

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 -

Cowichan Bay Contractors Ltd.
("Cowichan Bay" or "the contractor")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: James Wolfgang

FILE NO.: 1999/678

DATE OF HEARING: January 21, 2000

DATE OF DECISION: February 14, 2000

DECISION

APPEARANCES

Russ Jackson	for Cowichan Bay Contractors Ltd.
Darryl Nanus	for Cowichan Bay Contractors Ltd
Karl Williams	for Cowichan Bay Contractors Ltd.
Ron Fletcher	for himself
George Reid	for himself
Reg Lech	for himself

No representative for the Director attended.

OVERVIEW

This is an appeal by Cowichan Bay Contractors Ltd (“Cowichan Bay” or “the contractor”) pursuant to Section 112 of the *Employment Standards Act (the “Act”)* from a Determination issued by the Director of Employment Standards on October 21, 1999. The Determination found Cowichan Bay Contractors Ltd had violated Section 18(2), Section 34(2), Section 40(1), Section 58(1) and Section 58(3) of the *Employment Standards Act (the “Act”)* and ordered Cowichan Bay Contractors Ltd to pay \$3,441.38 as follows: Ron A. Fletcher (Fletcher) \$1,320.80, George W. Reid (Reid) \$1,126.00 and Reg Lech (Lech) \$790.44 plus interest of \$204.14. A penalty of \$0.00 was also assessed.

Russ Jackson (Jackson), a director of Cowichan Bay, is seeking to have the Determination set aside and, if that fails, to have minimum wage paid of hours worked.

ISSUE TO BE DECIDED

Does Cowichan Bay owe Ron A. Fletcher, George W. Reid and Reg Lech any wages for travel and work done at Rivers Inlet?

FACTS

Cowichan Bay is a drywall and painting contractor. They had a sub-contract from Unitech, a general contractor, to install drywall etc. on a First Nations project at Rivers Inlet. The company has done a considerable amount of work in isolated communities on

First Nations projects in addition to standard construction contracts. The regular drywall crew was working at another project when the Rivers Inlet contract needed a crew to start installing drywall.

In the Determination Jackson claimed he did not speak with any of the complainants, that they were hired by Tim Hodgetts (Hodgetts). Hodgetts' letter of January 20, 2000 states, in part:

As far as Russ Jackson goes, I did not hire Ron to work in Oweekeno.
Russ asked me for a drywall crew while I was in the Queen Charlottes,
and I gave him Rons phone number. Russ hired him.

Jackson contacted Fletcher by telephone and Fletcher agreed to go to work on the project. The only contact between Jackson and Fletcher was by telephone. Fletcher was to contact other potential employees. He contacted Reid and Lech who also agreed to go to work. Two were hired as tradesmen and one, Lech, was hired as a helper. The company did not directly contact either Reid or Lech.

We had differing evidence as to the terms of employment. The company takes the position they only employ people on a contract basis on isolated projects. They claim the three persons were hired on a price per square foot of installed drywall and at a different rate for taping. They claim it would be crazy to hire unknown people by the hour on an unsupervised job. Further, Jackson stated: "Never would I have allowed overtime had I been aware of any hourly rate". The company claim they do not pay traveling time on any project, as that is included in the price per square foot. The company did agree it would pay travel costs and hotel charges in Port Hardy when the crew was going in to the job.

The company called two witnesses to support their position. One was a painting sub-contractor that does work for Cowichan Bay and the other was a current employee, Karl Williams (Williams), who has worked for the company for eight months. Both indicated they always worked on contract when working out of the headquarters area. Williams did indicate he had been paid on an hourly rate when working on a project in Victoria.

Cowichan Bay submitted a letter from Michael Ashley, who was hired to complete the Rivers Inlet contract. He states he did the work on a contract of 18 cents per square foot basis. He was provided with room and board and travelling expenses but did not receive any travelling time.

Jackson submitted a copy of a newspaper ad for a future project, which was to be placed in the paper indicating no travelling time is paid. Reid disputed that and showed a copy of the newspaper ad for the Rivers Inlet project, which suggested travel time would be paid.

