

An appeal

- by -

Keywest Motors (2002) Ltd.
("Keywest Motors")

- and by -

Robert Hart
("Hart")

- 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: Cindy J. Lombard

FILE No.: 2002/254 and 2002/255

DATE OF HEARING: August 14, 2002

DATE OF DECISION: September 16, 2002

DECISION

APPEARANCES:

No one appeared on behalf of Keywest Motors (2002) Ltd.

Robert Hart, appeared together with the following witnesses on his behalf:

John Werkman
Gary Renaud
Steve Kovac
Marshall Davies

Robert Hart submitted the original of calendars prepared by himself for the months of December, 2001, and January and February, 2002, indicating the hours worked by Hart, Werkman and Renaud as well as two other employees during those months. The calendars are marked as Exhibit #1, #2 and #3.

No one appeared on behalf of the Director of Employment Standards.

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) by Keywest Motors (2002) Ltd. (“Keywest Motors”) and by Robert Hart (“Hart”) from a Determination of the Director of Employment Standards dated April 15, 2002, and amended June 3, 2002, which found that:

- Hart was hired by Keywest Motors to perform work which included cleaning, painting, some carpentry work and generally ready the business for opening;
- at a rate of \$15.00 per hour;
- between December 3, 2001, and February 2, 2002; and
- Hart was owed \$4,459.59 in wages, vacation pay and interest pursuant to Section 88 of the *Act* (\$4,430.40 was and \$29.19 interest).

ISSUES TO BE DECIDED

1. Was Hart an employee of Keywest Motors?
2. Was Hart hired as shop foreman, mechanic or as a general labourer to ready the business for opening performing such duties as cleaning, painting, carpentry work, etc.?
3. What was Hart’s rate of pay?
4. On what date did Hart commence his employment, i.e. December 3, 2001, as alleged by Keywest Motors or December 7, 2001, as found by the Determination?
5. On what date did Hart’s employment cease, i.e. January 23, 2002, as alleged by Keywest Motors or February 12, 2002, as found by the Determination?

FACTS AND ANALYSIS

Hart and his witnesses all gave credible sworn evidence as to the facts of this case. Hart gave detailed evidence as to how he came to be hired by the principle of Keywest Motors, Ron McHaffie, and the events which transpired, both in Hart's written evidence which includes photographs of work done to the Keywest Motors premises and calendars of the work hours of Hart and corroborating witnesses as well as the oral evidence of Hart and the witnesses on his behalf.

Hart states that he commenced his employment on December 3, 2001. Prior to that date Hart says that McHaffie had approached him on several occasions about being shop foreman at the Keywest Motors business which he had purchased from the previous owner, Charlie Brooks ("Brooks"). Hart pointed out to McHaffie that the business came with a shop foreman and therefore the appropriate position would be lead mechanic. Hart says that McHaffie concurred and agreed to pay him \$18.00 per hour.

The sale was closing on December 31, 2001, and the new business was scheduled to open on February 22, 2002.

During the time prior to the formal transfer of the business on December 31, 2001, Brooks allowed McHaffie on the premises to clean and renovate.

Hart began working on December 3, 2001. The shop had to be readied for an inspection by Yamaha as McHaffie hoped to be a dealer. A tremendous amount of work was necessary including extensive clean-up, painting, carpentry work, etc., as the shop had been let go for some time by the previous owner

Hart submitted 66 pages of written material and photographs detailing the extensive work he did to the physical premises (8 bay garage) as well as to various vehicles during his period of employment. This work included cleaning and painting the shop floor, repairing a hoist, painting dark brown walls to white, moving and cleaning equipment and tools, pressure cleaning bays and equipment, repairing vehicles (e.g. McHaffie's Cadillac limousine, etc.), etc.

In addition, McHaffie owned the local ski hill and brought in equipment to be worked on by Hart including snowmobiles and ski tow equipment as well as attending at the ski hill on at least two occasions. Hart says he did the work relating to ski hill equipment during overtime hours.

