

An appeal

- by -

Gordon Bourroughs
("Bourroughs")

- 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.: 2002/52

DATE OF HEARING: May 27, 2002

DATE OF DECISION: July 15, 2002

DECISION

APPEARANCES:

Belle DeRoche	for Gordon Bourroughs
Gordon Bourroughs	for himself
Les Neubauer	for Milton Pawn op. as Duncan Rental and Sales
Michael Jones	for Gordon Bourroughs
Steven Magrath	for Gordon Bourroughs
Carol Quast	for Gordon Bourroughs
Richard Brock	for Milton Pawn op. as Duncan Rental and Sales
Donald Taylor	Counsel for Milton Pawn op. as Duncan Rental and Sales

OVERVIEW

This is an appeal by Gordon Bourroughs (“Bourroughs”) pursuant to Section 112 of the *Employment Standards Act (the “Act”)* of a Determination issued by the Director of Employment Standards (the “Director”) dated February 04, 2001. The Determination found Bourroughs was not an employee within the meaning of the *Act* during the period August 10, 1998 until February 14, 2000 therefore Milton Pawn operating as Duncan Rental and Sales (“DRS”) did not owe any money to Bourroughs for wages. The Determination also found Bourroughs had been paid properly from February 18, 2000 until August 11, 2000 and was not entitled to any additional wages for overtime, statutory holiday pay or vacation pay for the period February 18, 2000 until August 11, 2000. The Determination found Bourroughs had been paid one-week’s wages as compensation for length of service when he was terminated on August 11, 2000.

Bourroughs claimed he was hired as a small engine mechanic by DRS for the period August 10, 1998 until February 14, 2000 and had not been paid wages and vacation pay. He also claimed he had not been paid overtime, statutory holiday pay or vacation pay for the period February 18, 2000 until August 11, 2000.

DRS claims Bourroughs was a sub-contractor doing repairs to their equipment and also repairs to equipment brought to the shop by customers. They also claim Bourroughs was to receive 50% of the labour cost of repairs done to customer equipment. He was to repair the DRS equipment in lieu of shop rental. DRS agreed when Bourroughs returned to work on February 18, 2000 he was paid as an employee at the rate of \$8.00 per hour.

In a letter dated December 03, 2001 the delegate for the Director issued a claim for \$13,057.78 to Neubauer Holdings Ltd. operating as Duncan Rental and Sales. The Employment Standards Branch (the “Branch”) identified this as a claim by Gordon Bourroughs.

A hearing was held May 27, 2002 and evidence was taken from all parties under oath.

At the hearing Bourroughs denied he had made a claim in that amount and further claimed he had not seen the above letter until the hearing.

The question of overtime, statutory holiday pay or vacation pay for the period February 18, 2000 until August 11, 2000 was addressed in the Determination. No evidence was presented at the hearing to counter that finding.

At the hearing I requested further evidence to be submitted by DRS. This evidence was to also be provided to the Branch and Bourroughs. The material was received in my office on June 04, 2002 and copies were supplied to the Branch and Bourroughs. Bourroughs' copy was sent to the Branch.

Upon receipt of that information I requested further evidence from DRS, which I received June 12, 2002. They sent copies to the Branch and Bourroughs. The Tribunal extended the time for reply until June 26, 2002. No replies were received.

There was no penalty assessed against DRS.

ISSUE

Was Bourroughs an employee of DRS during the period August 10, 1998 until February 14, 2000 and, if so, is he entitled to wages and vacation pay?

THE FACTS and ARGUMENT

Bourroughs claims he was an employee at DRS from August 10, 1998 until February 14, 2000. He claims he worked 9 hours per day 6 days per week, opening the shop in the morning and closing it at night. Bourroughs supplied his own tools worth about \$15,000. DRS did not pay any rental on his tools nor did they replace any that were lost or broken. When Bourroughs requested his cheque after he had worked two weeks he was told by Les Neubauer ("Neubauer"), the owner of DRS, there was no money to pay him. He claims he was offered a partnership when Neubauer was to retire in six months. This was later changed to retiring in one year and again later to eighteen months.

Bourroughs also worked for DRS from February 18, 2000 until August 11, 2000.

Belle DeRoche ("DeRoche"), Bourroughs' spouse, claimed Neubauer came to their house on July 25, 1998 and ask Bourroughs to come to work for him at Duncan Rentals and Sales. Bourroughs had asked for \$10.00 per hour when he started working in August 1998. Bourroughs claims Neubauer stated it was a new business just starting up and he could not pay more than \$8.00 per hour.

Bourroughs was in receipt of Social Assistance during this period and stated Social Assistance was aware he was working and he was to pay them back when he received his wages from DRS.

Bourroughs stated Neubauer gave him \$500 once and another time gave him \$1000. He also indicated when he took DRS equipment to do field work the labour charge rate was \$45.00 per hour of which he would be paid \$15.00.

On February 14, 2000 Bourroughs packed up his tools and left the shop. He claims Neubauer fired him after an argument in the shop. On February 16, 2000 David Rowsell (“Rowsell”) telephoned Bourroughs and requested a meeting. Bourroughs did not want to have anything to do with Neubauer therefore Rowsell was acting as a go-between for Bourroughs and Neubauer. Rowsell wanted to know what it would take for Bourroughs to return to work at DRS. Bourroughs stated he wanted to be paid for the period he had worked from August 1998 until February 14, 2000. He wanted a \$1,000 cash incentive, \$10.00 per hour and paid every two weeks by cheque. Rowsell countered with an offer of \$30,000, which was rejected by Bourroughs, who stated he was owed between \$60,000 and \$80,000. On February 17, 2000 Bourroughs had a meeting with Neubauer and agreed to return to work for DRS on February 18, 2000. He received the \$1,000 incentive and was paid \$8.00 per hour every two weeks by cheque, with all deductions being made. This arrangement continued until August 11, 2000 when DRS terminated him.

After leaving DRS, Bourroughs went to collect EI and was denied benefit. He then appealed that decision and was successful in his appeal. The EI office directed Bourroughs to the Employment Standards Branch where he filed his complaint.

The witnesses for Bourroughs all presented evidence that established Bourroughs worked at DRS. Other than DeRoche none were able to indicate precisely what the employment relationship was between DRS and Bourroughs.

DRS have a different version of the conditions under which Bourroughs worked for the company. Neubauer stated he was aware Bourroughs was operating a small engine repair business out of his home in August 1998. Neubauer had just acquired an equipment rental and sales business and wanted Bourroughs to operate it for him. Neubauer claims that he and Bourroughs made a verbal agreement for Bourroughs to rent space for \$500 per month and they would share the profit from the repair business. After the second or third month Neubauer realized there was insufficient revenue being generated and waived the shop rental of \$500. They were to continue to share the profit from the repairs and Bourroughs would maintain DRS’s equipment in lieu of rent.

Neubauer agrees he gave money to Bourroughs from time to time, as the business was very slow in developing. He claims his understanding was they were only to share the profit on the labour portion of repairs done. Bourroughs was not to receive any profit being made on parts. When customer equipment was brought in for repair a work order was made out, generally by Bourroughs, who calculated the cost of parts and labour. When the customer came to pick up the equipment they paid the amount of the invoice and the payment was put in the till. These invoices were totalled and, according to Neubauer, Bourroughs was paid his share of the profit on labour.

Copies of those invoices and documents showing Bourroughs had been paid a percentage of the labour cost were requested at the hearing. DRS agreed to forward copies by fax to the parties on their return to their office. While the material is of some benefit it does not actually show any proof Bourroughs received the amounts identified as “Sub Contractor” and the entry in the statement for “Rental-Labour Revenue” do not match the payments to the “Sub Contractor”. DRS claim Bourroughs was the only person designated as “Sub Contractor” in their statements.

I requested additional evidence, if any existed, showing that Bourroughs actually received the monies identified in the statements.

ANALYSIS

There is no dispute over the fact Bourroughs worked at DRS. The terms of that employment relationship are not agreed upon. Bourroughs claims he was hired as an employee at \$8.00 or \$10.00 per hour. He worked for eighteen months and never received a pay cheque. The reason he gives is that he was going to become a 50-50 partner in the business when the owner retired. The owner did not retire and Bourroughs now claims wages and vacation pay.