Fletcher, Reid and Lech have a different version of their conditions of employment. They claim the company was in real need of tradesmen and when Fletcher, the only person to talk directly to the company, made the arrangements for the job the company agreed with the rate of \$20.00 per hour for Fletcher and Reid and \$14.00 per hour for Lech. The

company would pay travelling time, expenses, fares and room and board. Fletcher and Reid indicated at the hearing that they had learned to never take a job on a contract basis without seeing the work. There are too many variables to simply take a job on contract sight unseen.

The Determination states Fletcher drove from Honeymoon Bay to Ladysmith and return on November 1, 1998 to pick up the groceries that were to be taken in with the crew. I believe there is an error on when that took place. Fletcher was paid 4 hours for that. The evidence at the hearing indicates Fletcher, Reid and Lech travelled to Port Hardy together on November 01, 1998 and stayed overnight in Port Hardy as the plane left in the morning for Rivers Inlet. They left Port Hardy on the morning of November 2, 1998 and went to work after arriving in Rivers Inlet. The groceries must have been picked up on October 31, 1998 if Fletcher went the day before leaving for Port Hardy. The Determination shows that as taking place on November 1, 1998. The hotel or airline receipts for Port Hardy and to Rivers Inlet were not supplied therefore I am unable to confirm those dates, however, the contractor agreed they paid the hotel in Port Hardy. The invoice for Unitech prepared by Fletcher indicates they started working at 2:30 pm on November 02nd. A letter to the Tribunal from Lech confirms those dates.

There is a reference on page 2 of the Determination to a date of November 02, 1999. This is obviously a typographical error and should read 1998.

Pauli Johnson (Johnson), the daughter of the Band Chief, asked Fletcher for a job while flying to Rivers Inlet. When they arrived he telephoned Jackson, who agreed to hire her. She was to be paid \$10.00 per hour.

They claim they worked 6 days and decided to take Sunday off. They went to a house party on Saturday night attended by a number of the local non-native residents. On Sunday morning the foreman for the general contractor came to their bunkhouse about 11:00 am and wanted them to go to work to allow another trade to proceed with their work. Fletcher and Lech went to work for three hours on that day. They all continued working until November 11, 1998. They claim the majority of the work was completed on that date.

Jackson claims the crew could not have worked November 11 as the plane left Rivers Inlet at 9:40 am. He submitted a copy of a memo from Pacific Coastal Airlines indicating Fletcher, Reid and Lech left November 11/98 however no flight time is indicated. Fletcher submitted a copy of his airline ticket of November 11/98 showing the departure time as 11:50 am.

The company indicates the camp was a “dry camp” meaning no liquor was allowed. Cowichan Bay claim they received a telephone call from the general contractor on Tuesday saying his crew had been drunk and had missed two days work. The company further alleges the complainants quit without notice after being drunk on the job.

Cowichan Bay's submission of November 12/99 to the Tribunal states, in part:

The above persons were severely warned at the place of work for excessive alcohol abuse and my company was threatened to be removed from the project because of it and any further projects. They were excessively drunk on a (sic) ALCOHOL DRY native village at Rivers Inlet. The above incidents can be supported with documentation given the requested time.

In the submission of Jackson to the Tribunal dated December 1, 1999 he states, in part:

Letter from Unitech-

The letter was faxed and mailed to me because my employees were in direct violation of the rules of the project; they were in fact the reason the letter was sent to the other trades. They were to (sic) drunk to make it to work two days in a row. (in an alcohol and drug free work place). Therefore their reason for leaving the jobsite without notice and fraudulently using my credit card to get home

The general contractor did circulate a memo dated February 11, 1999 to all trades complaining about the use of illegal drugs on the project and informing all the contractors if there were any violations their contract would be cancelled. This memo was circulated three months after Fletcher, Reid and Lech left the project and only dealt with illegal drugs, not alcohol.

Fletcher, Reid and Lech deny missing any work from drinking and claim they worked every day while on the project except the Sunday referred to above. Fletcher's Journal of Hours prepared for Cowichan Bay indicates he and Reid attended a Unitech(h) meeting on November 10, 1998 from 8:00 to 9:00 am. I did not receive any evidence of that meeting from the parties. It might be helpful if we knew the purpose of the meeting.

Fletcher, Reid and Lech deny it was a dry camp. They claim liquor was off limits to the natives but was allowed for the non-native residents.

The contractor telephoned the homes of at least two employees, Fletcher and Reid, and complained to their wives about the conduct of their husbands on the project. Fletcher and Reid claim the contractor was intoxicated when he telephoned their wives.

