

An appeal

- by -

Tom Dodsworth  
(‘Dodsworth’)

- 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:** James Wolfgang

**FILE No.:** 2000/825

**DATE OF HEARING:** April 27, 2001

**DATE OF DECISION:** May 30, 2001



## DECISION

### APPEARANCES:

Tom Dodsworth	for himself
Marilyn Dodsworth	for T. Dodsworth
Jim Ethier	DRGD Garage Door Doctor
Cory Paisley	DRGD Garage Door Doctor
Caroline Paisley	DRGD Garage Door Doctor

### OVERVIEW

This is an appeal by Tom Dodsworth (“Dodsworth”) pursuant to Section 112 of the *Employment Standards Act (the “Act”)* from a Determination dated November 9, 2000 by the Director. Dodsworth alleges he was an employee of DRGD Garage Door Doctor Canada Ltd (“DRGD”) and was not paid wages in accordance with the *Act*. Dodsworth claims he is owed \$1,927.51. DRGD claim Dodsworth was to become a partner in the business and at no time was an employee. The Determination found the *Act* had not been contravened and no action was taken. The Determination found, under Section 76:

- (2) The director may refuse to investigate a complaint or may stop or postpone investigating a complaint if
  - (c) The complaint is frivolous, vexatious or trivial or not made in good faith.

As a result the investigation ceased and the file was closed.

Dodsworth claims the delegate failed to properly investigate the facts, declined to meet directly with him, never reviewed his documents, nor allowed him to see the records relied on by the company and misrepresented the information given to the delegate.

### ISSUE

Was Dodsworth an employee of DRGD and, if so, is he owed any wages for time worked?

### ARGUMENT

Dodsworth was in a tent trailer rental business with Cory Paisley (“Paisley”). They operated the business from their homes and had a joint personal bank account, which was used to deposit the rent and to make loan payments.



Paisley had been operating another company, Garage Door Doctor, as a sole proprietor for about 10 years. In 1997 he formed DRGD Garage Door Doctor Canada Ltd. in an attempt to protect the name. The DRGD remained dormant until 1999 when Paisley decided to expand his business and began to form a partnership with his brother-in-law, Jim Ethier (“Ethier”).

In July and August 1999, Dodsworth discussed with Paisley the possibility of getting involved with him in the garage door business. Paisley claims Dodsworth was coming in as a full partner with a 1/3 share of the business. The evidence of Ethier supported this proposition. Dodsworth claims he was not a principal in DRGD but intended to purchase a share in the company under a share purchase agreement and work as an employee.

Dodsworth admitted he had no experience in the door business but could learn and would bring marketing skills to help expand the business. Ethier was not particularly supportive of the idea of another partner however he finally agreed.

The process of setting up the company began. They were going to use DRGD as the operating company. Paisley, Ethier and Dodsworth went to the bank and arranged an account for the new business. On September 30, 1999 they signed a “Business Banking Agreement” and a “Business Service Master Agreement”. Dodsworth was listed as a signing officer with the title Vice-President. Paisley was listed as President and Ethier as a Director. They also had meetings with the accountant and Paisley’s lawyer to arrange the proper papers and for the transfer of Garage Door Doctor into the new company, DRGD.

DRGD found a new location for a shop and began to do renovations in mid-September. Paisley, Ethier and Dodsworth all worked on the renovations, many times in the evenings after their regular workday. The new company was to officially open on October 1, 1999.

As Dodsworth had no knowledge of the door repair business he began going with Paisley to learn the operation. During this time Dodsworth claims he was assisting Paisley do the work. Paisley claims Dodsworth simply rode around with him and watched what he was doing. After some time Dodsworth began going out on his own and doing repairs. He modified his truck to carry the tools and equipment needed and carried a cell phone that he claims he specifically purchased for the business.

Dodsworth claims he has a record of the hours worked for DRGD and relies on the times the babysitter was employed in support of those hours. Dodsworth’s wife worked as well therefore he needed someone to watch the children while he was at work. Dodsworth claims he worked 9 hours per day. Paisley disputes this, claiming the business was only open from 9:00 to 5:00 and further, as they were starting up the amount of work coming into the shop was small. He claims many days he worked considerably less than 8 hours. Paisley also claims a large amount of work done in the shop by Dodsworth was work on Dodsworth’s own vehicle making it into a service truck. Dodsworth argues he was at the shop or on the job from 8:00 a.m. to 5:00 p.m. He claims in the beginning, the shop was open from 8:00 a.m. to 5:00 p.m. and was later changed to 9:00 to 5:00. He also submitted cell phone records that he claims support the hours he worked.



The pay system was arranged on a draw basis occurring every two weeks. According to Dodsworth, in the first half of October the draw was to be \$900.00, in the second half it was to be \$1,000.00 and in the first half of November to be \$900.00. Dodsworth claims he did not receive the first \$900.00 in October as he was out of town and it was not given to him when he returned. He did receive the next two draws for a total of \$1,900.00. He claims he did not receive any money from November 22 to November 26<sup>th</sup>. According to Paisley, they each took the same \$1,900.00 draw from the company in October and November.

Paisley stated it became obvious quite early that there was not enough business coming in to support three partners. Paisley advised Dodsworth on November 26, 1999 they were not going to proceed with the partnership and he was offered employment as a contract employee. Dodsworth refused this offer. At some point Paisley advised his lawyer not to proceed with the partnership documents as he had been instructed earlier but to change the number of partners from three to two. Ethier was to be a 1/3 partner while he would hold 2/3 of the shares.