When Bourroughs left DRS in February 2000 apparently no Record of Employment was issued. When he was terminated in August 2000 an ROE was issued which indicates, at least in the mind of the employer, a different employment relationship existed in February than in August.

I have great difficulty in believing a person would go to work for one and one half years without being paid any wages unless another arrangement existed. On the basis of probabilities I believe the employment scenario painted by DRS was the arrangement made by Bourroughs and Neubauer. Bourroughs was to come and run the shop for a percentage of the profits on labour. I will not speculate as to whether that was a good arrangement for Bourroughs or not.

The witnesses for Bourroughs were unable to provide any conclusive evidence Bourroughs was an employee. They knew what he did, when he came to work and left but not how he was paid. DeRoche's evidence is self-serving and must be weighed in that light. The bookkeeper stated she had seen Bourroughs around the building however she had nothing to do with Bourroughs until February 18th when he was put on the payroll.

In his appeal letter dated February 8, 2002 to the Tribunal Bourroughs outlined his recollection of the facts during the period February 14 to 18, 2000. When asked by Rowsell what it would take to get him to come back to work he stated:

2 years back pay, \$10.00 per hour, put on payroll every 2 weeks plus \$1000.00 cash incentive to return. Lloyd was the middle person because I didn't want to see or talk to Les. Later that night Les called to ask me to have a meeting with him at the Shop on February 17, 00 at 11:00 a.m. I did have the meeting on Feb. 17, 00 and returned to work on Feb. 18, 00. I was put on payroll, my cheque was at \$8.00 per hour not \$10.00.

There is no mention in that submission to the offer of \$30,000, which Bourroughs claims, was made by Rowsell.

Further, in a letter dated November 25, 2000, "To Whom It May Concern" DeRoche stated, in part:

Feb.16, 2000 Lloyd Rowsell phoned about 10 a.m. to ask if he could come over to talk to Gord. Lloyd came over shortly. Gord, Lloyd and I sat in the front room. Lloyd asked Gord what it would take to get him back. Gord said, 2 years back pay, \$10.00 per hr., put on payroll every 2 weeks plus \$1000.00 incentive to return.

Again, there is no mention of the alleged \$30,000 offer. It would appear neither Bourroughs or DeRoche recalled that offer being made at the time of each of those written submissions.

Rowsell denies making any reference to an offer of \$30,000 indicating he had no authority from Neubauer to offer anything. He recalls Bourroughs saying: “he wanted \$10.00 per hour, to go on payroll and \$1000.00 to clear up everything from the backend”.

Bourroughs made a considerable effort to use the ADT Security System password to identify he was an employee. I have difficulty with that evidence. It was a copy of an internal memo written to the ADT Data Department by an ADT employee identifying the telephone numbers on the call out list. As a footnote it identifies the staff all use a common password while the owner uses a different one. Bourroughs claims that proves he was an employee. I do not find that to be compelling evidence as the writer would not have any reason to know the management structure of DRS.

There is no other evidence presented to support the contention Bourroughs was an employee. In fact, the evidence of the events that followed the February 14 departure of Bourroughs supports the position Bourroughs was a sub-contractor to DRS. Both he and DeRoche were emphatic that Bourroughs had stated he wanted to be “put on payroll” as one of the conditions of his returning to work. There is no mention that he was on payroll before leaving on February 14, 2000 and that suggests he was, in fact, a sub-contractor.

I have reviewed the material supplied by DRS on June 04 and June 12 and find little that proves Bourroughs received the 50% share as indicated on the adding machine tapes. The difficulty appears to be the fact both DRS and Bourroughs operated primarily in cash and no records exist. If Bourroughs is owed money from Neubauer from that arrangement he must seek relief in another forum.

Notwithstanding that, I am inclined to believe, on the basis of probabilities that Bourroughs worked as a sub-contractor for the period August 08, 1998 to February 14, 2000.

There is an obligation on the appellant to prove the Determination is wrong in fact or in law. While many questions remain unanswered I find Bourroughs has failed in that regard.

ORDER

In accordance with Section 115 of the *Act* I confirm the Determination by the Director dated February 04, 2001.

James Wolfgang
Adjudicator
Employment Standards Tribunal