After calling home, Fletcher and Reid became upset and, because they had completed the majority of the work they could do, decided to leave the project. Reid telephoned the airline and made arrangements for them to leave November 11, 1998. They worked in the morning for 2 hours and left for Port Hardy. They claim there was only about ½ days work left that they could do without having to wait for other trades to install their equipment or material.

The contractor did not visit the project but relied on information on the progress of his contract from the general contractor. The contractor claims he was told Fletcher, Reid,

Lech and Johnson had only installed a small amount of drywall and it was, according to the replacement crew who came in later, not of good quality.

Both Fletcher and Reid deny this, claiming they have been in the business for over 20 years each and have a good reputation. They also claim they have never been accused of having a drinking problem in that time. Hodgetts' letter, dated January 20, 1999, states:

“I have known Ron Fletcher for over twelve years. I have never known him to have a problem with work and alcohol. If there is a job to do I know I can rely on him to be there on time and work a full productive day”.

Fletcher claims they loaded a complete three classroom school and drywalled it. They loaded the administration building and drywalled the majority of the second floor level. They also drywalled the ceilings and mechanical room on the first floor. Fletcher claims they could not proceed beyond that point, as some of the other trades were not in the camp. (The other trades were working a 10 days on and 4 days off shift) Fletcher tried to call Jackson on the evening of November 10 to inform him they were caught up. There was no answer and he did not leave a message. There is only one radiotelephone in the village, which is located in the band office.

Jackson claims Fletcher did not contact him for a week after returning home to the Duncan area and he was unaware the crew had left the job. The company is also claiming Fletcher, Reid and Lech illegally used the company credit card to fly from Rivers Inlet to Port Hardy.

Fletcher stated he kept the record of the hours worked by the crew and prepared a statement for Cowichan Bay. Fletcher presented a copy of that statement at the hearing dated November 16, 1998 covering a claim for the monies owed. Fletcher claims to have sent the statement by fax to Cowichan Bay on November 16th. The statement is broken into two parts, the first is a record of total hours worked and the rates of pay for the four employees in the amount of \$4,536.00. The second is titled “TOTAL HOURS FOR FIREPROOFING/TAPING/BOARD PACKING, ETC. BILLED TO UNITEC(H)”. It is a journal of hours on a daily basis of the time spent by each employee on those tasks and includes a statement of the total hours worked by each employee and the rate of pay for a total of \$1,756.00. That amount is to be billed by Cowichan Bay to Unitech and is included in the \$4,536.00. In addition, Fletcher indicated at the hearing he had kept a more detailed logbook, which was not produced as evidence.

The contractor changed his position at the hearing, recalling there were two components to his contract. The installation and taping of the drywall on the walls and ceilings of the buildings and the moving of the material from the warehouse to the point of installation and the fire taping, the latter being the responsibility of the general contractor and to be paid on an hourly rate basis.

The contractor paid Fletcher, Reid and Lech based on square footage of installed drywall reported to them by the general contractor. Johnson was paid an hourly rate based on a statement from the Band Administrator.

The contractor kept no record of hours worked for any of the employees. It is my understanding the delegate relied on the hours recorded by Fletcher in the calculation of the monies owed Fletcher, Reid and Lech.

ANALYSIS

Cowichan Bay had not employed any of the three previously and had received Fletcher's telephone number from one of his sub-contactors. All discussion on terms and conditions for the Rivers Inlet project took place between Fletcher and the company. Fletcher indicates he cleared the hiring and the rates of pay for Reid and Lech with the company before they left for Port Hardy. Reid produced a newspaper ad for the job indicating travel was included. Fletcher picked up their groceries in Ladysmith the day before the three travelled together to Port Hardy where they stayed overnight. They caught the plane the next morning and began work on arriving at the project. On the plane Johnson approached Fletcher asking for a job. Fletcher called the company when they arrived and they agreed to hire her. We have had no evidence as to what tools, either personal or company, were taken with them from the shop to the job site.

The general contractor appears to be responsible for the movement of the material from the warehouse to the point of installation and for the fire tapping on the job. This portion of the project was billed to the general contractor and was paid on an hourly rate. We have no evidence of any discussion between Fletcher and the company from the job site as to what rate would be paid for that work. It leads me to believe the rates were established before they left for Rivers Inlet.

