

An appeal

- by -

Dave Hanson operating commercial fishing vessel Bold Venture
("Hanson")

- 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: Carol L. Roberts

FILE No.: 2005A/215

DATE OF DECISION: March 23, 2006

DECISION

SUBMISSIONS

Dave Hanson	On his own behalf
Odd Eidsvik, Eidsvik & Associates, Chartered Accountants	On behalf of Dave Hanson
Amanda Welch	On behalf of the Director
Tim Jones	On his own behalf

OVERVIEW

1. This is an appeal by Dave Hanson operating commercial fishing vessel Bold Venture (“Hanson”), pursuant to Section 112 of the *Employment Standards Act* (“the Act”), against a Determination of the Director of Employment Standards (“the Director”) issued November 17, 2005.
2. Tim Jones worked as a fisher from March 1, 2004 until August 12, 2004 on a boat owned by Aero Trading and operated by Mr. Hanson. Mr. Jones filed a complaint alleging that he was owed wages.
3. Following an investigation of Mr. Jones’ complaint, the delegate determined that Mr. Hanson was the employer, and that he had contravened Section 18 of the *Employment Standards Act* in failing to pay Mr. Jones wages. He concluded that Mr. Jones was entitled to wages and interest in the total amount of \$11,746.17. The delegate also imposed a \$1,500 penalty on Mr. Hanson for the contraventions of the Act, pursuant to section 29(1) of the *Employment Standards Regulations*.
4. Mr. Hanson contends that the delegate erred in law and failed to observe the principles of natural justice in making the Determination. He also contended that evidence had become available that was not available at the time the Determination was being made.
5. After the Tribunal received the delegate’s reply to Mr. Hanson, Mr. Odd Eidsvik also submitted an appeal on Mr. Hanson’s behalf. This “appeal”, which was to have been a reply submission, contained new allegations and facts. The delegate was given additional time to respond to these new allegations.
6. This appeal is decided on the written submissions of the parties, the section 112(5) “record”, and the Reasons for the Determination.

ISSUES

7. Did the delegate err in law in concluding that Mr. Hanson was Mr. Jones’s employer?
8. Did the delegate fail to observe the principles of natural justice in making the Determination?
9. Has new evidence become available that was not available at the time the Determination was being made that would have led the delegate to a different conclusion on a material issue?

FACTS AND ARGUMENT

10. Mr. Hanson was the skipper/operator of a commercial fishing vessel, the Bold Venture. Mr. Jones took seven trips on the Bold Venture, two of which were to fish prawns, the other five for halibut. Mr. Hanson sold the catch to Aero Trading Ltd. (“Aero”)
11. On Mr. Hanson’s instructions, Aero paid 27% of the prawn adjustment to Golden Season Holdings Ltd., one of the owners of the boat, and a numbered company, 441663 B.C. Ltd. Cobalt Waters Enterprises Ltd., a company whose sole director and officer is apparently Mr. Hanson’s wife, received the balance of the price adjustment. When the delegate questioned Mr. Hanson about the price adjustment payout, Mr. Hanson advised her that the owner of the boat told him how to operate the boat and split the price adjustment. He said that 52% of the proceeds were to go to the owner, the balance to the crew, and that, since neither of the deckhands qualified for the price adjustment, the remainder of the proceeds was paid to Cobalt Waters.
12. Aero Trading paid Mr. Hanson the full amount for the halibut soon after each delivery, but did not pay the full amount for the prawns until it had sold the catch on the market (the “price adjustment”). The final settlement amount was paid in December, 2004.
13. Mr. Jones claimed that he was to receive 25% of the proceeds from the sales of the catch of prawns and halibut. However, although he went on the prawn fishing trips, he was unable to make the halibut fishing trips because he could not arrange childcare. He said that Mr. Hanson told him that he would not receive his share of the price adjustment because he had not worked the entire season. Mr. Jones argued that he should be entitled to his share of the prawn price adjustment irrespective of whether he worked on the halibut trips. Mr. Jones also contended that Mr. Hanson made deductions from his pay for food, gear, bait, fuel and mobile phone charges even though he was never given an accounting for those deductions. He did say that he consented to all deductions but for the mobile phone costs.
14. Mr. Hanson contended that Mr. Jones did not receive the price adjustment for the prawns because he did not work the entire fishing season, missing the last three days. Mr. Hanson said that he imposed this policy because he needed to persuade the crew to stay until the end of the season to fish halibut, and that, because the pay for halibut was not as lucrative as it was for prawns, and the weather was colder, it was harder to do. Mr. Hanson contended that he made it clear to Mr. Jones that he would only receive the price adjustment if he finished the season. He also claimed that deckhands received only 20% of the prawn catch, not 25%. He contended that this was standard, and there was thus no written employment agreement. Mr. Hanson also claimed that the crew was responsible for the telephone, as it was for the other charges, and said that Mr. Jones used the telephone excessively. He also claimed that Mr. Jones agreed to the deductions.
15. The delegate reviewed documents provided by Mr. Hanson detailing payments to Mr. Jones, amounts received for the catches, deductions and expenses. She also examined documents provided by Aero, including a record of earnings, ROE and T4, as well as the 2004 prawn adjustment amount paid to Mr. Hanson.
16. The delegate also questioned Andrew Cullen, another deckhand on the boat who was a witness to the employment agreement between Mr. Jones and Mr. Hanson.

