

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

- by -

511370 B.C. Ltd
(the "Company")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	John M. Orr
FILE No:	97/814
DATE OF HEARING:	January 12, 1998
DATE OF DECISION:	February 11, 1998

DECISION

APPEARANCES

James Mahon	President, 511370 B.C. Ltd
Douglas Leys	On his own behalf
Robert Morrison	On behalf of the Director

OVERVIEW

This is an appeal by 511370 B.C. Ltd (the "Company") pursuant to Section 112 of the *Employment Standards Act* (the "Act") from a Determination (File No. 78215) dated October 21, 1997 by the Director of Employment Standards (the "Director").

James Mahon ("Mahon") is the president and sole shareholder of the Company which employs commercial divers and dive tenders who harvest sea urchins. The Company sells the product to buyers and then pays the divers and tenders a percentage of the catch.

Douglas Leys ("Leys") was employed as a tender during the early spring of 1997 and the dispute in this case turns on whether the agreed upon percentage was based on the gross catch as sold to the buyers or on a "net" figure after certain deductions.

The Director's Delegate found that the Company could only base the percentage on a "net" (my terminology) figure if the nature and amount of deductions was clearly communicated and, as it was not clearly communicated, the percentage had to be based on the gross catch.

ISSUES TO BE DECIDED

The issues to be decided in this case are:

1. whether the Company can base the percentage payable to employees on a "net" figure which is based on the gross catch less certain business expenses, and
2. secondly in this case, if it is permissible to use a net figure, what was the agreement between the parties.

FACTS

By way of background I heard that the sea urchin harvest is controlled by way of licences which allow for a specific volume of catch in each licence. A holder of a licence may fish the licence or may lease it out to another fisher. The fisher, whether the holder of the licence or a lessee, will usually hire a commercial diver and sometimes someone (the tender) to tend the boat while the divers are working.

If the fisher has to lease a licence the cost of the lease varies from year to year depending on market value and in recent years has varied from \$30,000.00 to \$50,000.00. A fisher may work more than one licence, whether owned or leased.

The catch is taken to a commercial buyer who accounts for the catch and pays the fisher market value which of course also varies greatly from time to time. I was told that there is an administrative fee known in the business as "Log". This Log is one of the items sometimes deducted from the gross catch in calculating the crew's share. I was given no evidence by the Company as to how this Log is calculated.

In this case Mahon contacted Leys in January and asked if Leys would work for him as a tender for the balance of a trip as a previous tender had quit. It is a matter of dispute between the parties what was discussed and when but it is clear that the parties agreed upon a figure of 15% as the share that Leys would be paid. Leys says that the 15% was "off the top". He said that he is aware that some fishers who are leasing a licence will deduct the cost of the lease before the crew share but in this case Mahon was fishing his own licence and that therefore there would be no lease to pay. Mahon says that the usual percentage off the top is 8-10% and that 15% is only paid after the cost of the lease, log, fuel, food and advances.

At any rate Leys went to work and completed the first trip. Mahon took the catch to the buyers and arranged for the crew share to be deposited to their bank accounts. Leys received a deposit but did not receive a statement of his earnings or how they were calculated until after this complaint was filed with the Director. Leys returned for a second trip apparently on the same terms and Leys says that it was well into this second trip that Mahon announced that the percentage would be after the lease cost. Leys did not understand this as the Company owned the licence.

The total product harvested while Leys was employed by the Company was 38,808 lbs and the price varied from \$.70 per pound to \$1.00 per pound. On the first trip Leys was paid 15% of the "net", that is 15% of the gross catch less the cost of lease, log, fuel, food and advances. The lease and log were arbitrarily set at 35% because in this case there was no actual lease to pay and the owner did not know how the log is calculated. On the second trip Leys was paid an amount which worked out to be 11% of the gross less food.

ANALYSIS

The Director's Delegate identified the first issue as being whether an employer/fisher can deduct for lease and log (and other expenses) from the gross catch even where there is no actual expense involved and found that the answer was "yes" - provided that both parties clearly understood the charges to be deducted and the real base amount on which the crew percentage share would be based. The Director's delegate found that although this is permissible in this case the deductions were not clearly set out and therefore Leys was entitled to be paid on the gross.

The Director's Delegate explained to me at the hearing that it was the Director's view that it didn't really make any difference whether the percentage was on the gross or the net provided the parties clearly understood the basis for the calculation. So that the percentage on a gross base could be smaller and the percentage of a net base could be higher.

Although I agree in result with the Determination I can not agree with the means of arriving at the decision.

Section 21 of *The Employment Standards Act* (the "Act") provides as follows:

21. (1) *Except as permitted 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.*

On the evidence before me it seemed very clear that the employees were indeed being required to share in the employers business costs and in some cases in fictitious costs which could be arbitrarily set by the employer even after the trip is completed but before payment to the crew.

I agree, in theory, with the position taken by The Director's Delegate that it should not make a difference whether the percentage is calculated on the gross or the net if the percentage rate is adjusted accordingly. However in a business where the costs are not readily foreseeable, can fluctuate depending on the management of the employer, or can be completely arbitrary and even fictitious it seems contrary to the purposes of the *Act* to allow such practices to continue.

In my opinion the deductions of lease, log and fuel are contrary to the *Act*. The fairest method of calculating the catch is on the gross catch which is reasonably within the knowledge of the crew and may be verified by the commercial buyer. The costs of doing business, such as the lease, log and fuel, are all within the knowledge and control of the employer and can therefore be taken into account by the employer in negotiating the percentage share for the crew before the start of the trip. The crew's share should be based on the gross catch without any deductions except for advances already received by crew members.

Therefore I would decide the issues as follows:

1. The employer/fisher may not base the crew percentage on the gross catch less business expenses such as lease, log and fuel.
2. Even if I were found to be wrong about #1, I would agree with the Director's Delegate that in this case the percentage was to based on the gross because any other terms were vague and uncertain.

ORDER

I order, under Section 115 of the *Act*, that the Determination is confirmed.

John Orr
Adjudicator
Employment Standards Tribunal