It is difficult to believe Fletcher would misrepresent the terms and rates of employment to Reid and Lech at the time of their hire. I am inclined to believe Fletcher's evidence rather than the company's on that point. I accept the company does employ tradesmen on a contract basis but do not believe that was the case in this instance.

Reid presented newspaper ads, which showed the conditions in the ads have changed following the complaints to the Employment Standards Branch. They no longer suggest travel time is paid. I believe the payment of travel time had been agreed and I support the Determination on that point.

We know Johnson was paid on an hourly basis, however the company argues that was done to keep peace at the job site rather than as an admission hourly rates were agreed to be paid. As Johnson's rate was different than either Fletcher, Reid or Lech's rate the company did not provide any evidence of how they were to pay Johnson if it was not on an hourly basis.

The company complained about the crew losing two days work as a result of excessive drinking. They claim they nearly lost their contract as a result of that. No evidence was produced, either from the general contractor or any of the sub-contractors that would support the seriousness of that charge. The letter from the general contractor dealing with illegal drugs appears to have been issued three months after Fletcher, Reid and Lech left the project.

We have no evidence from the employer of the hours worked by the crew therefore I will rely on the hours prepared by Fletcher for the company and amended by the delegate in the Determination except where noted.

It should be noted, the statement issued by Fletcher to Cowichan Bay, dated November 16, 1998, does not appear to contain any time for Fletcher picking up the groceries or travelling time for Fletcher, Reid and Lech from Duncan to Rivers Inlet and return. It does not contain any overtime but, I believe, reflects the actual hours worked on site at Rivers Inlet. There is an error in the travel expenses on the same statement. If travel expenses were to be paid at \$0.32 per kilometre and the distance is 720 kms. return, the amount should be \$230.40 not the \$216.00 shown. The Determination does not address that point and that is referred back for review as well.

There appears to be an error in the Determination in respect to the travel time. The calculations for Fletcher show him picking up the groceries November 1, 1998. The evidence indicates he picked up the groceries the day before leaving for Port Hardy. If Fletcher picked up the groceries the day before leaving Duncan, he would have been entitled to 4 hours on Saturday, October 31, 1998 not November 1, 1998. Fletcher, Reid and Lech left for Port Hardy on November 1, 1998, according to the letter from Lech and the evidence at the hearing. They stayed in a hotel overnight and flew to Rivers Inlet the next morning. This would mean Fletcher picked up the groceries October 31, 1998 not November 1st. November 1st would be travel time to Port Hardy. They should receive 9.75 hours for travel time for November 1st, if that is the correct travel time from Duncan to Port Hardy. November 2nd, the day they flew to Rivers Inlet, would be a travel and workday. Fletcher indicates they started working in the afternoon of November 2nd and should receive 9 hours for travel and work, assuming the 9 hours are correct.

There appears to be an error in the report Fletcher prepared on the hours to be billed to Unitech for November 2nd. In the hours column he has indicated the hours worked was from 2:30 to 5:00. In the summary he states they carried drywall for 3 hours, a difference of ½ hour.

On November 11, 1998, according to Fletcher, they all worked two hours and caught the plane at 11:50 am to Port Hardy. From there the three of them drove back to Duncan. That creates a different pattern of work and travel than on the way to Rivers Inlet. Here they worked two hours, travelled by plane to Port Hardy and then drove to Duncan on the same day. That would require a different amount of travel time than on the trip in, which was over a two-day period.

The Determination gives them each 9.75 hours on November 11, the same as they were awarded on November 2nd. On November 2nd the Determination appears to indicate they travelled from Duncan to Rivers Inlet in one day. That was not the evidence at the hearing. On November 11th, they should receive pay for working 2 hours, travel time from Rivers Inlet to Port Hardy and the appropriate travel time to Duncan. The matter is referred back to the Branch for review and a possible correction.

Finally, the Branch may want to review the employment contract of Michael Ashley and Cowichan Bay to determine if any travelling time may be owed.

ORDER

In accordance with Section 115 of the *Act* I order the Determination dated October 21, 1999 be confirmed except where amended and is referred back to the Branch for the calculation of the proper hours. Interest is to be calculated in accordance with Section 88 of the *Act*.

James Wolfgang
Adjudicator
Employment Standards Tribunal