With respect to overtime hours, Hart says that he agreed not to claim overtime in return for which McHaffie stated that he would instead provide him with a Yamaha motorcycle.

McHaffie on behalf of Keywest Motors kept no records of hours worked or compensation. Hart says that he began keeping records for himself as well as Werkman, Renaud and Jenner who also kept their own hours, all of which are compiled on Exhibits #1, #2 and #3.

John Werkman ("Werkman") is a carpenter who began working at Keywest Motors on December 25, 2001, and continued until January 27, 2002.

Werkman confirmed that Hart was always present working when he was there which was generally 8:00 a.m. until 5:00 p.m. including on some weekend days. Werkman also recalls seeing Hart at the shop premises at 7:30 or 8:00 p.m. during January, 2002, working cleaning the floors.

Gary Renaud (“Renaud”) is a painter hired by McHaffie to paint in the Keywest Motors shop and office. Renaud began working on December 8, 2001, and continued until January 17, 2002. Renaud says that he usually would arrive at the shop early but often would have to wait until it warmed up (being winter) to commence painting. On some occasions Renaud worked until 7:00 or 8:30 in the evening. Renaud says that Hart was always there working when he arrived as early as 8:00 a.m. and when he left in the evening. Renaud observed Hart working doing such things as moving equipment and tools in the shop in order that Renaud could paint.

Renaud says that often he knew Hart had continued working after he left each day because the next morning equipment had been moved, painting accomplished and different vehicles moved in to work on.

Steve Kovac (“Kovac”) is a friend and former supervisor of Hart at a previous employer. Kovac described Hart as a meticulous, hardworking employee.

Kovac says that he dropped by the Keywest Motors premises frequently to visit Hart from the time he commenced his employment. Kovac observed Hart to be working ridiculously long hours to ready the premises for the Yamaha inspection that never took place and doing mechanic work on various vehicles.

Often Kovac would drive by the garage and see Hart’s vehicle and the lights on in the evenings.

Marshall Davies (“Davies”) operates a business a couple of blocks from the Keywest Motors premises. Prior to and since his employment with Keywest Motors Hart had done all of the mechanical work on Davies’ vehicles. While he was working at Keywest Motors, Hart told him that he was too busy with that work to work on Davies’ vehicles at any time.

Davies said that he dropped by to see Hart at Keywest Motors once or twice a week. Davies observed Hart washing the concrete shop floor, working on various vehicles, including a limousine, GMC 4 x 4 and generators and equipment from the ski hill.

Hart says that he received no wages apart from the balance of \$3,000.00 Hart received from McHaffie and from which he paid wages of Jenner, Werkman and supplies as detailed in Appendix 1 leaving a net to Hart of \$1,333.46.

The employer failed to keep any payroll records as required by Section 28 of the *Act*. That significant omission combined with the credible oral evidence of Hart as well as Werkman and Renaud and the absence of any sufficient grounds to find that Hart’s records are not reliable leads us to the conclusion that Hart’s record of hours worked as detailed in Exhibits #1, #2 and #3 should be accepted as accurate: See for example *Re Jean Pierre Rodrigue* BCEST # D600/97, and *Re Brent Davies* BCEST # D273/01.

In summary, I accept the evidence of Hart as supported by his witnesses and concluded that:

- 1) Hart was employed by Keywest Motors between December 3, 2001 and February 12, 2002;
- 2) Hart’s position was mechanic and his duties included the responsibility of getting the Keywest Motors premises ready for inspection by Yamaha and the opening on February 22, 2002 (which never occurred);
- 3) Hart’s rate of pay was \$18.00 per hour;

- 4) Hart worked the regular and overtime hours detailed on Exhibits#1, #2 and #3

ORDER

Pursuant to Section 115 of the *Act*, I order that the matter be referred back to the Director to calculate regular wages and overtime due to Hart in accordance with the above findings of fact plus interest pursuant to Section 88 of the *Act* and that the Determination be varied to substitute the recalculated amount due to Hart.

Cindy J. Lombard
Adjudicator
Employment Standards Tribunal