17. The delegate concluded that the price adjustment constituted wages rather than a bonus or inducement to finish the season as argued by Mr. Hanson. She determined that the first payment was a partial payment of the proceeds from a catch and the price adjustment a final payout. She determined that the price adjustment could not be withheld at the discretion of the employer. She further determined that if the wages were withheld to create an incentive bonus, the withholding would be in contravention of section 21(1) of the *Act*.
18. The delegate preferred the evidence of Mr. Jones, corroborated by Mr. Cullen, that he was to receive 25% of the employer's share of the prawn adjustment. She found that Mr. Hanson had not established an agreement to the contrary. The delegate further determined that Mr. Hanson improperly deducted business costs off Mr. Jones' wages, contrary to section 21(1), even though Mr. Jones had agreed to those deductions.
19. The delegate found that Mr. Hanson had contravened sections 17 (failure to pay all wages owing within 8 days of the end of the pay period), 21 (improperly deducting business costs from wages) and 27 (failure to provide written wage statement each pay day) of the *Act*, and imposed three monetary penalties.
20. Mr. Hanson argues that the delegate denied him the opportunity to refute the allegations made against him during the investigation, and that this failure resulted in factual errors, errors of law, and the imposition of "punitive measures", which I infer were the monetary penalties. Mr. Hanson contended that the delegate applied these punitive sanctions "without the basis of supporting legislation without investigating the Canadian fishing industry practices for coastal BC", which I infer constitute the basis for his argument that the delegate erred in law.
21. In his letter of appeal, Mr. Hanson makes the following arguments:
 - * the bonus/price adjustment is not guaranteed and thus cannot be included with an employee's final pay. Fishermen are paid the market rate for their product at the time of delivery, and this payment is not a down payment on product. The price adjustment is paid at the discretion of fish buyers and is based on a number of criteria, not just the selling price.
 - * Mr. Jones actually quit work on October 19, 2004 following a trip in which there was a loss. He says that Mr. Jones owed money for this trip but he did not pay it. He says the delegate did not request these records, and based her decision on incomplete information.
 - * Mr. Hanson further argues that Mr. Jones was to receive 20% of the net proceeds and this rate can be substantiated through prior year records.
 - * all receipts were kept in the galley of the boat and the settlement sheets were left on the galley table along with the pay cheques at the end of each trip. He says Mr. Jones chose to leave after taking his cheque without reviewing the settlement sheet, and that it is unfair for the delegate to impose a penalty for failing to provide a wage statement.
 - * the delegate "failed to review the long-standing industry standard of these deductions on every fishing trip by every boat in coastal BC." He submits that the practice of crew sharing expenses is at least one hundred years old and is recognized by both federal and provincial standards and regulations". He says that, for Revenue Canada purposes, fishermen are self employed.

- * Mr. Jones was responsible for his own mobile telephone calls, and that the Act does not say that an employee is permitted to use their employer's phone for personal long distance calls at the employers' expense.
- * he provided the delegate with all information she requested, and even though he did so, she wrote the decision as if he was dishonest and failed to comply with her requests. He said he made repeated attempts to contact her and she failed to return his telephone calls.
- * the price adjustment/bonus disbursement is made by the boat owner, not the skipper. He also says that he has no ownership interest in Cobalt Waters, even though the delegate infers that he does, despite a corporate record search that confirms otherwise.
- * the delegate ought not to have relied on Mr. Cullen's evidence, rather, she ought to have reviewed his documentation from previous years confirming his contractual agreement with Mr. Cullen.
- * Aero produces all of the paycheques, not the skipper of the boat, and that the delegate erred in finding that he had contravened section 27 of the Act.

22. Mr. Eidsvik's submission makes the following points:

- * the Determination is invalid because Mr. Jones was a self-employed fisher or a "co-adventurer" on the vessel, and that Aero Trading paid Captain Dave Hanson and other parties participating in the fishing trips.
- * Mr. Jones did not earn a 'wage' but a 'share of the fishing profits'. He contends that Mr. Jones shared in the financial risk of the fishing trip.

