

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 -

Oliver Cottam, operating as Wilderness Contracting
("Cottam")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Hans Suhr
FILE NO.:	1999/75
DATE OF HEARING:	April 8, 1999
DATE OF DECISION	April 27, 1999

DECISION

APPEARANCES

Oliver Cottam	on his own behalf
Robert Joyce	on behalf of the Director of Employment Standards
Paul Kenny	on his own behalf
Dennis Rentmeester	on his own behalf
Lorne Christensen	on his own behalf
Cst. Randall Reed	via telephone conference call, on behalf of the Director of Employment Standards
George Kunz	on behalf of the Director of Employment Standards
Pat McColl	on behalf of the Director of Employment Standards
Shane McColl	on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by Oliver Cottam operating as Wilderness Contracting (“Cottam”), under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination dated January 21, 1999 issued by a delegate of the Director of Employment Standards (the “Director”). Cottam alleges that the delegate of the Director erred in the Determination by concluding that wages were owed in various amounts to Paul Kenny (“Kenny”), Dennis Rentmeester (“Rentmeester”) and Lorne Christensen (“Christensen”) in the total amount of \$10,012.48 (includes interest).

Cottam further alleges that he was not the employer of Kenny, Rentmeester and Christensen.

Cottam finally alleges that the delegate of the Director did not provide Cottam an opportunity to respond to the complaints filed.

PRELIMINARY ISSUE

The delegate of the Director contends that Cottam did not at any time during the investigation deny that he was the owner of Wilderness Contracting..

The delegate of the Director further contends that Cottam also did not during the investigation bring up Allan Edwards.

The delegate of the Director submits that pursuant to earlier decisions of the Tribunal, this panel should not accept information on appeal that was not provided during the investigation.

This panel ruled that Cottam would be entitled to present reasons why the information with respect to the ownership issue and Allan Edwards was not provided to the delegate of the Director during the investigation. This panel further ruled that any decision with respect to admissibility of that evidence would be reserved until all the evidence had been presented.

ISSUES TO BE DECIDED

The issues to be decided in this appeal are:

1. Is Cottam entitled to introduce information at the appeal that he did not provide during the investigation by the delegate of the Director ?
2. Did the delegate of the Director provide an opportunity to Cottam to respond to the allegations filed in the complaints ?
3. Does Cottam owe wages to Kenny, Rentmeester and Christensen ?

FACTS

I was presented with a substantial amount of verbal evidence by witnesses and as well, a great number of documents to consider. I will refer only to that evidence which was relevant to the issues before me.

Cst. Reed testified that:

- he is a regular RCMP member of the Fort Nelson detachment;
- he has been an RCMP officer for 13 1/2 years;
- he met with Cottam on June 17, 1998 with respect to another matter;
- during the course of that meeting, Cottam provided a statement which was tape recorded;
- at the request of the delegate of the Director, he prepared a brief transcript of a portion of that statement;

- during Cottam's statement, Cottam acknowledged that he used the alias "Allan Edwards" for the purpose of dealing with I.C.B.C. and the Motor Vehicle Branch;

Cottam testified that:

- he never got any material from the delegate of the Director in regard to the complaints;
- the "Demand for Employer Records" was served on his brother John Cottam;
- he did contact the Employment Standards Office in Dawson Creek in mid-August 1998 to discuss the complaints;
- prior to this hearing he has never seen any time sheets to support the allegations in the complaints;
- he believes he spoke to Cst. Reed but did not say that he used the alias "Allan Edwards";
- Wilderness Contracting was owned by Allan Edwards and Shane McColl;
- he was only the manager of Wilderness Contracting;
- the material supplied during the appeal clearly shows that he was not the owner of Wilderness Contracting
- the request for name search clearly shows that the owners of Wilderness Contracting were Allan Edwards and Shane McColl.

In response to cross examination by the delegate of the Director, Cottam stated:

- he attended at the Employment Standards Branch office in Dawson Creek at which time the delegate of the Director reviewed the 3 complaints with him;
- he subsequently telephoned the delegate of the Director on numerous occasions;
- he subsequently submitted information via fax to the delegate of the Director;
- he advised the delegate of the Director that all wages owing had been paid;
- he advised the delegate of the Director that McColl owed the wages to the complainants;
- he was not sure where he got the time sheet information from, it may have been a Victor Salahub (sic);
- the delegate of the Director might have requested that Cottam send any further information ;
- he may have written some of the time sheet information in regard to Kenny;
- he has never used the alias "Allan Edwards";
- he has never used any alias;
- he hired Kenny and Rentmeester but Victor Salahub (sic) hired Christensen;
- he had nothing to do with Wilderness Contracting except work for them;
- he is still working for Wilderness Contracting;
- he filed a "Notice of Claim" in Small Claims Court on behalf of Wilderness Contracting and Oliver Cottam alleging that "...I give this Company a bill for

\$7700 plus GST Total \$8239 and they paid another man, not my Company, plus they sent my truck on to public property and it was wrecked.....”