When Dodsworth checked the joint trailer rental bank account in November he found Paisley had withdrawn \$3,000 on October 18, 1999. He claims when he approached Paisley he agreed he would repay the money. When no money was forthcoming Dodsworth wrote Paisley informing him if the money was not repaid by February 10, 2000 he would start court proceedings. On February 9, 2000 Dodsworth stated Paisley informed him by telephone that he would not repay the money and indicated he would be filing a counter suit. This prompted Dodsworth on February 16, 2000 to file a small debts claim to recover 1/2 of the \$3,000.00.

According to Paisley, when the three partners were discussing finances, Dodsworth offered the money in the tent trailer rental account to be used in DRGD. Ethier's evidence supports that of Paisley.

In a letter to the small debts court dated February 15, 2000 Dodsworth states Paisley sought permission to borrow \$1,000 from the trailer rental joint bank account and he agreed. Dodsworth claims he was not aware of the reason for the loan and states he has no knowledge of what the money was used for.

Dodsworth claims he lost \$1,500 from the trailer account and was paid \$1,900 for over 2 months work.

DRDG filed a counter suit against Dodsworth on March 3, 2000 seeking the return of the \$1,900.00 and \$1,200.00 for welding work done on Dodsworth's truck.

Both court actions failed in respect to the money however the judge ordered Dodsworth to return the uniform that he said he paid for.

Dodsworth went to a lawyer who suggested he go to Employment Standards. Dodsworth filed a complaint with the Employment Standards Branch dated February 17, 2000 claiming wages and overtime. The Determination found no employee/employer relationship and rejected the complaint. It also stated Dodsworth was paid for the work he performed as a partner. Further, the



delegate of the Branch believes the complaint was filed in retaliation of the action in small debts court.

Dodsworth felt he had contributed to the business and had not been paid equally. He claimed he was not a partner but an employee and that he did not receive compensation for 484.25 hours he worked. He claims at the time of filing his complaint he had no knowledge of the outcome of the court cases.

## **THE FACTS AND ANALYSIS**

The question that must be addressed is whether Dodsworth was to be a partner in DRGD or whether he was to be shareholder and an employee?

In the beginning I believe all the parties were sincere in forming a business relationship. There is no doubt that Dodsworth intended on participating in DRGD. The extensive alterations made to his truck clearly establish that intent. If he were to be a partner this would be a failed business venture and the Tribunal is not in a position to provide any relief. As a shareholder it would be quite possible for Dodsworth to also be an employee.

We have some strong evidence to indicate, while there was to be a purchase of shares, the prime objective was to form a partnership of the three parties. There were only going to be three shares with each partner holding one share. Dodsworth and, I presume Ethier, were to purchase their shares from Paisley for some undisclosed amount.

From the explanation of Ethier, they were to operate as separate contractors under the umbrella organization of DRGD. Initially there was to be a cap of \$2,000.00 on what each partner would take out of the business each month before transferring money to DRGD. The cap was expected to increase as the business improved.

If Dodsworth was to be a shareholder and employee, we heard no evidence how he was to be paid. He has claimed he worked 484.25 hours however none of the documents from anyone indicates how that would be converted into wages. Each of the parties took a draw from the company, although Dodsworth claims he was not paid the first October draw of \$900.00 he admits he received the other two. If he were to receive a draw or dividend from the business equal to the other parties was he to be paid wages in addition? This would seem to place him in a better position than the other two parties.

All of the evidence points to Dodsworth being more than an “arms length” shareholder. He signed the banking documents and is listed as an officer of the company. He has signing authority for cheques and, in fact signed some. He appears to have signed to approve the Yellow Page ad. He attended meetings with both the lawyer and the accountant. He appears to have fully and equally participated in the creation and start-up of DRGD.

I agree the issue around the tent trailer rental business in not before the Tribunal, however the withdrawal of the \$3,000 from the bank account, must be considered. If, as Paisley claims,



Dodsworth offered to use the money from the tent trailer rental business to pay for renovations and get the business started, it strengthens the case Dodsworth was a partner and not a shareholder. If Paisley is correct and Dodsworth offered the money to the company in good faith, when DRGD made the decision to not proceed with the partnership it would only seem fair that they would repay Dodsworth his share of the \$3,000. Unfortunately, the Tribunal does not have authority to make that happen.

I do have some difficulty with the record of hours provided by Dodsworth. The calendar indicates when the babysitter is at his house but that does not place him at work for DRGD. DRGD kept no records of the hours worked by Dodsworth, claiming as a potential partner, there was no requirement to do so. His cell phone records are an indication of work or time spent but do not assist in determining if a partner in the business or an employee made the calls.

Dodsworth did incur some considerable cost to get into the business. He claims he paid \$3,000 for the babysitter, lost \$1,500.00 from his share of the trailer rental account and was only paid \$1,900 for over two months work. He also made substantial alterations to his vehicle that would appear to limit its use for other purposes. Dodsworth has lost a considerable amount of money and time, which went to the benefit of DRGD. However I agree with the delegate that no employee/employer relationship existed and the Tribunal is without jurisdiction to correct this situation, unfortunate as it may be.

This is an example of the requirement for all of the terms of a business relationship to be in place before the business opens.

I feel there may not have been as comprehensive an investigation of Dodsworth's complaint as one could expect. The delegate appears to believe the complaint was in retaliation to the suit filed by DRGD and dismissed the complaint. I may not agree with the delegate that Dodsworth's complaint was frivolous etc., but believe if a full investigation were conducted it would not have found Dodsworth to be an employee.

## **ORDER**

In accordance with Section 115 of the *Act* I confirm the Determination by the Director dated November 9, 2000.

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**James Wolfgang**  
**Adjudicator**  
**Employment Standards Tribunal**