23. The delegate submitted that Mr. Hanson never argued that he was not Mr. Jones' employer or that Aero Trading was the proper employer, nor did he argue that Mr. Jones was self-employed. She contends that Mr. Jones was a fisher as defined in the *Regulations*. With respect to Mr. Eidsvik's argument that Mr. Jones shared a financial risk was reflected in the *Act* by exempting fishers from the minimum wage provisions.

24. The delegate says that the issues raised by Mr. Hanson are dealt with in the Determination. With respect to the allegation that Mr. Hanson was not given an opportunity to present his case, the delegate says that Mr. Hanson was difficult to locate and communicate with during the investigation. She says that, six weeks after sending Mr. Hanson a letter via Aero and many telephone calls to Aero, Mr. Hanson's wife Joanne contacted her to discuss the complaint. She refused to give a phone number or address for Mr. Hanson, and asked that all information be sent to Aero for forwarding. She says that after issuing a Demand for Records, Mr. Hanson eventually provided, via Aero, some documentation. Mr. Hanson contacted the delegate by telephone on July 15th to discuss the documents. She says that he refused to discuss who the boat owners were. The documents did not contain information on the price adjustment, and Mr. Hanson denied there was one. He also denied that Mr. Jones was owed a price adjustment. The delegate says she then contacted Aero who gave her information on the price adjustment. She says that during a telephone call on August 18, 2005, Mr. Hanson acknowledged that Joanne Hanson was his wife, and asked for information on the complaint and the relevant provisions of the *Act*. The delegate says she attempted to fax him the documents, and was unable to do so, apparently because the phone line had a call block. She then sent the information to Aero and the registered office for Cobalt Waters. She says that, although Mr. Hanson left her several messages after that time, she was unable to contact him because

his phone would not accept calls from her line. When they ultimately spoke, Mr. Hanson denied he had call block. He confirmed his mailing address, and asked for information on the Director's powers of investigation. The delegate says that all communication after that time was by mail, and that Mr. Hanson did not submit any further information.

25. The delegate denied that she refused to accept any relevant information. She said that, although she advised Mr. Hanson that he could send whatever evidence he wanted, she was most interested in information on the fishing season in question. Mr. Hanson did not provide any further information. She says he never mentioned or provided evidence of an October fishing trip that resulted in a financial loss, nor did he say that the price adjustment was based on anything but the sale of the catch.
26. Mr. Jones took issue with many of the comments made by Mr. Hanson in his appeal submission which will not be repeated here as they do not relate to the issues I must decide.

ANALYSIS

27. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
- (a) the director erred in law
 - (b) the director failed to observe the principles of natural justice in making the determination;
or
 - (c) evidence has become available that was not available at the time the determination was being made

Natural Justice

28. Principles of natural justice are, in essence, procedural rights that ensure parties a right to be heard by an independent decision maker. Parties alleging a denial of a fair hearing must provide some evidence in support of that allegation. (see *Dusty Investments Inc. dba Honda North* BC EST #D043/99)
29. Although Mr. Hanson advances a number of arguments in his appeal letter, I am not persuaded that he was denied natural justice. Although Mr. Hanson says that the delegate "refused to return my phone calls" and failed to "consult" with him, the record discloses that Mr. Hanson did not co-operative with the delegate during her investigation. He initially refused to provide a home address and telephone number. Mr. Jones also had no information on Mr. Hanson's address, and was unable to send him the self help kit prior to delivering his complaint to the Employment Standards Branch.
30. The record also discloses that the delegate had some difficulty delivering documents to Mr. Hanson and reaching him on the telephone. Mr. Hanson's wife initially directed the delegate to communicate with Mr. Hanson through Aero Trading, which also refused to provide the delegate with Mr. Hanson's phone number. Although Mr. Hanson disputes the delegate's assertions that he had a call block on his phone, the fact is that the delegate made many attempts to contact him by telephone, most of which were unsuccessful. However, the delegate did send Mr. Hanson information on the complaint and issued a Demand for Records.

31. I am satisfied that Mr. Hanson knew the details of Mr. Jones' complaint, and had the opportunity to respond to them. The record discloses that the first documents were forwarded to Aero, at Mr. Hanson's request, on June 3, 2005. The Demand for Records was issued in early July. Mr. Hanson had a number of telephone conversations with the delegate in July and August. There was correspondence between Mr. Hanson and the delegate into November. I am not persuaded that the delegate failed to observe the principles of natural justice.
32. The Tribunal has consistently said that an appeal is not a re-investigation of the complaint nor is it intended to be simply an opportunity to re-argue positions taken during the hearing. Further, the Tribunal will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative process. In *Tri-West Tractor Ltd.* (BC EST #D268/96), the Tribunal held that it would not allow appellants to "sit in the weeds", failing or refusing to cooperate with the delegate during an investigation and then later file appeal of the Determination when they disagreed with it. The "new evidence", consisting of the T-4 and other documents was clearly available at the time the Determination was made, and does not meet the Tribunal's test for new evidence. However, even if it had, I find it would not have caused the delegate to arrive at a different conclusion for the reasons that follow.

