

Dockets: 2006-3320(EI)  
2006-3321(CPP)

BETWEEN:

LIMAR FISHING LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

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Appeal heard on October 1, 2007, at Kamloops, British Columbia

Before: The Honourable Justice Judith Woods

Appearances:

Agent for the Appellant: John Stirling

Counsel for the Respondent: Christa Akey

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**JUDGMENT**

The appeal in respect of decisions of the Minister of National Revenue under the *Employment Insurance Act* and the *Canada Pension Plan* is allowed, and the decisions are varied on the basis that Robert Forsey and Rene Slaney were engaged in insurable and pensionable employment but for the period from December 20, 2005 to January 16, 2006 only.

Signed at Toronto, Ontario, this 19<sup>th</sup> day of October 2007.

"J. Woods"

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Woods J.

Citation: 2007TCC639  
Date: 20071019  
Dockets: 2006-3320(EI)  
2006-3321(CPP)

BETWEEN:

LIMAR FISHING LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

### **REASONS FOR JUDGMENT**

Woods J.

[1] This is an appeal by Limar Fishing Ltd. in respect of decisions made by the Minister of National Revenue (the “Minister”) pursuant to the *Employment Insurance Act* and the *Canada Pension Plan*.

[2] Late in 2005, the appellant purchased a large fishing vessel (MV Bakur), hired a crew of eight men, and set sail down the Atlantic coast from Halifax, through the Panama Canal, and to the Pacific Ocean where it had a license to fish. Four months later, the Bakur landed in British Columbia where it was met by RCMP officers who discovered a large quantity of marijuana on board.

[3] Robert Forsey and Rene Slaney (the “Workers”) were among four members of the crew who worked on the Bakur for just a short period, leaving the vessel at its first port of call in Trinidad because they suspected that the Bakur was going to be used for more than catching fish. The police in Trinidad were called in and inspected the ship, but found nothing untoward. The four men were flown home to Nova Scotia and the Bakur continued on with the remaining four crew members. Additional crew members were picked up along the way to replace those that had left.

[4] Some time later, the Workers attempted to recover purported unpaid wages and filed complaints with labour standards authorities, both federal and provincial. As far as the evidence before me indicates, the Workers' complaints have to date all been dismissed, but Mr. Forsey may have an appeal pending.

[5] The Workers also claimed employment insurance benefits with respect to their short engagement on the Bakur. This led to the decisions of the Minister that are under appeal, namely, that the Workers were engaged by the appellant in insurable and pensionable employment for the following periods: November 1, 2005 to January 28, 2006 for Mr. Forsey, and November 1, 2005 to January 19, 2006 for Mr. Slaney.

[6] The appellant has appealed these decisions to this Court.

[7] In addition to this determination, the Minister also decided that the insurable earnings of the Workers should include amounts which they claimed as unpaid wages in their complaints to the labour authorities. The appellant has filed an appeal of this decision to the Appeals Division of the Canada Revenue Agency, but it has not yet been dealt with. Accordingly this issue is not before me.

[8] During the hearing, I indicated that it might be helpful to the parties if I could comment on the insurable earnings decision as well. My comments would of course not be binding. Subsequently, I realized that Mr. Forsey's entitlement to wages may not yet be finally determined by the labour authorities, and I will therefore refrain from commenting on this issue.

[9] The appellant was represented at the hearing by its president, John Stirling, who was the captain of the Bakur during the relevant period. Mr. Stirling also testified on behalf of the appellant, and introduced into evidence a binder containing a large number of documents (Exhibit A-9). Another officer of the appellant who also worked on the Bakur, Ralf Harris, provided further testimony.

[10] The Crown had arranged to bring one of the Workers from Halifax to Kamloops to testify, but the proposed witness advised counsel shortly before the hearing that he was unable to attend. An adjournment request made by the Crown at the commencement of the hearing was denied.

[11] Turning to the main issue, the two questions for determination in this appeal are whether the Workers were engaged in an employment relationship with the appellant, and if they were, over what period were they so engaged.

[12] In determining whether or not there is an employment relationship, courts are required to balance several factors, including the degree of control, ownership of tools, chance of profit, risk of loss, and intention. Ultimately the question is whether the workers were in business for themselves.

[13] The decision of the Minister that the Workers were employees of the appellant was based on the following assumptions of fact, which I reproduced from one of the replies:

- a) the Appellant purchased a boat from Karlsen Shipping Company;
- b) the Appellant hired Forsey and Slaney through an advertisement placed with the Human Resources Skills Development Canada jobsite;
- c) the Appellant hired Forsey to help get the boat ready and to act as a deck hand at sea;
- d) the Appellant hired Slaney to help get the boat ready and to cook for the boat crew members when at sea;
- e) the Appellant told Forsey and Slaney what jobs were required to be done to prepare the boat for sea;
- f) the Appellant told Forsey and Slaney that the boat was being readied to go fishing for tuna in the Pacific Ocean;
- g) the Appellant's boat was used to smuggle drugs into Canada;
- h) the Appellant's boat set sail on or about December 31, 2005 with Forsey and Slaney on board;
- i) Forsey and Slaney did not participate in the catching of fish during their respective periods of employment;
- j) neither Forsey or Slaney could send a replacement to perform any of their assigned duties had they been unable to do the work;

- k) the Appellant provided all the tools and equipment used by Forsey and Slaney to get the boat readied for sea;
- l) the Appellant provided the supplies and equipment used by Slaney to cook for the crew members;
- m) the Appellant provided Forsey and Slaney with food and accommodations on board the boat;
- n) neither Forsey or Slaney invested any money in the Appellant's business;
- o) neither Forsey or Slaney had any responsibility for investment and management of the Appellant's business operations;
- p) the Appellant did not pay Forsey or Slaney for the work they did during their respective periods of employment;
- q) Forsey and Slaney filed complaints against the Appellant with the Canada Labour Standards Branch for non-payment of wages; and
- r) Slaney filed a complaint against the Appellant with the Federal Canada Labour Program.

[14] Mr. Stirling submits that the approach taken by the Minister is flawed, in that it does not take into account the accepted practice in the fishing industry, which is that crew members of fishing boats who receive remuneration based on the proceeds of the catch are self-employed.

[15] The problem that I have with this argument is that the evidence does not support a finding that the crew were to be remunerated on a share catch basis.

[16] In the unusual circumstances of this case, I think that it is relevant to have regard, not only to what the Workers were told when they were hired, but also to whether and to what extent fishing was actually undertaken on the Bakur. If the fishing was insubstantial, it is likely that the appellant intended to remunerate the Workers in some other way, and not just from the proceeds of the catch.

[17] I accept that Mr. Stirling told the Workers that they were being hired on a share crew basis, but the evidence presented has not satisfied me that the appellant had any intention of paying the Workers on this basis.

[18] Although the evidence suggests that the Bakur may have undertaken some commercial fishing in the Pacific Ocean after the Workers had flown home, the testimony was far too vague and incomplete to satisfy me that the crew of the Bakur engaged in commercial fishing in a significant way. In addition, the testimony given by Mr. Stirling and Mr. Harris failed to explain to my satisfaction how the Workers were to be remunerated on a share catch basis for a trip that started in Halifax, ended in British Columbia, and lasted over four months.

[19] Neither Mr. Stirling nor Mr. Harris gave detailed evidence of fishing activity on the Bakur, from the point of view of either the catching of the fish or its sale. Further, the binder of documents produced by Mr. Stirling provides very little evidence that the Bakur engaged in commercial fishing in a significant way. Mr. Harris, who was not a disinterested witness, could not recall what his share of the catch was and seemed to give an evasive answer when asked how much he received from working on the Bakur. Mr. Stirling testified that the Workers were to receive remuneration based on the industry standard, that is, 10 percent of the proceeds of the catch, after deducting fuel expenses. No satisfactory explanation was given as to why Mr. Slaney, who was engaged as the cook, would work on the boat for over four months and be paid only the industry standard of 10 percent of the catch. And no explanation was provided as to why the crew would bear the costs of the fuel for such an expensive trip.

[20] I agree with the submission of the Crown that the evidence presented in this case is more consistent with a finding that the commercial fishing activity undertaken on the Bakur was insubstantial. As such, I find that there is no reasonable basis to conclude that the Workers were in fact to be paid on a share crew basis. The evidence as a whole, then, is strongly in favour of a finding that the Workers were engaged in an employment relationship, based on the usual factors.

[21] The second question to be determined is the period of employment. There is no dispute about when the Workers left the Bakur in Trinidad but the starting date of their employment is not clear. I generally accept the testimony of Mr. Stirling in this regard, and conclude that the employment of the Workers commenced on December 20, 2005 and ended on January 16, 2006.

[22] Accordingly, the appeal will be allowed in part on the basis that the decisions of the Minister of National Revenue that Robert Forsey and Rene Slaney were engaged in insurable and pensionable employment should be confirmed, and their period of employment should be varied to include the period from December 20, 2005 to January 16, 2006 only.

Signed at Toronto, Ontario, this 19<sup>th</sup> day of October 2007.

"J. Woods"

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Woods J.

CITATION: 2007TCC639  
COURT FILE NOS.: 2006-3320(EI), 2006-3321(CPP)  
STYLE OF CAUSE: LIMAR FISHING LTD. AND M.N.R.  
PLACE OF HEARING: Kamloops, British Columbia  
DATE OF HEARING: October 1, 2007  
REASONS FOR JUDGMENT BY: The Honourable Justice Judith Woods  
DATE OF JUDGMENT: October 19, 2007

APPEARANCES:

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