the delegate's analogy is deeply flawed. When a party contracts to have its goods delivered by a truck transport company, it will rarely, if ever, have the right to dictate the specific vehicle to be used or the particular driver. The measure of control exercise by Cermaq over the vessels to be used to deliver its cargo is significant.

53. In my view, the facts of this case are sufficiently similar to those in *Williston* such that the same result should pertain. In other words, and only in regard to the work undertaken by Mr. Nikiforuk on behalf of Cermaq (i.e., when he was master of a vessel transporting cargo on behalf of Cermaq), his employment fell within the "master…of a chartered boat" exception and he was not entitled to any overtime pay in regard to those trips. I am unable to determine from the record before me what proportion of Mr. Nikiforuk's overtime award represents overtime on trips made delivering cargo for Cermaq and, accordingly, that matter will have to be returned to the Director for purposes of recalculation.

SUMMARY

54. Wichito Marine's arguments relating to whether Mr. Nikiforuk's overtime pay award should be cancelled because he was "estopped" from advancing such a claim, or because he was a "manager" (subsection 34(f) of the *Regulation*), or because his employment was governed by subsection 34(i) of the *Regulation*, are summarily dismissed under subsection 114(1)(f) of the *Act*.

55. I am not satisfied that Mr. Nikiforuk's award for compensation for length of service should be cancelled because he either quit or abandoned his employment or because Wichito Marine had "just cause" for his dismissal.

56. Mr. Nikiforuk, during his tenure with Wichito Marine, was not a "tender vessel worker" within subsection 34(g) of the *Regulation* and thus excluded from the hours of work and overtime provisions of the *Act* (Part 4).

57. While employed by Wichito Marine, Mr. Nikiforuk was a "master…of a chartered boat" within subsection 34(n) of the *Regulation* when he was in charge of a vessel transporting goods pursuant to Wichito Marine's service contract with Cermaq and, accordingly, was not entitled to any overtime pay relating to that aspect of his work. He is entitled to overtime pay under the *Act* with respect to any overtime hours worked independent of the Cermaq contract.

ORDER

58. Pursuant to subsection 115(1)(a) of the *Act*, the Determination is varied to the extent that Mr. Nikiforuk was a "master…of a chartered boat" within subsection 34(n) of the *Regulation* when he was in charge of a vessel transporting goods pursuant to Wichito Marine's service contract with Cermaq. Accordingly, Wichito Marine is not liable for any overtime pay awarded to him under the Determination with respect that latter work.

59. Pursuant to subsection 115(1)(b) of the *Act*, the matter of Mr. Nikiforuk's overtime pay entitlement is referred back to the Director to be recalculated in accordance with these reasons for decision.

60. As a result of my referral back order, the Director must also recalculate Mr. Nikiforuk's vacation pay and section 88 entitlements. If, as a result of the recalculation, Mr. Nikiforuk is not entitled to any overtime pay, it follows that the monetary penalty levied against Wichito Marine for having contravened section 40 of the *Act* must be cancelled.

61. In all other respects, and pursuant to subsection 115(1)(a) of the *Act*, the Determination is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal