

An appeal

- by -

Kimberly T. Morton  
("Morton" or "employee")

- 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

**ADJUDICATOR:** Paul E. Love

**FILE No.:** 2001/245

**DATE OF DECISION:** August 21, 2001

## DECISION

### OVERVIEW

This is an appeal by an employee, Kimberley Morton, from a Determination dated March 9, 2001 issued by a Delegate of the Director of Employment Standards (“Delegate”), pursuant to the *Employment Standards Act, R.S.B.C 1996 c. 113* (the “Act”). The Delegate found that the claim of the employee for a 15 % share was unsubstantiated. On appeal Mr. Morton also raised issues related to compensation for an engine breakdown and loss of fishing time, compensation for preparation work prior to the season, and an issue of trading product for moorage. Mr. Morton was employed as a fisher, and worked in expectation of a share of the catch. An engine breakdown is a risk in commercial fishing, which might reduce the catch, however, any loss is not compensable under the Act or the wage bargain of the parties. There was no agreement between the parties for compensation for preparation work prior to the season. The issue of “product trade for moorage” should not be considered by me on appeal, given that this claim was not before the Delegate. I, therefore dismissed the appeal.

### ISSUES:

Did the Delegate err in determining that Mr. Morton was entitled to a 10 % crew share of the profits, as opposed to 15 % claimed by Mr. Morton?

Did the Delegate err in failing to address the Employee’s claim for lost fishing time due to a vessel breakdown?

Did the Delegate err in failing to address the Employee’s claim for time spent for preparation work?

Did the Delegate err in failing to assess an alleged trade of prawns for moorage?

### FACTS

This is an appeal decided upon the written submissions of the parties, without an oral hearing.

Kimberley Morton (“Morton” or “Employee”) and his friend, Carmen Schott, were employed with Tidewater Harvesters Ltd, and engaged in the prawn fishery during the 2000 season. Larry Duggan is the principal of Tidewater Harvesters Ltd (“Tidewater” or “Employer”). Tidewater sells its product to Paladin International Food Sales Ltd. (“Paladin”). Mr. Morton worked for the period April 28 to May 29, 2000 in the prawn fishery for Tidewater. This was Mr. Morton’s first season prawn fishing, and his first season with Tidewater.

Tidewater paid Mr. Morton 10 % of the proceeds of the fishing on the basis of \$7.00 per pound, for a catch of 6,758 pounds. The principle issues raised by Mr. Morton in the complaint to the

Delegate, related to the percentage of the proceeds, and the price of the sale of the prawns. The Delegate investigated Mr. Morton's claim that he was entitled to be paid for a share of the profits at 15 % rather than 10 %, as paid by the Employer. The Delegate also investigated Mr. Morton's claim that he was entitled to be paid for 100 hours of preparatory work, prior to the commencement of the season. Mr. Morton did not keep any records with regard to the preparatory work, and the amount of time spent in preparation was disputed by the Employer.

In the Determination, the Delegate found that for a portion of the time period, Mr. Morton operated a small boat for the Employer, and then worked on the Employer's vessel. The parties dispute the amount of time, and the reasons for the short operation of the vessel, however, it is unnecessary for me to make any findings on this point, in order to resolve the appeal points in issue. The Delegate found that the parties agreed that Mr. Morton would receive a 15 % share when he operated a second boat, but found that Mr. Morton worked as a deck hand on the main boat, and that there was no evidence to support a 15% share of the catch while working as a deck hand. The Delegate was unable to assess, because of a lack of record keeping, the amount of the catch obtained from the main boat, and from the boat operated by Mr. Morton for a short period of time.

Mr. Morton's claim for a crew share depended in part on the price per pound, and the volume of the catch. Mr. Morton raised issues with the Delegate related to a discounting of the price for repayment of a loan, and an allegation that the price on which his share was calculated (\$7.00 per pound) was lower than the final selling price (\$8.50 per pound). The Delegate's investigation revealed that the price was not discounted for a loan repayment, and that the price was \$7.00 per pound. The Delegate obtained evidence from Paladin International Seafood Sales Ltd. ("Paladin") the seafood processing company, that it made payment on the basis claimed by the Employer.

### **Employee's Argument:**

Mr. Morton argues that the Employer agreed to pay him 15 % of the profits to work on a smaller boat known as the T'Bay. Mr. Morton argues that this agreement was unaltered when he worked on the Thunder Bay II. Mr. Morton argues that "industry standards" are irrelevant as the agreement was 15%. Mr. Morton says that he was not paid for 100 hours of preparatory work. Mr. Morton alleges that he lost five days of fishing time due to boat repairs, and that he advised Mr. Duggan of the necessity for repairs prior to the start of fishing. Mr. Morton says that part of the catch was used to pay for moorage, and that the Employer did not account for this in calculating the crew share. Mr. Morton raised an issue that "prawn tail packs" were used to pay for moorage, and he has not been paid a share of the profit which . Mr. Morton argues that he has not received "any paperwork to substantiate Mr. Duggan's position".

**Employer's Argument:**

The Employer argues that Mr. Morton was hired to work at 15 % of the share for the second boat, but that Mr. Morton ceased operating the second boat, due to inexperience, and lack of expected assistance from Mr. Morton's friend. The Employer argues that 10 % was the appropriate share for a deck hand such as Mr. Morton. The Employer argues that preparatory work is expected and included in the compensation for employment as a crew share. The Employer indicates that while a small amount of product was given away as a gift for moorage, moorage is an expense deducted from the gross revenue. The Employer indicates in any event that the amount of the gift was less than the amount of product consumed by the crew members.

**ANALYSIS**

In an appeal under the *Act*, the burden rests with the appellant, in this case the Employee, to show that there was an error in the Determination such that I should vary or cancel the Determination.

**The Crew Share:**

The Delegate investigated the claim for a 15 % crew share presented by the Employee. In this investigation, the Delegate was faced with an oral contract, and a complete lack of documentary evidence supporting the Employee's claim. In reviewing the evidence of the parties concerning the crew share, the Delegate had regard to the evidence of the parties, and considered the "industry standard", and the shares of other crew members, and the skipper, as a method of testing the probability. In effect the Delegate applied the approach set out in *Faryna v. Chorney [1952] 2 D.L.R. 354(B.C.C.A.)*, in assessing the evidence of Mr. Morton. The Delegate considered Mr. Morton's claim as a deck hand, to crew members in similar circumstances, who worked that season with the Employer, and an industry standard. The Delegate found it improbable that in his first season of work, Mr. Morton would have been paid more than other crew members, and an amount equal to Mr. Duggan, the skipper and president of the Employer.

I note that in an investigation of a complaint, the onus is placed on the claimant to demonstrate a breach of the *Act*. The Delegate identified correctly the onus on the Employee asserting the claim to prove the entitlement. The Delegate apparently preferred the evidence of the Employer, which seemed more probable, than that of the Employee. I am not persuaded, by the evidence tendered on this appeal, or the appeal submissions made, that Mr. Morton's view is to be preferred over the view of the Employer. Mr. Morton has not established any error in the Determination with regard to the crew share.

**Breakdown of the Vessel**

Mr. Morton alleges that the Delegate erred in not assessing compensation for the "break down" of the fishing vessel, and the loss of five days fishing. I note that this does not appear to be a

claim that falls within the *Act*. I also note that the wage bargain between the parties was based on a share of the catch. In a commercial fishing venture there are likely many risks which may reduce the catch, and unfortunately for the parties this risk did materialize. The failure by the Delegate to address this claim does not constitute an error in the Determination.

**Preparation Work:**

In this case the Determination is silent on the issue of compensation for preparation work prior to the commencement of the season. In the Delegate's written submission, the Delegate noted that Mr. Morton had no records with regard to the amount of time spent on preparation. In the Employer's written submission, the Employer disputed the amount of time alleged by Mr. Morton, and noted that preparation work was expected and included in the crew share. I find that the Delegate did not err with regard to the claim for preparation work. There was an unsatisfactory evidentiary basis to support any claim made for preparation work. I note in addition that pursuant to s. 37(a) of the *Employment Standards Regulation* ("*Regulation*") the minimum wage provisions of the *Act* (s. 16) do not apply to a fisher. A fisher is defined in the *Regulation* as 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. The wage bargain between the parties did not provide for separate payment for preparation time. Mr. Morton is not entitled to any extra compensation for preparation work.

**Prawns for Moorage:**

With regard to the claim of trading prawns for moorage, Mr. Morton did not raise this claim with the Delegate during the investigation. The Employer had an answer to this allegation which could have been presented during the course of the investigation. It cannot be said that the Delegate has erred in an investigation or in issuing a Determination, where the claimant fails to raise the claim in the complaint.

For all the above reasons, I am satisfied that the Delegate did not err in the Determination.

**ORDER**

Pursuant to s. 115 of the *Act* I order that the Determination dated March 9, 2001 is confirmed.

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**Paul E. Love**  
**Adjudicator**  
**Employment Standards Tribunal**