- that it was really Allan Edwards who gave the bill to the Company referred to in the Notice of Claim;
- he is currently working “up north” in the Yukon;
- he is not doing anything “down here”, meaning the Fort St. John or Fort Nelson area;
- he believes that Wilderness Contracting was never registered as a partnership.

George Kunz (“Kunz”) testified that:

- he is employed by the Peace River Regional District as a Public Works Supervisor, responsible for solid waste disposal, sewers, etc.;
- he does not know an Oliver Cottam;
- he does know the individual seated across from him (Cottam) as a John Peterson (“Peterson”) (sic);
- Peterson has been doing salvage work (extracting scrap metals, etc.) in various landfills in the North Peace area, around Fort St. John;
- he has spoken many times to Peterson on the telephone and met him (Peterson) in his (Kunz’) office where he spoke to Peterson in person;
- a John Cottam, who Kunz has never personally met, has also performed work for the Regional District in the Hudson Hope area.

Pat McColl (“P. McColl”) testified that:

- she knows Cottam;
- she and her husband hauled steel for Cottam;
- around the end of March 1998, she and her husband decided to go into a partnership with Cottam;
- she arranged for a bank account to be opened in the name of Wilderness Contracting and the signing authority on the account were Shane McColl and Allan Edwards;
- the name Allan Edwards was supplied by Cottam, he signed lots of things with that name;
- she was aware that Cottam used a number of names.

In response to cross examination by Cottam, P. McColl stated:

- the partners in Wilderness Contracting at the end of March 1998 were Shane McColl and Allan Edwards;
- the cheque from West Coast Energy was payable to Wilderness Contracting and was deposited into the Wilderness Contracting bank account;
- during February and up to March 28, 1998, she and Shane McColl had no involvement with Wilderness Contracting;

- the partnership between Shane McColl and Cottam (Allan Edwards) was dissolved in early April 1998 as a great number of bills started coming in for material that Cottam had charged prior to the partnership starting;
- both she and Shane had given money to Kenny, Rentmeester and Christensen on occasions prior to getting involved in the partnership when Cottam left town and had not provided them with any money to pay for food or lodging.

Shane McColl (“S. McColl”) testified that:

- he knows Cottam;
- he also knows Cottam operates under a number of other names, Allan Edwards, English Brothers, Wilderness Contracting, Open Heart for Food and Shelter Society, John Cottam, Oliver Cotton, Oliver Cottage;
- he was made aware of the various names used by Cottam through his business dealings, hearing Cottam on the telephone and having been told by Cottam himself;
- there are currently a number of ongoing civil actions between Cottam and himself;
- he had agreed to enter into a partnership with Cottam on March 28, 1998 and at that time he and Cottam went to find out if they could register the partnership as Wilderness Contracting;
- he was surprised that Cottam signed the application for a name search as Allan Edwards but was advised by Cottam that he did this to remain a ‘silent partner’;
- he decided to dissolve the partnership after it became apparent that there were problems with the number of bills coming in for payment;
- a notice dissolving the partnership effective April 14, 1998 was placed in the local newspaper;
- his only involvement with Cottam prior to March 28, 1998 was that his trucking company hauled steel for Cottam;
- he knew Kenny, Rentmeester and Christensen as employees of Cottam;
- he never made any decisions with respect to Wilderness Contracting until after March 28, 1998;

In response to cross examination by Cottam, S, McColl stated:

- Rentmeester performed some work for S, McColl in April 1998;
- he received the cheque from West Coast Energy in early April 1998 and deposited it into the Wilderness Contracting account from which the bills for Wilderness Contracting were paid;
- he provided money to Kenny, Rentmeester and Christensen to allow them to buy food on the occasions when Cottam left town and did not provide them with any money;
- he did not employ either Kenny, Rentmeester or Christensen during the period covered by their complaints;

The delegate of the Director testified that:

- Cottam attended a meeting at the Employment Standards office to review the complaints and discuss the issues;
- Cottam contacted the office by telephone on numerous occasions;
- Cottam promised to provide information and statements from witnesses on several occasions yet nothing was provided;
- the information provided by the complainants and the subsequent investigation conducted supports the conclusions reached in the Determination;
- Cottam did not dispute that he was the owner of Wilderness Contracting until after the Determination was issued;

Kenny testified that:

- he was hired by Cottam;
- he worked for Cottam from February 17 to March 15, 1998;
- he never received any wages or wage statement from Cottam;
- he only ever got \$20 here and there to enable him to buy food;

In response to cross examination from Cottam, Kenny stated;

- he only got a little bit of money from Cottam;
- he did not get money from Cottam on a regular basis;
- Cottam had never given him any money to be passed on to Rentmeester.

The panel admonished Cottam as he was badgering the witness. Cottam refused to stop badgering the witness therefore he was advised that the panel would not permit him to continue his cross examination unless his questions were properly put and relevant to the issues before this panel.

In response to cross examination by the delegate of the Director, Kenny stated that he recorded his hours on the time slips on a daily basis.

Christensen testified that:

- he was hired by Cottam and his brother John;
- he worked for Cottam from March 7 to March 28, 1998;
- he had to sign in and out at the jobsite at West Coast Energy;
- he was given \$20 a week for food from Cottam;
- he told Cottam that he wanted to be paid \$18 per hour and Cottam agreed, but when it was time to get paid, Cottam refused to pay him anything and destroyed the original time sheets;
- he did not meet Victor Salahub (sic) until the middle of March 1998.

In response to cross examination by Cottam, Christensen stated:

- he worked on the water tank in March 1998;
- he signed in and out each day at West Coast Energy;
- he was never paid any wages for the work.

The panel had to again admonish Cottam for badgering the witness. Cottam was again advised that he would not be permitted to continue his cross examination unless his questions were properly put and relevant to the issues before this panel.

In response to cross examination by the delegate of the Director, Christensen stated that he recorded his hours on the time slips on a daily basis.

Rentmeester stated he had nothing to add to the material already provided with his complaint.

In response to cross examination by the delegate of the Director, Rentmeester stated that he recorded his hours on the time slips on a daily basis.

ANALYSIS

The onus of establishing that the delegate of the Director erred in the Determination rests with the appellant, in this case, Cottam.

A central issue in cases such as this is often the credibility of the participants and the witnesses.

A guide frequently relied on with respect to credibility issues is found in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) at 356-8 where the court said:

....The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of a story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses and of those shrewd persons adept in the half-lie and of long and successful experience in combining skillful exaggeration with partial suppression of the truth....

In my view therefore, when assessing the credibility of a witness, a number of factors are to be considered. These include:

- the demeanour of the witness
- opportunities for knowledge
- powers of observation
- judgment and memory
- ability to describe clearly what has been said and heard
- the probability of the event happening in the manner suggested

Cottam's evidence was not clear on any of the issues in dispute. Cottam was evasive and argumentative when responding to questions put to him. Cottam was unable to recall issues which might be viewed as being detrimental to his position yet he claimed to clearly recall other issues which could be viewed as being supportive of his position. Cottam, on a number of occasions, clearly contradicted even his own evidence given during the hearing. Cottam was, simply put, just not believable. Cottam presented himself before this panel as an example of the individual referred to in *Faryna v. Chorny supra* as a "shrewd person(s) adept in the half-lie and of long and successful experience in combining skillful exaggeration with partial suppression of the truth...."

Cottam's lack of credibility is clearly demonstrated when his evidence is compared with the evidence provided by Cst. Reed and George Kunz, both truly independent witnesses and neither having any interest in the outcome of this matter.

Therefore, when considering the evidence provided, where the evidence of Cottam differs from the evidence of the other witnesses, I prefer the evidence of the other witnesses.

I now turn to the issues to be decided in this appeal.

1. Is Cottam entitled to introduce information at the appeal that he did not provide during the investigation by the delegate of the Director ?

The burden in this matter is on Cottam to show some reason why the Tribunal should allow him to challenge the conclusions reached in the Determination with information he failed or refused to provide during the investigation by the delegate of the Director. Cottam did not provide any reasonable explanation to this panel as to why the issue of ownership only arose after the Determination was issued. Furthermore, Cottam did not offer any explanation, reasonable or otherwise, at the time of filing his appeal, he only makes the bald assertion that he was not the employer. Those assertions are simply not sufficient. On the evidence before me, there are no facts and circumstances that would justify the Tribunal relaxing its approach in cases such as this, where an appellant seeks to challenge conclusions of fact in the Determination with material that it failed or refused to produce during the investigation.