Error of Law

33. In their appeal submissions, both Mr. Hanson and Mr. Edisvik contend that Mr. Jones was a self-employed fisherman, and that it is well recognized in the industry that crew pay their share of food, bait and fuel. He says that the delegate erred in finding otherwise.
34. It does not appear that Mr. Hanson raised Mr. Jones' employment status as an issue before the delegate, likely because she determined that Mr. Hanson agreed he was an employer. The delegate determined that Mr. Jones was a fisher under section 1 of the *Employment Standards Regulations*. I find no error in the delegate's determination on this point.
35. The *Regulations* define fisher as a person (a) who is employed on a vessel engage in commercial fishing and (b) whose remuneration is a share or portion of the proceeds of a fishing venture".
36. Section 1 of the *Act* defines employee to include
- (a) a person....receiving or entitled to wages for work performed for another, and
 - (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee....

An employer is defined as including a person

- (a) who has or had control or direction of an employee, or
- (b) who is or was responsible, directly or indirectly, for the employment of an employee.

Work is defined as meaning "the labour or services an employee performs for an employer whether in the employee's residence or elsewhere."

37. In determining whether the *Employment Standards Act* applies, I must look to the definitions contained within that statute. Other considerations, such as the fact that Aero Trading issued Mr. Jones' ROE and T-4F, and federal government considerations, are of marginal relevance to this consideration. I also find the *Mark Fishing Co. Ltd et. al.* decision of the BCCA cited by Mr. Eidsvik of little relevance. It was decided in 1972, well before the *Act* came into force, and dealt primarily with issues involving trade union rights.
38. The facts clearly show that Mr. Jones was employed on the Bold Venture, and that the Bold Venture was engaged in commercial fishing. It is also clear that his remuneration was a share of the proceeds.
39. Therefore, the *Act* applies, and I find that the delegate did not err in her conclusion on this issue.
40. Given that Mr. Jones is a fisher, he is entitled to the protections of the *Act*. As Mr. Hanson was the skipper of the vessel, he had control and direction over Mr. Jones' work. Therefore, for the purposes of the *Act*, Mr. Hanson was the employer. (see other Tribunal decisions on this issue: *Wishinski* BC EST# D321/98, *Matt Hill* BC EST #D283/98, and *Warrior Marine Fishing Co.* BC EST #D579/98)
41. Section 21 of the *Act* provides as follows:
- (1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.
 - (2) An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.
 - (3) Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this Act applies to the recovery of those wages.
42. Mr. Hanson argues that the delegate ignored evidence that it is a long standing industry practise for crew to pay their share of food, bait and fuel, and erred in law in finding that he made unauthorized deductions from Mr. Jones' pay. He suggests that there is legislation specific to the fishing industry that supports this practice. The record contains a document entitled "Salmon Seine Vessels Share Basis & Fishing Conditions, April 16, 1998 – April 15, 1999", between the Fish Processors' Bargaining Association and the United Fishermen and Allied Worker's Union – CAW which Mr. Hanson cites in his appeal submission.
43. This document does not support Mr. Hanson's argument. It reflects an agreement between members of a union, to which Mr. Jones does not belong, and a bargaining association. There is no evidence the delegate erred in finding that Mr. Hanson had contravened section 21. Mr. Hanson acknowledged that he made those deductions as well as the auto-telephone expenses, from Mr. Jones' pay. (see also *511370 B.C. Ltd.* BC EST #D056/98, and *Warrior Marine Fishing Co.* BC EST #D170/98)
44. I am also not persuaded that the delegate erred in finding that the prawn adjustment was not a bonus. The price adjustment constitutes earned wages, is not conditional and cannot be withheld at the discretion of the employer. (see also *Morton* BC EST #D438/01 and *Osborne* BC EST #D016/06)

45. Finally, Mr. Hanson has failed to demonstrate that the delegate erred in calculating Mr. Jones' share of the prawn adjustment. The delegate found the employer's documents to be unreliable and nothing before me persuades me that she was in error in her conclusions.

ORDER

46. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated November 17, 2005, be confirmed in the amount of \$13,246.17, plus whatever interest might have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal