

An appeal

- by -

Lorne Osborne operating the commercial fishing vessel Viking Girl
("Osborne")

- 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: David B. Stevenson

FILE No.: 2005A/214

DATE OF DECISION: February 13, 2006

DECISION

SUBMISSIONS

Lorne Osborne	on his own behalf
Sean Kristmansson	on his own behalf
Amanda Welch	on behalf of the Director

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Lorne Osborne operating the commercial fishing vessel Viking Girl (“Osborne”) of a Determination that was issued on November 18, 2005 by a delegate of the Director of Employment Standards (the “Director”). The Determination found that Osborne had contravened Part 3, Section 17 of the *Act* in respect of the employment of Sean Kristmansson (“Kristmansson”) and ordered Osborne to pay Kristmansson the amount of \$2360.79.
2. The Director imposed an administrative penalty on Osborne under Section 29(1) of the *Regulation* in the amount of \$500.00.
3. Osborne says the Director erred in finding there were any wages owing to Kristmansson.
4. The Tribunal has reviewed the appeal, the Record and the submissions of the parties and has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

5. The issue is whether Osborne has shown any error in the Determination.

THE FACTS

6. The facts are relatively straight forward.
7. Osborne operates a commercial fishing vessel. Kristmansson was employed on that vessel as a “fisher”, as that term is defined in Section 1 of the *Employment Standards Regulation* (the “*Regulation*”) from April 4 to September 8, 2004. The definition contemplates a fisher being remunerated by receiving a share of the catch. Kristmansson’s remuneration was a 15% share of the salmon catch.
8. Kristmansson claimed Osborne had failed to pay him all of wages owed for the time he worked.
9. The Determination describes the background to the claim as follows:

When a boat returns from a fishing trip the catch is sold to a buyer. The buyer will either pay the crew the full amount owing for the sale, or they will make partial payment on the catch (the

“settlement”) and pay the balance once the buyer sells the catch on the market. The final payment is called the “price adjustment”.

In this particular case, the commercial fishing vessel Viking Girl (“Viking Girl”) sold the salmon catch to Aero Trading Ltd. (“Aero Trading”) the buyer. Aero Trading paid a price adjustment in the amount of \$15,254.00 for Viking Girl’s catch on November 25, 2004.

10. None of the price adjustment was paid to Kristmansson and that omission formed the basis for his claim.
11. Osborne argued there was a handshake agreement between he and Kristmansson that receiving a share of the adjustment price was dependent on working the whole season, that Kristmansson broke that agreement and he was, therefore, not entitled to any part of the adjustment price. Kristmansson denied any such agreement.
12. The Director found that Kristmansson’s share of the price adjustment was part of his wages, that it had been earned and was payable. As expressed in the Determination:

. . . the first payment is a partial payment of the proceeds from a catch and the price adjustment is the final pay-out. Therefore, the price adjustment is not an unearned sum of money that can be withheld at the discretion of the employer as bonus or otherwise.
13. The Director rejected the argument the price adjustment could be considered a bonus whose payment was conditional upon completing the season because subsection 21(1) of the *Act* prohibits an employer to withhold wages for any purpose, including serving as an incentive to complete the fishing season.

ARGUMENT AND ANALYSIS

14. Osborne has the burden of showing an error in the Determination. He has failed to do so. He has simply restated his view that Kristmansson’s unpaid wages could be treated as an incentive for him to complete the fishing season and were forfeited when he quit. That view is incorrect for the reasons stated in the Determination, which can be summarized as follows:
 1. The price adjustment was part of Kristmansson’s wages, had already been earned and was, as a result, payable.
 2. The price adjustment was not a bonus whose payment was conditional on some future event.
 3. Subsection 21(1) prohibits an employer withholding an employee’s wages for any purpose.
 4. Section 17 of the *Act* requires an employer to pay an employee all wages earned. The failure to comply with the requirement of that section is a contravention of the *Act*.
 5. Kristmansson was entitled under the *Act* to be paid the wages he had earned.
15. I would add the following comment in response to Osborne’s reliance on what he says was a “handshake agreement”. Even if there was such an agreement, and I note that such an agreement was denied by Kristmansson, it would not survive the application of Section 4 of the *Act*, which says:

4 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.

16. The appeal is dismissed.

ORDER

17. Pursuant to Section 115 of the *Act*, I order the Determination dated November 18, 2005 be confirmed in the total amount of \$2,860.79, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal