BC EST #D321/98

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 -

William Wishinski, also known as Bill Wishinski
("Wishinski")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE NO.: 98/261

DATE OF HEARING: June 19, 1998

DATE OF DECISION: July 15, 1998

DECISION

APPEARANCES

William Wishinski	The Appellant
David I. Roome	The Complainant

OVERVIEW

William Wishinski, also known as Bill Wishinski, pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), appeals a Determination of the Director of Employment Standards dated April 2, 1998. The Determination orders Wishinski to pay wages to David I. Roome.

ISSUES TO BE DECIDED

The Determination is that Roome is an employee, a "fisher" as the term is defined by the *Employment Standards Regulation*. Wishinski says that Roome was not his employee and not paid wages. He describes Roome as a fellow employee and "co-adventurer".

The Determination awards Roome pay for work during a test fishery. Pay is awarded on the basis of the only agreement that Wishinski and Roome reached on pay, namely, that Roome be paid 10 percent of the commercial value of the catch. Wishinski says that he agreed to pay Roome a share of the catch but not all moneys earned while fishing. And he argues that, in any event, as fish caught in the test fishery were not sold by him, but handed over to others for sale, with all proceeds going to the Area D Gillnet Association, the value of the catch is zero.

The rate of pay is at issue in one other respect. Wishinski claims that the agreement on pay is really 10 percent of the catch less 50 percent of the food bill. Wishinski says in failing to deduct for food, he overpaid Roome by $750. The Determination denies his claim on the basis that there is no evidence to support a conclusion that the agreement on pay is as Wishinski claims, and because the deduction for food is found to be contrary to section 21 (1) of the *Act*.

FACTS

Bill Wishinski owns and operates his own 35 foot fishing vessel. He was licensed for the 1997 commercial salmon fishery. He hired Roome as his deckhand. Roome started work on June 21, 1997. He quit on September 2, 1997.

There is no written contract setting out the terms of employment. According to the United Fisherman and Allied Workers' Union, it is standard practice in the gillnet fishery that the deckhand receives 10 to 20 percent of the gross value of the catch and that he or she pays for the food which they consume. Roome denies that was his deal with Wishinski. He says that he was to receive a share of what was earned fishing (set at 10 percent in the Determination) and Wishinski was to pay for all food. Wishinski claims that pay is a share of the catch minus half the cost of food but on paying Roome, what he views as his share of the catch, he did not deduct for food.

During the fishing season, Wishinski was one of 24 Area D licence holders that participated in a test fishery for Sockeye and Coho in Johnstone Strait, the point being to gain experience with 90 mesh "Alaska Twist" gillnet gear. The fishery was intermittent, a day or two here and there, spread over 6 weeks, and 6 days in total. That Roome worked each day of the test fishery is not disputed. Wishinski's appeal goes only to the rate of pay and the matter of whether or not the services of Roome were really needed for the test fishery and whether there was any practical way of putting him ashore.

Under the terms of participation in the test fishery, Wishinski was required to turn all fish caught over to the Area D Salmon Gillnet Association for sale, with the proceeds going towards the cost of the test fishery and the remainder going to the association. Wishinski was paid $1,000 a day for participating in the fishery, $6,000 in total. Wishinski argues that just covered the cost of participation. The price for just the 'Alaska Twist' gear required for the fishery is $4,500. He says that it is unlikely that the net will be approved for use in Canadian waters.

ANALYSIS

Section 1 of the *Act* defines employee, employer and wages as follows:

> ***"employee"*** *includes*
>
> *(a) a person, including a deceased person, receiving or* ***entitled to wages for work*** *performed for another,*
>
> *(b) a person an employer* ***allows****, directly or indirectly, to perform the work normally performed by an employee,*
>
> *(c) a person being trained by an employer for the employer's business,*
>
> *(d) a person on leave from an employer, and*
>
> *(e) a person who has a right of recall;* (my emphasis)
>
> *"****employer"*** *includes 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.*

*"**wages"** includes*

(a) salaries, commissions or money, paid or payable by an employer to an employee for work, … .

*"**work"** means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.*

I have considered the above definitions and I am satisfied that Roome fits the *Act*'s definition of employee, indeed, as the delegate has found, Roome is a 'fisher' as that term is defined in the *Employment Standards Regulation* (the "*Regulation*"). Section 1 of the *Regulation* defines "fisher" as 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 … .

Roome was employed on a vessel engaged in the industry of commercial fishing, and pay was a share of the catch, in other words, a portion of the proceeds of a fishing venture. The *Act* and the *Regulation* clearly extend so far as to cover deckhands on commercial fishing vessels.

Roome did not agree to an hourly wage, or work for a salary, but pay typical of commercial fishing, a share of the gross value of the catch. That is money payable to an employee for work and 'wages' so far as the *Act* is concerned.

It is clear to me that Roome is an employee and it is equally clear that Wishinski is his employer. He claims that he is himself a fisher and employee, not an employer. It may well be that as skipper of a fishing vessel he might, for the purposes of some legislation, be considered an employee or at least a dependent contractor, but for the purpose of the *Employment Standards Act*, it is clear to me that Wishinski is the employer. It is he that hired the deckhand and was at all times responsible for Roome's employment. The only agreement on pay is between Roome and Wishinski. It is Wishinski that has paid Roome for work. And as skipper of the vessel, Wishinski clearly had control and direction over the deckhand's work.

Roome may not have been needed for all days of the test fishery, or indeed, any part of it, and there may very well have been no way of putting him ashore. That does not matter. What matters is that he was allowed to work. Roome worked all days of the test fishery, and for that he is entitled to pay.

Pay is either a share of the proceeds of the test fishery or it is the minimum wage for all hours worked plus applicable overtime, vacation and statutory holiday pay. It is only where pay is a share of the proceeds of a fishing venture of the commercial fishing industry that Roome can properly be considered a 'fisher'. If the agreement on pay was for only regular commercial fisheries, in other words, not the test fishery, Roome is not a 'fisher' but just a regular employee. Fishers, by virtue of Section 37 of the *Regulation*, are not covered by those sections of the *Act* which provide for the minimum wage, set hours of

work, govern the termination of employment, and call for the paying of overtime, statutory holiday, and vacation pay. But all of those provisions of the *Act* apply to regular employees.

No one argues that it is the latter. I am shown nothing which indicates that the Determination is in error, that Roome is not entitled to 10 percent of the $6,000 earned for participation in the test fishery. As matters are presented to me, it is my conclusion that Roome agreed to work for 10 percent of whatever was earned fishing, nothing more elaborate than that. Clearly, the $6,000 earned through the test fishery is money earned through fishing. But even if the agreement was that Roome was to get 10 percent of the commercial value of the catch, it remains the case that he is entitled to a share of the $6,000. To the boat, that is the commercial value of fish caught. As I see it, the fishery merely altered the terms of sale. The price was set beforehand, at $1,000 for whatever fish were caught on a day.

The final matter for me to decide is whether pay was a share of the catch or a share of the catch minus 50 percent of the food bill. Nothing leads me to think that it is the latter. Indeed, the evidence is to the contrary. I consider it most unlikely that if Roome agreed pay for food that Wishinski would then fail to deduct for food at all on paying Roome.

To recapitulate, Roome is an employee, indeed, he worked as a fisher as defined by the *Regulation*. Wishinski was his employer. Roome agreed to work for 10 percent of whatever was earned fishing. A total of $6,000 was earned in the test fishery. Roome is entitled to 10 percent of that amount.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated April 2, 1998 be confirmed in the amount of $617.86, together with whatever further interest has accrued pursuant to Section 88 of the *Act*, since the date of issuance.

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Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal