

**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-

Calvary Publishing Corp.  
("Calvary" or the "employer")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

<b>ADJUDICATOR:</b>	Kenneth Wm. Thornicroft
<b>FILE No.:</b>	1999/122
<b>DATE OF HEARING:</b>	June 17th, 1999
<b>WRITTEN SUBMISSIONS DEADLINE:</b>	July 8th, 1999
<b>REPLY SUBMISSIONS DEADLINE:</b>	July 19th, 1999
<b>DATE OF DECISION:</b>	August 18th, 1999

**DECISION**

**APPEARANCES**

John W. Motiuk                      Legal Counsel for Calvary Publishing Corp.  
Joseph Daou                        on his own behalf  
Adele Adamic                      Legal Counsel for the Director of Employment Standards  
Joanne Kembel                    also for the Director of Employment Standards

**OVERVIEW**

This is an appeal filed by Glen P. Robbins on behalf of Calvary Publishing Corp. (“Calvary” or the “employer”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on February 10th, 1999 under file number ER 76890 (the “Determination”).

At the appeal hearing, Mr. Motiuk appeared as counsel for Mr. Robbins but was unsure if he had instructions to appear on behalf of Calvary. Upon being advised that Mr. Robbins, although named in the Determination, was not liable for any the monies determined to be owed to Daou, and thus did not have the ability to appeal the Determination in his own right, Mr. Motiuk advised that he would take instructions from Mr. Robbins regarding whether or not he (Motiuk) was authorized to appear on behalf of Calvary. Mr. Motiuk has now obtained the necessary instructions and thus the appeal form in EST File No. 1999/122 is hereby ordered amended so that Calvary Publishing Corp., rather than Glen P. Robbins (who is a principal of Calvary), is the named appellant.

**THE DETERMINATION**

The Director’s delegate determined that Calvary owed its former employee, Joseph Daou (“Daou”), the sum of \$67,909.93 on account of unpaid wages. By way of the Determination, a \$0 penalty was also levied pursuant to section 98 of the *Act* and section 29 of the *Employment Standards Regulation*.

The particulars of Daou’s unpaid wage claim, as determined by the delegate, are set out below:

Commission earnings:	\$46,561.59
Compensation for length of service (including concomitant vacation pay):	\$ 7,576.46
Vacation pay:	\$ 4,750.77

Unauthorized wage deductions:	\$ 1,726.94
Statutory Holiday Pay:	\$ 1,304.06
Interest:	<u>\$ 5,990.11</u>
TOTAL:	<u>\$67,909.93</u>

The delegate rejected the employer's position that Daou was an independent contractor and thus not entitled to file an unpaid wage complaint under the *Act*. The delegate found that Daou's employment with Calvary was terminated without just cause, nor with proper written notice of termination (see section 63 of the *Act*), on July 3rd, 1997. Accordingly, Daou was awarded 8 weeks' wages as compensation for length of service [see section 63(2)(b) of the *Act*].

In awarding Daou 8 weeks' wages, the delegate found that his employment dated from June 1st, 1997 when he commenced work with an employer referred to as "The Tannis Group of Companies" and that Calvary was a successor employer of the Tannis Group (see section 97 of the *Act*). The "unauthorized deductions" were various "fines" that had been levied by the employer--pursuant, I understand, to some written corporate policy--"for such things as speaking to administration staff, submitting an incorrect address or name, calling someone on the do not call list or receiving nasty letters from clients" (see Determination at page 6).

### **ISSUES TO BE DECIDED**

Following the appearance of the parties before me on June 17th, 1999 it was agreed that the parties would file written submissions relating to the issues in dispute. To that end, I confirmed these arrangements in a letter to the parties dated June 17th, 1999 the relevant portions of which read as follows:

"[T]he Calvary appeal will proceed on the basis of written submissions which shall address the following issues set out in the Determination:

- a) Mr. Daou's status--employee or independent contractor?
- b) Whether the delegate erred in finding a successorship pursuant to section 97 of the *Employment Standards Act*;
- c) Whether Calvary had just cause for termination; and
- d) Mr. Daou's unpaid wage entitlement.

The parties, if they wish, are to deliver written submissions regarding the above issues to my office and to each other by no later than July 8th, 1999.

Each party will have the right to deliver (to me and to each other) a Reply submission by no later than July 19th, 1999.”

I have now received written submissions dated July 8th and 19th, 1999 from Ms. Adamic, counsel for the Director; Mr. Motiuk, counsel for Calvary, submitted a submission dated July 12th, 1999 but chose not to file a Reply submission. I might also note that while Mr. Motiuk signed the submission, it appears to have been prepared by Mr. Robbins.

I shall now address the issues raised by this appeal.

## **FACTS AND ANALYSIS**

It should be noted that the burden of showing that the Determination is in error in some respect and, accordingly, ought to be cancelled or varied, lies with the appellant.

