

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 -

Conybio Canada Limited
("Conybio")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2000/211

DATE OF DECISION: June 5, 2000

DECISION

OVERVIEW

On March 1st, 2000, and under file number ER 097-427, a delegate of the Director of Employment Standards (the “Director”) issued a Determination against Conybio Canada Limited (“Conybio”) ordering that firm to pay a total of \$11,766.37 to its former employees, Riyaz Thawer (\$9,506.59) and Jenny Wang (\$2,259.78) (the “Determination”). On March 23rd, 2000, the delegate issued a letter pursuant to section 86 of the *Employment Standards Act* (the “Act”) varying the Determination by deleting the award in favour of Ms. Wang--I understand that Ms. Wang’s claim has now been settled and that she has formally withdrawn her unpaid wage complaint. Thus, the Determination, as varied, orders Conybio and Pura International Trading Ltd. (an “associated corporation”) to pay Riyaz Thawer (“Thawer”) the sum of \$9,506.59 on account of unpaid regular wages, concomitant vacation pay and interest.

On March 24th, 2000 legal counsel on behalf of Constante Garcia and William Dickson filed an appeal of the Determination with the Tribunal. Although Constante Garcia and William Dickson are the named appellants, the proper appellant is Conybio (there are no section 96 determinations before me although it may well be that section 96 determinations will be issued--if they have not already been--at some point); I understand that Constante Garcia is the president of Conybio; Mr. Dickson is Conybio’s secretary. Given that the appeal documents clearly evidence an intention to appeal the Determination on behalf of Conybio, I hereby order the notice of appeal to be amended to show Conybio as the appellant.

THE DETERMINATION

According to the information set out in the Determination, Conybio was (the company is apparently no longer in business) a multi-level marketing company selling health care products. Thawer was employed as Conybio’s “Vice-President of Marketing and Advertising” from May 1st to July 31st, 1999; his monthly salary was \$3,500. Thawer was paid \$1,750 (less deductions) for his first half-month’s employment but a subsequent \$2,400 cheque was countermanded by a “stop payment” order issued to the drawee branch of Canada Trust. Thawer claimed he was not paid for the period May 15th to July 31st, 1999 and, accordingly, filed an unpaid wage complaint with the Employment Standards Branch.

The delegate’s various (and largely unsuccessful) efforts to contact Conybio with respect to Thawer’s complaint--and, more particularly, the delegate’s dealings with Conybio’s solicitors--are detailed at pages 2 and 3 of the Determination. In the absence of any sort of formal substantive response from Conybio, the delegate proceeded to issue the Determination based on the information provided to him by Thawer.

The Director’s delegate also declared that Conybio and Pura International Trading Ltd. were “associated corporations” as defined in section 95 of the *Act* and thus both firms are jointly and severally liable for Thawer’s unpaid wages.

ISSUES ON APPEAL

Conybio grounds of appeal may be summarized as follows:

- Thawer was an independent contractor not an employee and, therefore, was not entitled to file a complaint under the *Act*; and
- the delegate did not afford Conybio a reasonable opportunity to respond to Thawer's complaint thereby breaching section 77 of the *Act*;

Although mentioned in its appeal documents, Conybio has not appealed the section 95 declaration and, in any event, there is insufficient evidence before me to set aside that declaration. Further, Conybio makes mention of certain counterclaims that it asserts against Thawer but those claims are not properly before me and cannot, in any event, be founded on any provision of the *Act*.

I shall now deal with the two principal issues that have been raised by the appellant.

ANALYSIS

Employee or Contractor?

Based on Conybio's own submissions, I am satisfied that Thawer was an "employee" as defined in section 1 of the *Act*. I might add that this issue was not raised by Conybio during the investigation--indeed, Conybio appears to have consciously avoided any substantive involvement with the delegate--and thus I reject any notion (advanced by Conybio in its appeal documents) that the delegate had to set out in chapter and verse why he concluded that Thawer was an employee. I note that Thawer was selling distributorships on behalf of Conybio; he worked out of Conybio's offices in Richmond (now closed) and devoted a substantial measure of his available working days to the business affairs of Conybio. One certainly has to question why, if Conybio truly believed that Thawer was an independent contractor, it issued him a payroll cheque net of statutory payroll deductions.

Section 77

The delegate's various efforts to obtain relevant information from Conybio's officers and directors are set out, in some considerable detail, in the Determination. Conybio has not challenged, in any material fashion, any of the factual assertions set out in the Determination relating to the delegate's investigation. In my view, not only did the delegate give Conybio a reasonable opportunity to respond to Thawer's complaint, I would go further and suggest that the delegate made extraordinary efforts to ensure that Conybio was given every chance to put its position forward. Notwithstanding those efforts, Conybio seemingly evidenced studied indifference towards the delegate and his investigation.

ORDER

Pursuant to sections 114(1)(c) and 115 of the *Act*, I order that this appeal be dismissed and that the Determination, as varied, be confirmed in favour of Thawer in the amount of **\$9,506.59** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal