

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 -

Warrior Marine Fishing Company Ltd.
("Warrior Marine")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorna Pawluk

FILE NO.: 98/166

DATE OF DECISION: May 13, 1998

DECISION

OVERVIEW

This is an appeal by Warrior Marine Fishing Company Limited ("Warrior Marine") under Section 112 of the *Employment Standards Act* (the "Act") from a Determination dated February 26, 1998 by the Director of Employment Standards ("the Director").

ISSUE TO BE DECIDED

The issue is whether the *Act* permits the employer to deduct the costs of losing an outboard motor from a crew payment owing to James Dominix ("Dominix").

FACTS

Dominix was one of a four-member crew on the Island Warrior, a fishing boat owned by Warrior Marine, in September of 1997. On September 15, 1997, a motor was lost from the skiff. At the time, Dominix was the skiffman and Warrior Marine Captain M.H. Gillis ("Gillis") held Dominix responsible for the loss. Gillis said that crew had agreed to assume the costs of service, repairs or replacement (if lost) excluding theft of the two outboard motors. Gillis withheld half the cost of the lost motor from the crew share owing all members of the crew including Dominix.

Dominix filed a complaint with the Branch, claiming that the cost of the lost motor had been wrongly withheld. The Director's delegate, following an investigation, determined that the sum had been wrongly deducted from the crew share owing to Dominix as it was contrary to sections 21, 22 and 4 of the *Act*. The employer was ordered to pay \$450.23.

ANALYSIS

The Director's delegate concluded that the sum withheld from Dominix was contrary to Section 21 of the *Act* which outlines an employer's powers to make deductions from an employee's wages:

- 21 (1) Except as permitted or required by this Act of 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.

An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.

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.

"Wages" is defined in section 1 of the *Act*:

"wages" includes
salaries, commissions or money, paid or payable by an employer to an employee for work,
money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency,
money, including the amount of any liability under section 63, required to be paid by an employer to an employee under this Act,
money required to be paid in accordance with a determination or an order of the tribunal, and
in Parts 10 and 11, money required under a contract of employment to be paid, for an employee's benefit, to a fund, insurer or other person,
but does not include
gratuities,
money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency,
allowances or expenses, and
penalties;

Fishers are defined in section 1 of the *Employment Standards Regulation* ("*Regulation*"):

"fisher" means a person
who is employed on a vessel engaged in commercial fishing, and
whose remuneration is a share or portion of the proceeds of a fishing venture,
but does not include a person employed in aquaculture

Section 37 of the *Regulation* exempts fishers from certain provisions in the *Act*:

The following provisions of the *Act* do not apply to fishers:
section 16 (minimum wages);
Part 4, other than section 39;
Parts 5, 7 and 8.

Section 21 of the *Act* falls in Part 3 and thus is not excluded from operation by the *Regulation*.

In arguments before me, the Director reasserts her position that the deduction contravenes section 21 of the *Act* and any agreement by the crew, as alleged by Warrior Marine, is void under section 4.

Gillis argues that section 21 does not apply since Dominix was not an employee but rather a "co-adventurer". He points out that the federal government does not consider a member of the crew to be an employee and thus he suggests that Dominix is not an employee for the purposes of the provincial legislation at issue here. He also points to a number of facts which show that Dominix bears at least part of the fault for the loss of the motor.

While Dominix's status under federal legislation is not definitive of his status under a provincial scheme such as employment standards, Gillis makes a valid point: if Dominix is not an employee, section 21 does not protect him from the deduction complained of. The above provisions of the *Act* and the *Regulation* cover the situation in this case: the Island Warrior which is a vessel engaged in commercial fishing and Dominix's remuneration is a share or portion of the proceeds of a fishing venture. However, it is unclear whether he is "employed" on the Island Warrior or is there in some other capacity. Only if he is an employee is he entitled to the protection offered by section 21. This question cannot be determined here from the facts as set out in the Determination and it was an issue not canvassed by the delegate. Given that Dominix's status as an employee is critical to the accuracy and correctness of the Determination, I am referring that question back to the Director.

Nonetheless, if Dominix is a Warrior Marine employee, the cost of the motor was withheld contrary to the *Act* and section 4 invalidates any agreement that section 21 not apply. This is true regardless of the question of fault as this has no place in application of section 21. The only critical question there is whether the cost of the lost motor was deducted from wages but is not a deduction permitted under the *Act*. Whether or not the employee's actions caused the loss in question and whether or not the employee agreed to the deduction, section 21 prohibits withholding of the sum from outstanding wages.

ORDER

Pursuant to section 115(1)(a) of the Act, I order that the Determination in this matter, dated February 26, 1998 be referred back to the Director.

Lorna Pawluk
Adjudicator
Employment Standards Tribunal