That approach is stated in several cases that have come to the Tribunal, including *Tri-West Tractor Ltd.* BCEST No. D268/96 and *Kaiser Stables Ltd.* BCEST No. D058/97. There

are sound policy reasons for limiting the material before the Tribunal in an appeal to what has been disclosed during the investigation, unless there is a valid reason shown for allowing the additional material to be submitted. Those reasons are grounded in the purposes and objects of the *Act*. Section 2 of the *Act* states, in part:

2. *The purposes of this Act are to:*

(d) provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act,

An approach that, in effect, treats appeals to the Tribunal as a trial *de novo*, where the parties are free to ignore the statutory requirements to disclose information during an investigation and add any material to the appeal is not consistent with the above stated purpose.

Additionally, the Tribunal is not intended to be the decision maker of first instance under the *Act* and it is not the function of the Tribunal to investigate complaints. That authority is given by the *Act* exclusively to the Director under Part 10. As this case clearly demonstrates, the investigative role of the Director is frequently adversarial. One of the primary objectives of the *Act* is to establish and maintain the Tribunal as an adjudicative body independent of the Branch and of the authority, duties and responsibilities of the Director outlined in Parts 10 and 11 of the *Act*. An approach that avoids compromising the statutory function of the Tribunal and its impartiality as an adjudicative body is consistent with that objective.

For all of the above reasons, I conclude that Cottam is not entitled to present evidence before this panel that he failed or refused to provide during the investigation by the delegate of the Director.

I now turn to the next issue to be decided in this appeal.

2. Did the delegate of the Director provide an opportunity to Cottam to respond to the allegations filed in the complaints ?

The obligation of the Director to provide an opportunity for a person under investigation to respond to allegations is found in Section 77 of the *Act* which states:

Section 77, Opportunity to respond

If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

Cottam's assertion, both in his appeal and before this panel, were that he did not have an opportunity to respond to the allegations raised in the complaints. Cottam's evidence was

in direct conflict with the evidence of the delegate of the Director in this matter. Cottam agreed in cross examination that he visited the Employment Standards Branch office in Dawson Creek, made numerous telephone calls to that office and provided some information via facsimile.

The evidence of the delegate of the Director was that Cottam visited the Employment Standards Branch offices in Dawson Creek, made numerous telephone calls to the office and provided some information via facsimile to the office. While Cottam may be unhappy with the conclusions reached in the Determination, it cannot be said that he did not have an opportunity to respond to the allegations being investigated.

Based on the evidence provided and on the balance of probabilities, I conclude that Cottam was provided with ample opportunity to respond to the allegations raised in the complaints filed.

I now turn to the final issue to be decided in this appeal.

3. Does Cottam owe wages to Kenny, Rentmeester and Christensen ?

The uncontradicted evidence was that Kenny, Rentmeester and Christensen were hired by Wilderness Contracting. Even if I were to accept that a principal of Wilderness Contracting was a person known as Allan Edwards, the evidence of Cst. Reed and the McColls was that Cottam used the alias Allan Edwards. Furthermore the evidence of Kunz, who only knew Cottam as a John Peterson, and the evidence of S. McColl certainly indicates Cottam frequently used an alias while engaging in numerous business ventures.

Cottam was unable to explain why, if he did not owe wages to his former employees, there were no records to prove, as he claimed at one point, that wages had been paid in full. Cottam did not challenge the evidence of Christensen that Cottam destroyed the original time slips because he was upset with Christensen about the wage rate. The clear evidence was that Cottam, aside from periodic payments for food and lodging, did not pay wages to his former employees for work performed during the periods as set forth in the Determination.

The evidence of Kenny, Rentmeester and Christensen was that the time slips provided to the delegate of the Director were completed on a daily basis as the work was performed.

For all of the above reasons and on the balance of probabilities, I conclude that Cottam owes wages to Kenny, Rentmeester and Christensen as calculated by the delegate of the Director and set forth in the Determination.

The appeal by Cottam is therefore dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated January 21, 1999 be confirmed in the amount of **\$10,012.48** together with whatever further interest that may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

Hans Suhr
Adjudicator
Employment Standards Tribunal