

**TO INTERESTED PARTIES**

**Re: Employment Standards Act - Part 13  
Appeal of a Determination issued by the Director of Employment Standards on  
February 26, 1998  
Warrior Marine Fishing Company Ltd. - and - James Dominix  
Decision Number: D579/98**

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This letter sets out the Tribunal's decision on the issue of whether James Dominix ("Dominix") was an employee of Warrior Marine Fishing Company Ltd. ("Warrior Marine").

On May 13, 1998, the Tribunal issued Decision BC EST #D170/98 in connection with the above-noted appeal which referred the matter back to the Director of Employment Standards (the "Director") to determine whether Dominix was an employee of Warrior Marine. Dominix was one of a four-member crew on the Island Warrior, a fishing boat owned by Warrior Marine. Warrior Marine withheld half the cost of a lost motor from the wages owing all crew members, including Dominix. The Director's delegate concluded that the sum withheld from Dominix was contrary to Section 21 of the *Employment Standards Act* (the "*Act*"). Warrior Marine argued that Dominix was not an employee but a "co-adventurer" and that federal legislation does not consider a member of a crew to be an employee. It also argued that Dominix was partially at fault for the loss of the motor.

The Adjudicator found that it was unclear whether Dominix was employed on the Island Warrior or was there in some other capacity. She stated as follows:

While Dominix's status under federal legislation is not definitive of his status under a provincial scheme such as employment standards, (Warrior Marine) makes a valid point: if Dominix is not an employee, section 21 does not protect him from the deduction complained of. The 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 here is whether the costs 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.

In response to the Determination being referred back to the Director, the Tribunal received a submission from the Director's delegate on November 25, 1998. The Director's delegate found, following his investigation, that Dominix was an employee of Warrior Marine.

In a letter dated November 26, 1998, the Tribunal invited the other parties to reply to the submission of the Director's delegate no later than 4:00 p.m. December 10, 1998. The parties were also advised that the matter before the Tribunal may be decided based solely on written submissions and that an oral hearing may not necessarily be held, and, further, that the Determination would either be confirmed, varied, cancelled or referred back to the Director.

The Tribunal did not receive any replies from the other parties.

This appeal has been decided based on the written submissions received by the Tribunal.

I have considered the comprehensive submission made by the Director's delegate and I find no basis to alter his conclusion that Dominix was an employee of Warrior Marine. The Director's delegate interviewed Captain M.H. Gillis, Dominix, a senior economist at the Federal Department of Fisheries and the Executive Director of Government Relations for the Fisheries Council of B.C. He also considered the definition of a "fisher" under the *Act* and the various common law tests to determine whether a person is an employee. He found, based on the foregoing, that Dominix was an employee of Warrior Marine. His conclusion was not challenged by Warrior Marine. Therefore, in accordance with Tribunal Decision BC EST#D170/98, the deduction made by Warrior Marine is prohibited by the *Act*. The appeal is dismissed.

### **Order**

Pursuant to Section 115 of the *Act*, and further to Tribunal Decision BC EST#D170/98, I order that the Determination dated February 26, 1998 be confirmed in the amount of \$450.23 together with whatever further interest that may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

**Norma Edelman**  
**Registrar**  
**Employment Standards Tribunal**

### **Interested Parties:**

Warrior Marine Fishing Company Ltd.  
James Dominix  
Director of Employment Standards (Delegate:Morry Levin)