*Is Daou an employee or an independent contractor?*

The employer did not make any submission on this point and having reviewed the facts set out in the Determination I am satisfied that although the parties attempted to document their relationship so that it would appear that Daou was a contractor, in fact, Calvary exercised close supervisory and disciplinary authority over him--for example, the employer purported to levy “fines” for various breaches of particular corporate policies or practices; Daou was identified in various corporate memoranda as being a member of the employer’s “sales staff”; he frequently received directions from the employer regarding sales targets and related matters; Daou was responsible for hiring and training new sales personnel; Daou received wages in the form of commissions; Daou used the employer’s offices and equipment to carry out his daily tasks.

I am unequivocally of the view that the relationship between the parties was that of employer-employee and that, accordingly, Daou was entitled to file an unpaid wage complaint pursuant to section 74 of the *Act*.

*Successorship: Section 97 of the Act*

Section 97 of the *Act* provides as follows:

### **Sale of business or assets**

97. If all or part of a business or a substantial part of the entire assets of a business is disposed of, the employment of an employee of the business is deemed, for the purposes of this Act, to be continuous and uninterrupted by the disposition.

The delegate noted that Daou had been employed by the Tannis Group of Companies since June 1st, 1997 and that his employment continued uninterrupted when, in 1996, Calvary purchased the assets of the Tannis Group. Daou’s employment was terminated on July 3rd, 1997 and thus Daou was awarded

8 weeks' wages as compensation for length of service given that he had at least 8 consecutive years of service at the point of termination.

I have before me the actual asset transfer agreement, dated June 15th, 1996. Under this agreement, Mitchell and Nadine Tannis and various corporations controlled by them transferred "all of the assets of [the Tannis Group] including the data base of clients". The agreement provided that Calvary would assume up to \$900,000 in debts and other outstanding liabilities of the Tannis Group.

In his written submission Mr. Robbins acknowledges that he incorporated Calvary and that this company purchased certain (he says valueless) tangible assets. His submission continues "a contract was written between [Calvary] and The Tannis Group of companies" and that "any matters relating to this contract right belong in the higher court, the Supreme Court...".

The above admissions, combined with the uncontroverted fact that Daou's employment continued after the asset transfer--Mr. Robbins admits as much but says that he only agreed to keep Daou on as a result of some (not particularized) "duress"--more than satisfies the statutory preconditions to find a section 97 successorship. Mr. Robbins is quite right in asserting that any dispute about the parties' respective rights and obligations under the asset transfer agreement belongs in the B.C. Supreme Court, but the delegate quite rightly relied, in part, on the agreement in finding that section 97 applied.

#### *Just Cause and Unpaid Wage Entitlement*

Mr. Robbins asserts simply, that "Daou's contract is a matter for the Supreme Court". By reason of the fact that Daou was an employee as defined in the *Act*, he was entitled to file a complaint under the *Act*. In its defence, the employer is entitled to assert that it had just cause for termination [section 63(3)(c)] in which case the employer would not be liable for paying compensation for length of service. Given that a valid complaint was filed, the delegate had the jurisdiction to investigate the complaint and to issue a Determination with respect to that complaint; the B.C. Supreme Court does not have exclusive jurisdiction over employment issues that fall within the ambit of the *Act* but rather only concurrent jurisdiction--see section 118. The B.C. Supreme Court does, of course, retain the residual jurisdiction to review decisions made by the Tribunal in accordance with the provisions of the *Judicial Review Procedure Act*.

The employer also asserts, *without providing any corroborating evidence*, that it had just cause for termination by reason of Daou's misconduct and/or poor performance. The onus is on the employer to prove just cause; the employer in this case has fallen well short of the mark. There are well-established protocols that an employer must follow prior to, for example, dismissing an employee for poor performance such as warning the employee about the unsatisfactory performance, taking steps to help the employee improve his or her performance and placing the employee on notice that continued poor performance will result in dismissal. The employer in this case simply terminated the employment relationship without having first undertaken the necessary warnings and training. The so-called misconduct--relating to certain sexual harassment complaints that have been filed by a former employee against Mr. Robbins--is entirely unproven.

Similarly, the employer has not provided any evidence to show that the delegate's calculation of the amounts owed to Daou are, in any fashion, incorrect. Mr. Robbins, in his written submission, has advanced several unsupported, irrelevant and quite possibly defamatory assertions relating to the conduct of Daou, the delegate and other third parties none of which I found the least bit helpful in my deliberations.

**ORDER**

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **\$67,909.93** together with whatever further interest that may have accrued, in accordance with section 88 of the *Act*, since the date of issuance.

**Kenneth Wm. Thornicroft**  
**Adjudicator**  
**Employment Standards Tribunal**