

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 -

Matt Hill & Sons Co. Ltd.
("Matt Hill")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE NO.: 98/242

DATE OF DECISION: July 6, 1998

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Matt Hill & Sons Co. Ltd. (“Matt Hill”) of a Determination which was issued on March 27, 1998 by a delegate of the Director of Employment Standards (the “Director”). In the Determination, the Director found that Matt Hill had contravened Sections 17, 21, 28, 36, 40 and 58 of the *Act* in respect of the employment of Jennifer Davidson (“Davidson”), Earl Hill (“Hill”) and Terry Stewart (“Stewart”) and ordered Matt Hill to cease contravening the *Act* and to pay an amount of \$17,240.85 in respect of the contraventions. The Tribunal has reviewed the file and has concluded the appeal can be determined without the requirement of an oral hearing.

ISSUES TO BE DECIDED

The appeal raises two issues: first, whether the complainants were “fishers” as that term is defined in Section 1 of the *Employment Standards Act Regulation* (“*Regulation*”); and, second, if the complainants are not “fishers”, whether the Director was wrong to calculate the wages owing on anything other than the minimum wage under the *Act*.

FACTS

Matt Hill is the holder of a J-Licence under the *Fisheries Act (Canada)*, R.S.C., 1985, F-14. The licence authorizes the holder to harvest herring roe on kelp up to the amount of the quota shown on the licence. The harvesting of herring roe on kelp is a seasonal venture, involving a crew of between five and seven people. The process covers a 2 1/2 to 3 month period from March to May.

At the commencement of the season, the crew moves onto a “float” which serves as their living quarters during the season. There is a considerable amount of preparatory work before the float can reasonably accommodate the crew, including minor maintenance and cleaning. The float can be, and sometimes is, moved from one location to another during the season. The first part of the process of harvesting herring roe on kelp involves constructing enclosures, called ponds, into which the kelp and herring are to be placed. The ponds are constructed of net and there are several of them constructed in different locations within the license area. Once the ponds are constructed, the crew, using boats called “punts”, pick kelp and place it in the ponds.

The next part of the process involves capturing the spawning herring. As Matt Hill does not have a seine boat, he engages a “catcher” for this part of the process. This is done by encircling the herring in a net and closing it off. Once captured, the herring are towed to a location adjacent to one of the ponds, where the capture net and pond net are connected and the herring guided into the pond which is then closed. The herring spawn on the kelp and, after they have spawned, are released from the pond. The kelp is then harvested, using the punts, and delivered to the buyer. After the harvesting operation, the ponds are disassembled, removed and stored until needed for the following season. The task may be

required to be delayed until any herring roe which has attached to the netting has hatched. When the season ends, the crew clean the float, inventory remaining food and equipment and tow the float to its “home” berth.

The complainants were employed in the above process by Matt Hill for several seasons, including the 1996 season, which is the only period of employment to which this complaint relates. They were paid a share of the season’s earnings. The record indicates that Hill was employed as a “deckhand” and Davidson was employed as a “cook/deckhand” during the 1996 season. The record does not outline what job designation was held by Stewart, but it is not necessary to identify his job for the purpose of addressing the appeal as it relates to him. The Determination covers only the period of time during which the individuals were employed harvesting herring roe on kelp.

ANALYSIS

The relevant parts of the legislation are found in Section 1 and Section 37 of the Regulation:

1. (1) *In this Regulation:*
 - “**Act**” means the *Employment Standards Act*;
 - ...
 - “**fisher**” means a person
 - (a) who is employed on a vessel engaged in commercial fishing, and
 - (b) whose remuneration is a share or portion of the proceeds of a fishing venture,but does not include a person employed in aquaculture;
 - ...
37. *The following provisions of the Act do not apply to fishers;*
 - (a) section 16 (minimum wages);
 - (b) Part 4, other than section 39;
 - (c) Parts 5, 7 and 8.

I note at the outset that there is no dispute that the second part of the definition of “fisher” has been met. The individuals were paid with a share of the proceeds of the herring roe on the kelp venture. The question is whether the individuals were “employed on a vessel

engaged in commercial fishing” and, in any event, whether they were “*employed in aquaculture*”.

In the Determination, the Director concluded the individuals were not fishers, stating:

The *Employment Standards Regulations* defines a fisher as a person who is employed on a vessel engaged in commercial fishing. The complainants did not work on a vessel catching fish. Their duties entailed constructing a spawning pen and harvesting herring roe which was affixed to kelp strands. Consequently, the complainants are not fishers and exemptions from the *Employment Standards Act* for fishers do not apply.

The Determination did not conclude the individuals were “*employed in aquaculture*”. In its appeal of the Determination, counsel for Matt Hill submitted:

All of the activities of the employer and the employees in this occupation were carried on pursuant to a licence issued by the Minister of Fisheries of the Government of Canada pursuant to the *Fisheries Act of Canada*. In that *Act*, by Section 2, “fish” includes... “(c) the eggs, sperm, spawn, larvae, spat, and juvenile stages of fish, shellfish, crustaceans and marine animals;”. By the same Section of the *Act*, “fishing” means “fishing for, catching or attempting to catch fish by any method.”

In this particular fishery, the fishers go on a vessel to harvest kelp strands which are transported to a location where, in open water, an enclosure is constructed of netting.

...these activities are carried on the water and the employees are working on a vessel and living on a vessel of some sort.

In response to the appeal, the Director raised the issue of whether the individuals were “*employed in aquaculture*” and submitted:

I argue that the determination is correct and that the affected workers are not “fishers” because the work done is aquaculture rather than fishing. The Provincial *Fisheries Act* defines “aquaculture” as follows:

“**aquaculture**” means the growing and cultivation of aquatic plants, as defined in section 12, or fish, for commercial purposes, in any water environment or in human made containers of water, and includes the growing and

cultivation of shellfish on, in or under the foreshore or in water,”

In response, counsel for Matt Hill joins issue with that assertion, arguing that the exclusion from the definition of “fisher” of persons employed in aquaculture is intended to capture the employment of person employed at salmon farms and similar enterprises, where the work is typically performed at fixed locations developed for the specific purposes of cultivating the marine products identified in the definition and which are operated from permanent shore based establishments.

I have two concerns with the position of the Director that the individuals are employed in aquaculture. First, no reference is made to that position in the Determination. Subsection 81(1) of the *Act* requires the Director to set out the reasons for the Determination. The Tribunal has said in several decisions that the requirement to provide reasons is a substantive obligation and the failure to do so may be reason to nullify the decision. In this context, there are reasons provided in the Determination, but those reasons have changed in response to the appeal. There is a serious question about whether the Director may add to or change the basis for the Determination on appeal. However, no objection has been raised by counsel for Matt Hill and I choose not to reach any final conclusion about this concern. That is primarily because of my second concern with the position of the Director that the individuals were employed in aquaculture. I do not agree that the process of harvesting herring roe on kelp meets the definition of “aquaculture”. There is nothing in the process that could be characterized as “the growing and cultivation” of fish. Clearly, there is nothing “grown”, as that term is understood in its normal and everyday meaning, and it is arguable whether providing and environment, the kelp strands, upon which the herring may spawn is “cultivating” the fish which result from the process. In any event, the terms are conjunctive and both “growing” and the “cultivation” of fish must be present in order to satisfy the definition.

That does not, however, dispose of the appeal. The individuals cannot be “fishers” for the purposes of the *Act* unless, in addition to being paid a share of the proceeds of the venture, they can be said to be “employed on a vessel engaged in commercial fishing”. There are two elements to that phrase. The first is that the activity constitute “commercial fishing”. The second is that there be a vessel, upon which the individuals are employed, that is “engaged” in commercial fishing.

The *Act* does not define “commercial fishing” nor what would be considered a “vessel” in the context of commercial fishing. Other provincial legislation is also of limited assistance. The *Fisheries Act (BC)* adopts the concept of commercial fishing developed in the *Fisheries Act (Canada)*. The latter legislation contains the following definition of “fisher”:

“fisher” means a person licensed under the *Fisheries Act (Canada)* for commercial fishing;

Under the *Fisheries Act (Canada)* a person engaged in harvesting herring roe on kelp is engaged in commercial fishing. The activity is carried on under licence issued under the *Fisheries Act (Canada)* and is regulated under that *Act*. In the absence of any provision in the *Act* suggesting I should take a different view of what is commercial fishing than is identified in the federal legislation and adopted in provincial legislation, I conclude the individuals were engaged in commercial fishing for the purposes of the *Act*.

In respect to the second element, the Director suggested in the Determination that in order to come within the phrase “*engaged in commercial fishing*” the vessel must be “catching fish”. There are two responses to that position, neither of which assist the position of the Director. First, the phrase uses the term “*commercial fishing*”, not “catching fish”, and harvesting herring roe on kelp is commercial fishing.

Second, “catching fish” is only one part of what constitutes being *engaged in commercial fishing*. A more complete and useful aid in determining the scope of that phrase also comes from the *Fisheries Act (Canada)* which contains, in the context of licencing and regulating commercial fishing under that *Act*, the following definition of “fishing vessel”:

“fishing vessel” means any vessel used, outfitted or designed for the purpose of catching, processing or transporting fish;

As well as “catching”, I conclude that the activities of processing and transporting fish are included as part of being “*engaged in commercial fishing*”. In this case, the vessel used to harvest the herring roe was also used to transport it.

I find the individuals fall within the definition of “fishers” in the *Regulation*. In reaching this conclusion, I have considered that the individuals were not employed continuously on a “*a vessel engaged in commercial fishing*” and some of their employment consisted of work performed at the float and on the shore. However, there are several reasons why this circumstance does not affect the result I have reached. First, it is normal in commercial fishing ventures that some preparatory work, including maintenance work on the vessel, mending and repairing nets and lines and stocking the vessel with supplies, will be required prior to the vessel leaving port. As well, it is not uncommon for a vessel to return to port several times during a commercial fishing venture. On such occasions, the crew may be required to do additional maintenance and repairs or may use the opportunity to restock and clean the vessel or do their laundry. Second, the predominant purpose for their employment was to work “*on a vessel engaged in commercial fishing*”. Third, the work performed away from the vessel was integrally related to the predominant purpose for their employment. And, finally, the remuneration for their employment related to all work

performed in respect of the commercial fishing venture, not just the part of it that was performed on the vessel.

Accordingly, the Director erred in concluding the individuals were not “fishers”. Section 37 of the *Regulation* applies to exclude some provisions of the *Act* from application to the employment of the individuals. The Determination will need to be varied to reflect this result. In light of my conclusion on the first issue, I do not need to address the second one.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated March 27, 1998 be varied to omit reference that Matt Hill has contravened Sections 36, 40 and 58 of the *Act* and to reduce the payment ordered by the Director by the amounts attributable to those contraventions. Interest, pursuant to Section 88 of the *Act*, will accrue on the remaining amount from the date of issuance.

Dave Stevenson
Adjudicator
Employment Standards Tribunal