Employment Standards TRIBUNAL

An appeal

- by -

Hemlunda Fishing Ltd.
("Hemlunda")

- 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: Shafik Bhalloo

FILE No.: 2016A/85

DATE OF DECISION: August 5, 2016

DECISION

SUBMISSIONS

Lorne Oborne on behalf of Hemlunda Fishing Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the *"Act"*), Hemlunda Fishing Ltd. ("Hemlunda") has filed an appeal of the Determination issued by a delegate of the Director of the Employments Standards ("Director") on May 27, 2016.

2. The Determination found that Hemlunda contravened Part 3, section 18 of the *Act* in respect of the employment of Christopher Auger ("Mr. Auger") and ordered Hemlunda to pay wages to Mr. Auger in the amount of $3,975.43 inclusive of accrued interest. The Determination also levied an administrative penalty against Hemlunda in the amount of $500.00 for its breach of section 21 of the *Act*. The total amount of the Determination is $4,475.43.

3. Hemlunda has filed this appeal on the grounds that the Director failed to observe the principles of natural justice in making the Determination and new evidence has become available that was not available when the Determination was being made. Hemlunda seeks to have the Determination changed or varied.

4. The deadline to file the appeal of the Determination was July 4, 2016. The Tribunal received Hemlunda's appeal on June 30, 2016. The appeal included an Appeal Form, written submissions of Lorne Oborne ("Mr. Oborne") – one of the directors and officers of Hemlunda – and written statement from Mike Banks ("Mr. Banks").

5. On July 4, 2016, the Tribunal notified the parties that an appeal had been received from Hemlunda, requesting production of the section 112(5) "record" (the "Record") from the Director and notified the parties, among other things, that no submissions were being sought from the other parties pending review of the appeal by the Tribunal and that following such review, all or part, of the appeal might be dismissed.

6. The Record was provided by the Director to the Tribunal and a copy was sent to Hemlunda, who was advised of its right to object to the completeness of the Record. Hemlunda did not submit any objection and, accordingly, the Tribunal accepts the Record as complete.

7. On July 22, 2016, the Tribunal informed the parties that the appeal had been assigned, that it would be reviewed and that following the review, all or part of the appeal may be dismissed. Consistent with the notice contained in the correspondence dated July 4, 2016, and July 22, 2016, I have reviewed the appeal, the appeal submissions and the Record. I have decided this appeal is an appropriate case for consideration under section 114 of the *Act*. Therefore, at this stage, I will assess the appeal based solely on the Determination, the Reasons for the Determination ("the Reasons"), the Appeal Form, written submissions of Mr. Oborne, written statement of Mr. Banks and my review of the Record that was before the Director when the Determination was being made. Under section 114 of the *Act*, 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 subsection 114(1). If satisfied the appeal or part of it has some presumptive merit and should not be dismissed under subsection 114(1), the Tribunal will invite Mr. Auger and the Director to make further submissions. Alternatively, if the appeal is not meritorious, it will be dismissed under subsection 114(1) of the *Act*.

ISSUE

8. The issue to be considered at this stage of the proceeding is whether there is any reasonable prospect the appeal can succeed.

THE FACTS

9. The undisputed facts set out in the Reasons" are as follows:

- Hemlunda operated a commercial fishing business within the jurisdiction of the *Act* and was incorporated under the laws of British Columbia on December 2, 1974.
- Mr. Oborne and Elaine Oborne are Hemlunda's directors and officers.
- Mr. Auger was employed as a deckhand on Hemlunda's fishing vessel, the *Viking Girl*, trolling salmon from late June to July 29, 2015, for a share of the catch which varied on the three trips taken during that period.
- Mr. Auger was a "fisher" as defined by section 1 of the *Employment Standards Regulation* (the "*Regulation*").
- Fishing vessels are licenced to catch a certain quota of fish.
- When a vessel lands with a catch, a Department of Fisheries and Oceans contractor will observe the unloading and weighing of the catch and will charge a fee to the vessel, referred to as a "validation fee", for the service.
- If a vessel has caught more than its quota of fish, it usually leases a quota from another licensee and pays a "quota lease" on the extra catch.
- The validation fees and quota lease costs along with fuel costs, food and other related expenses are often deducted from the gross value of the catch prior to calculating the crew's share of the catch.
- Aero Trading Company ("Aero"), as a contractor of the Department of Fisheries and Oceans, weighed and purchased the catch of the *Viking Girl*.
- Aero paid Hemlunda a set rate for the catch, which was then divided among the owner and the crew. This is called the "settlement".
- When the fish was ultimately sold, Aero provided an additional payment to Hemlunda to account for the actual value received for the fish, referred to as the "adjustment".
- Mr. Auger's share for the catch was calculated as a percentage of the *net* value of the *Viking Girl's* catch after deducting for fuel, validation fees, quota lease and the cost of the gear loss during the trips.
- Mr. Auger's share also included a deduction for a proportionate share of the food expenses on the trips.
- On January 28, 2016, within the time period allowed under the *Act*, Mr. Auger filed a complaint under section 74 of the *Act* alleging that Hemlunda contravened the *Act* by making impermissible deductions from his wages ("Complaint").

- On May 9, 2016, a delegate of the Director conducted a hearing into Mr. Auger's Complaint (the "Hearing").
- Mr. Auger attended at the Hearing on his own behalf and gave evidence.
- Hemlunda was represented at the Hearing by Mr. Oborne and he gave evidence on behalf of Hemlunda together with three other witnesses, namely, Mathew Leakey ("Mr. Leakey") who was the second deckhand on the first trip on the *Viking Girl*; Nicole Schooley ("Ms. Schooley"), who provided settlement services through Aero to companies including Hemlunda; and Brad Mirau ("Mr. Mirau"), Aero's manager.
- At the Hearing, the delegate sought to determine the terms of the agreement between Mr. Auger and Hemlunda for payment of wages. More particularly, the delegate sought to determine whether Mr. Auger was entitled to a share of the *gross* earnings of the *Viking Girl* or *net* profits after various deductions were made.

10. After reviewing the evidence of Mr. Auger and Hemlunda's witnesses, the delegate, for the following reasons, went on to conclude that Mr. Auger was entitled to a share of the gross value of each trip without any deductions:

> While Mr. Oborne testified that the Act permits a fisher to be paid a portion of the profit of a venture, per section 1 of the Regulation, fishers are paid "a share or portion of the proceeds of a fishing venture". The use of the term "proceeds" implies that a fisher's share may be of the profits of a venture, as the Employer's witnesses universally testified was the norm in the salmon trolling fishery; the term "proceeds" could equally, however, refer to the gross value of the catch, and the fact that certain terms of employment are standard in an industry does not necessarily lead to a finding that those terms govern any particular contract of employment. Particularly when an employee is inexperienced in an industry, as was Mr. Auger, it is incumbent on an employer to clearly and effectively communicate the terms of employment. In resolving this complaint, it is necessary that I determine the particular terms of Mr. Auger's employment. As they had no direct knowledge of the terms of Mr. Auger's employment, I find Ms. Schooley's and Mr. Mirau's testimony to be of no assistance in resolving this complaint.
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> Mr. Oborne's explanation of the agreement was that the crew's share would be paid from the profit of the trip, after deductions were made for fuel, quota lease, validation fees, and lost gear. Grub was then to be deducted from each crew member's share. Mr. Oborne's understanding was supported by Mr. Leakey's testimony. This mutual understanding is unsurprising given that Mr. Oborne and Mr. Leakey are both experienced fishers, and familiar with the standards of the industry.
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> Mr. Oborne's testimony regarding what he told Mr. Auger was far less specific than the explanation above. Mr. Oborne testified that he stated the boat would take 50% and pay 50% of the fuel, that the crew would share a maximum of 30%, and that the cost of food would be equally divided. There was no reference in this explanation to the crew's share being calculated on the profit of the trip, or, aside from fuel, to what specific deductions would be made from the gross value of the catch in order to calculate the profit. Mr. Leakey's testimony as to the specific language used supports Mr. Oborne's. I find that the terms of Mr. Auger's employment were at best ambiguously explained to him. Given Mr. Auger's limited experience in the industry, it was incumbent on Hemlunda to clearly explain the terms of employment.
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> Reviewing all the evidence, I find that Mr. Oborne did not clearly explain the calculation of shares to Mr. Auger. His statement was that the crew would share a maximum of 30%; he did not identify which, if any, costs would be deducted for the gross value of the catch before calculating the crew shares. Given Mr. Auger's lack of experience in the industry, and the ambiguous description of the terms of his employment, I find that Mr. Auger was not aware that he would be paid a share of the net profit of the catch, and therefore, that Mr. Auger did not agree to be so paid.

> Absent any clear and specific agreement between Mr. Oborne and Mr. Auger as to the calculation of Mr. Auger's share, I find that the Employer was not permitted to deduct the costs of fuel, quota lease, validation fees, lost gear, or grub before calculating Mr. Auger's share. I find that Mr. Auger was entitled to a share of the gross value of each trip.
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> I find that, by making these impermissible deductions from Mr. Auger's wages, Hemlunda contravened section 21 of the Act, most recently on December 2, 2015, when the quota lease was deducted from Mr. Auger's price adjustment for the first trip.

SUBMISSIONS OF HEMLUNDA

11. In his written submissions, Mr. Oborne relies on the policy interpretation of the Employment Standards Branch (the "Branch") of the term "fisher" in section 1 of the *Regulation* contained in the *Interpretation Guidelines Manual British Columbia Employment Standards Act and Regulation* (the "*Guidelines*"). The policy interpretation states "[a] person employed on a commercial fishing vessel who receives a share or portion of the profits from a fishing venture is a 'fisher' for the purposes of this definition". Mr. Oborne appears to contend that this description together with the example provided in the *Guidelines* contemplates that a fisher is "paid a percentage of whatever profit the vessel makes per trip" and, therefore, the Determination is inconsistent with the policy interpretation of "fisher" in the *Guidelines*.

12. Mr. Oborne also submits that he "bumped into" an acquaintance of his, Mr. Banks, an owner of a vessel named *F.V. March Girl*, who returned to Prince Rupert in early June 2016 for another fishing season. He says that Mr. Banks indicated to him that he had heard through some friends that he (Mr. Oborne) was having some issues with the deckhand (Mr. Auger) whom he had given a ride to Prince Rupert in June 2015. Mr. Oborne indicated that he shared with Mr. Banks that Mr. Auger claimed that he was not aware that expenses had to be taken off before he receives his share of the profits. Mr. Oborne indicates that Mr. Banks informed him that during Mr. Auger's ride with him to Prince Rupert in June 2015, Mr. Auger asked him how settlements, expenses and crew shares were paid out and he explained to him how most everybody he knew handled it. More particularly, Mr. Oborne states Mr. Banks informed Mr. Auger that "[a]ny leased fish and validation cost come off the gross" and so does fuel on most boats. With respect to groceries, Mr. Oborne states that Mr. Banks advised Mr. Auger that "some take it off the gross, some share it, and some pay it all". In the circumstances, Mr. Oborne contends that Mr. Auger is "taking advantage of the system" and made "false statements" at the Hearing.

13. Accompanying Mr. Oborne's written submissions on appeal is also a handwritten statement of Mr. Banks dated June 17, 2016, which largely corroborates Mr. Oborne's submissions setting out what Mr. Banks told him about his conversation with Mr. Auger.

14. Mr. Oborne also submits in his written submissions that the Determination "was neither fair nor objective". He concedes that Mr. Auger should have been paid 15% of the crew share for the first trip as he failed to explain to Mr. Auger that there would be a 2% difference in the shares between the 2 crew on his ship. However, Mr. Oborne says that he does "not accept" the delegate taking "Mr. Auger's testimony as being 100% truthful" and rejecting his and Mr. Leakey's testimonies.

15. Mr. Oborne also reiterates his evidence at the Hearing that he explained Mr. Auger in "ample detail", how he would receive his share split and that "leased fish, validation expenses, and fuel … trip expenses [would] come off the gross stock". He states that he also explained to Mr. Auger that the costs of groceries would be shared three ways. Since Mr. Auger had "no questions" at the time nor "during the whole season ending in late July", Mr. Oborne states he assumed Mr. Auger "understood the split and was agreeable".

16. Mr. Oborne also submits that after each trip, he left the "settlement papers" on the galley table for all crew to look at and he also encouraged them to look at them. He states he was available to explain and clarify anything to his crew but does not think that Mr. Auger looked at the settlement papers and he never questioned him about the settlement papers at any time.

17. Mr. Oborne concludes that he would like the Determination varied and agrees that Mr. Auger should be paid 15% of the first trip, after deduction for trip expenses, which consists of lease costs, fuel costs and groceries.

ANALYSIS

18. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

> (a) the director erred in law;
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> (b) the director failed to observe the principles of natural justice in making the determination;
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> (c) evidence has become available that was not available at the time the determination was being made.

19. In the Appeal Form, Hemlunda has appealed the Determination on the natural justice and new evidence grounds of appeal in section 112(1)(b) and (c). However, Mr. Oborne's submissions appear to also invoke the error of law ground of appeal in section 112(1)(a) of the *Act*. I will review all three grounds of appeal below.

(a) Error of Law

20. The British Columbia Court of Appeal's decision in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12-Coquitlam),* [1998] B.C.J. No. 2275 (BCCA) provides the following instructive definition of an error of law:

> 1. a misinterpretation or misapplication of a section of the Act [in *Gemex,* the legislation was the *Assessment Act*];
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> 2. a misapplication of an applicable principle of general law;
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> 3. acting without any evidence;
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> 4. acting on a view of the facts which could not be reasonably be entertained; and
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> 5. adopting a method of assessment which is wrong in principle.

21. In this case, as indicated previously, Mr. Oborne contends that the policy interpretation of the term "fisher" in section 1 of the *Regulation* contained in the *Guidelines* (and the accompanying example in the *Guidelines*) contemplates a payment to the "fisher" of his share net of expenses of the fishing venture and, therefore, the delegate misinterpreted or misapplied the definition of "fisher" in concluding that Mr. Auger was entitled to a share of the *gross* earnings of the *Viking Girl*. At the Hearing of the Complaint, Mr. Oborne argued for a similar interpretation of the definition of "fisher" in the *Regulation* when he stated that the term "proceeds" in the definition of "fisher" implied that a fisher's share is calculated net of expenses and not a gross share of the earnings of the venture. However, the delegate rejected that argument and the narrow construction of "proceeds" Mr. Oborne argued for stating that the term "proceeds" in the definition of fisher could equally refer to the gross value of the catch. In so interpreting the definition of "fisher" in the *Regulation*, I do not find the Director misinterpreted or misapplied the *Regulation*. I find that it was open to the delegate to so interpret the *Regulation*. I also find that the policy interpretation of "fisher" offered by the Branch in the

Guidelines Mr. Oborne now relies on does not preclude the delegate from interpreting "fisher" as he did in the Determination. In the circumstances, I do not find the delegate to have committed an error of law.

(b) Natural Justice

22. The Tribunal has consistently indicated that principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to learn the case against them, the right to present their evidence or respond to evidence against their interest, and the right to be heard by an independent decision-maker (*Re 607730 B.C. Ltd. (c.o.b. English Inn and Resort)*, BC EST # D055/05; *Re Wilkinson*, BC EST # D017/06.

23. In this case, while Mr. Oborne does not argue that Hemlunda was denied the opportunity to present its evidence or respond to Mr. Auger's evidence, he contends that the delegate neither fairly nor objectively decided the case because he accepted Mr. Auger's testimony 100% to the exclusion of his and Mr. Leakey's testimony.

24. This Tribunal has indicated previously (see *Re Economy Movers (2002) Ltd.,* BC EST # D026/07, and *Re Greenfield*, BC EST # D033/08) that one of the most significant tasks of a delegate at an adjudicative hearing is to assess and weigh the evidence presented and determine what evidence is not only relevant but also reliable. If a delegate fails to consider relevant evidence in making the determination, particularly if that evidence is determinative of an issue in the complaint, this could amount to a denial of natural justice.

25. In this case, the delegate reviewed all relevant evidence of the witnesses and preferred the evidence of Mr. Auger over Mr. Oborne's and Mr. Leakey's, which it was open for the delegate to do in his adjudicative capacity. In preferring the evidence of Mr. Auger, the delegate set out his rationale at pages R6 and R7 of his Reasons as follows:

> Mr. Oborne's testimony regarding what he told Mr. Auger was far less specific than the explanation above. Mr. Oborne testified that he stated the boat would take 50% and pay 50% of the fuel, that the crew would share a maximum of 30%, and that the cost of food would be equally divided. There was no reference in this explanation to the crew's share being calculated on the profit of the trip, or, aside from fuel, to what specific deductions would be made from the gross value of the catch in order to calculate the profit. Mr. Leakey's testimony as to the specific language used supports Mr. Oborne's. I find that the terms of Mr. Auger's employment were at best ambiguously explained to him. Given Mr. Auger's limited experience in the industry, it was incumbent on Hemlunda to clearly explain the terms of employment.
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> Reviewing all the evidence, I find that Mr. Oborne did not clearly explain the calculation of shares to Mr. Auger. His statement was that the crew would share a maximum of 30%; he did not identify which, if any costs would be deducted from the gross value of the catch before calculating the crew shares. Given Mr. Auger's lack of experience in the industry, and the ambiguous description of the terms of his employment, I find that Mr. Auger was not aware that he would be paid a share of the net profit of the catch, and therefore, that Mr. Auger did not agree to be so paid.

26. I do not find any evidence of unfairness or lack of objectivity on its face in the delegate's reasons for preferring the evidence of Mr. Auger and concluding as he did that Mr. Auger was not aware that he would be paid net profit of the catch. To the contrary, I find the delegate's reasons in this case persuasive. Having said this, it should be noted that the Tribunal's jurisdiction in an appeal is restricted. Unless the determination reveals errors of the type set out in section 112(1) of the *Act*, it is not sufficient for the Tribunal to cancel or vary a determination even if it would have come to a different conclusion than the delegate on the evidence presented. In the result, I find the natural justice ground of appeal fails in this case.

(c) New Evidence

27. As indicated above, Mr. Oborne wants the Tribunal to accept and consider, as "new evidence" under section 112(1(c) of the *Act*, a summary of his conversation with Mr. Banks in June 2016 wherein the latter purportedly informed Mr. Oborne he gave Mr. Auger a ride to Prince Rupert in June 2015 and explained to him how "settlements, expenses, and crew shares were paid out". Mr. Oborne is also asking the Tribunal to accept and consider as "new evidence" Mr. Bank's written statement to the same effect and argues that Mr. Banks evidence shows that Mr. Auger was aware that his share would be net and not gross value of the catch on each trip he made on the *Viking Girl*.

28. The test for admitting new evidence on appeal is set out in the Tribunal's decision *Re: Merilus Technologies Inc.* (BC EST # D171/03). In the latter case, the Tribunal indicated that for evidence to qualify as "new evidence" in the appeal, it must satisfy the following conjunctive requirements:

> (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;
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> (b) the evidence must be relevant to a material issue arising from the complaint;
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> (c) the evidence must be credible in the sense that it is reasonably capable of belief;
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> (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 lead the Director to a different conclusion on the material issue.

29. In this case, Mr. Oborne states in his written appeal submissions that Mr. Auger travelled up to Prince Rupert in June 2015 with Mr. Banks. Mr. Oborne does not indicate when he became aware of this information. However, he indicates that he only became of aware of Mr. Banks' purported conversation with Mr. Auger in June 2015 pertaining to how settlements, expenses and crew shares were paid when he "bumped into him [Mr. Banks]" in Prince Rupert, in June 2016, at the start of the new fishing season. There is no explanation in Mr. Oborne's submissions as to why that information was not available at the time of the investigation or the Hearing, or could not have been submitted to the Delegate before the Determination was made on May 27, 2016. More particularly, there is no information in the submissions what, if any efforts, Mr. Oborne made to speak with Mr. Banks before the Determination was made or before the Hearing to obtain Mr. Banks' evidence, particularly *if* Mr. Oborne was aware at the time that Mr. Auger travelled to Prince Rupert with Mr. Banks in June 2015. I am, therefore, uncertain whether the evidence of Mr. Banks would meet the first condition for admitting new evidence on appeal set out in *Re: Merilus Technologies Inc. supra.*

30. Having said this, even if the evidence of Mr. Banks meets the first condition in *Re Merilus* for admitting it as new evidence, I find that it does not meet the fourth condition. More particularly, Mr. Banks does not have firsthand knowledge or information on what precise agreement was struck between Mr. Auger and Hemlunda or Mr. Oborne. More particularly, he is not privy to what Mr. Oborne said to Mr. Auger at the material time before Mr. Auger agreed to be employed as a deckhand on the *Viking Girl.* Therefore, I do not find that Hemlunda or Mr. Oborne have shown that the purported new evidence has high probative value and would have led the delegate for the Director to a different conclusion on a material issue, if he had the opportunity to consider the evidence at the Hearing. In the result, I find that Hemlunda has failed to satisfy the test in *Re Merilus, supra,* for new evidence to be considered.

31. In conclusion, I find that Hemlunda has not shown, on a balance of probabilities, any reviewable error in the Determination. Pursuant to section 114(1)(f) of the *Act,* I dismiss Hemlunda's appeal of the Determination.

ORDER

32. Pursuant to section 115 of the *Act,* I confirm the Determination made on May 27, 2016, together with any additional interest that has accrued under section 88 of the *Act*.

Shafik Bhalloo
Member
Employment Standards Tribunal