



An appeal

- by -

Sardar Barahmand a Director of Diar Restaurant Ltd. also known as Diyar  
Restaurant  
("Barahmand")

and

Diar Restaurant Ltd. also known as Diyar Restaurant  
("Diar Restaurant")

- 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 (as amended)

**TRIBUNAL MEMBER:** Kenneth Wm. Thornicroft

**FILE No.:** 2013A/23

**DATE OF DECISION:** June 25, 2013

## DECISION

### SUBMISSIONS

Eric Chow

counsel for Sardar Barahmand a Director of Diar Restaurant Ltd. also known as Diyar Restaurant

### INTRODUCTION

1. I have before me an appeal filed by legal counsel on behalf of Diar Restaurant Ltd. (“Diar Restaurant”) and Sardar Barahmand (“Barahmand”). This appeal is filed under subsections 112(1)(a) and (b) of the *Employment Standards Act* (the “*Act*”).
2. On May 29, 2010, Shahram (Shawn) S. Shamsian (“Shamsian”) filed an unpaid wage complaint under section 74 of the *Act* in which he claimed that his former employer, Diar Restaurant, owed him over \$13,000 in unpaid wages. A delegate of the Director of Employment Standards (the “delegate”) presided at a complaint hearing held on September 30, 2010, and, on March 25, 2011, issued a determination pursuant to which Diar Restaurant was ordered to pay Mr. Shamsian \$16,464.63 on account of unpaid wages and section 88 interest (the “Corporate Determination”). By way of the Corporate Determination, the delegate also levied three separate \$500 monetary penalties against Diar Restaurant (see *Act*, section 98) and thus the total amount payable under the Corporate Determination was \$17,964.63.
3. Mr. Barahmand and Mr. Abdolla Nozadgagin (“Nozadgagin”) appeared on Diar Restaurant’s behalf at the September 30, 2010, complaint hearing (they were both Diar Restaurant directors but Mr. Nozadgagin has now gone bankrupt leaving Mr. Barahmand as Diar Restaurant’s sole director). The delegate determined that Diar Restaurant had employed Mr. Shamsian as its business manager and that he quit his employment at the end of March 2010 when Diar Restaurant failed to pay him his earned wages. The delegate applied section 66 of the *Act* and awarded Mr. Shamsian compensation for length of service (\$646.15 representing one week’s wages), regular wages (\$14,000 earned during the period from November 1, 2009, to March 31, 2010), 4% vacation pay, and \$693 to reimburse Mr. Shamsian for some work related expenses he incurred (see section 21).
4. Diar Restaurant, through its legal counsel (not the same legal counsel who is representing the appellants in these proceedings), appealed the Corporate Determination on the grounds that the delegate erred in law and failed to observe the principles of natural justice in making the determination. The “natural justice” ground was based on an assertion that neither Mr. Barahmand nor Mr. Nozadgagin had sufficient command of the English language to properly participate in the complaint hearing – counsel asserted that the delegate should have advised them of their right to have a translator present at the hearing. This ground of appeal was rejected as being wholly unfounded by the Tribunal Member since there was ample evidence that both men were able to effectively function in English and that the “translator” issue was not even raised until about six months later when the Corporate Determination was issued. I note that Exhibit 23 at the complaint hearing (contained in the record before me) was a form of business plan prepared by the Diar Restaurant’s principals and at page 8 of that document the personal biographies of Diar Restaurant’s “management team” are set out – Mr. Barahmand is described as “highly organized, detail oriented and *he is fluent in six languages* of: Dutch, German, *English*, Kurdish, Farsi, and Turkish” and that he has “*Excellent and effective written and verbal communication and negotiation skills*” (my *italics*).

5. The alleged error of law related to the delegate's treatment of the parties' relative credibility. Counsel asserted that although the delegate correctly stated the governing legal principles regarding the assessment of a witness's credibility, she misapplied the test in this instance. This ground was also rejected, the Tribunal Member concluded that the delegate's reasons for preferring Mr. Shamsian's evidence to that of Messrs. Barahmand and Nozadgagin were "well reasoned" and reasonably supported by the evidence. Diar Restaurant, by way of its reply submission, raised a new argument relating to Mr. Shamsian's employment insurance benefits claim, but the Tribunal Member did not find this argument to be relevant to the *Act* proceedings.
6. Since the Tribunal Member found that neither ground of appeal was made out, he issued, on June 29, 2011, written reasons confirming the Corporate Determination (see *Diar Restaurant Ltd.*, BC EST # D070/11). So far as I am aware, Diar Restaurant never applied for reconsideration of the Corporate Decision under section 116 of the *Act*.
7. Subsection 96(1) of the *Act* states: "A person who was a director or officer of a corporation at the time wages of an employee of the corporation were earned or should have been paid is personally liable for up to 2 months' unpaid wages for each employee." This provision imposes a personal 2-month unpaid wage liability on both corporate officers and directors; however, the Section 96 Determination was issued against Mr. Barahmand solely in his capacity as a corporate *director*.
8. On February 28, 2013, the delegate issued a determination against Sardar Barahmand pursuant to section 96(1) of the *Act* representing 2 months' wages owing to Mr. Shamsian (a total of \$5,600 plus 4% vacation pay) and additional accrued section 88 interest (the "Section 96 Determination"). The delegate determined that "Mr. Barahmand was a Director between January 2, 2010 and March 31, 2010, when Mr. Shamsian's wages were earned or should have been paid" (delegate's "Reasons for the Determination", page R2). The Section 96 Determination also includes \$1,500 representing three separate \$500 monetary penalties (see subsection 98(2)) and thus the total amount payable under the Section 96 Determination is \$8,087.91.
9. On April 8, 2013, legal counsel filed an appeal seemingly on behalf of both Diar Restaurant and Mr. Barahmand as these two parties are named in part 1 of the Appeal Form as having been "named in the determination". However, a review of the attached reasons for appeal clearly indicates that the appeal concerns only Mr. Barahmand's liability under the Section 96 Determination and not Diar Restaurant's liability under the Corporate Determination. I refer to numbered paragraph 3 of counsel's "Appendix to the Appeal Form":

3. State your grounds for appeal

Sardar Barahmand is appealing the February 28, 2013, File #: 165-363, determination of Joy Archer Delegate of the Director of Employment Standards (the "Delegate"), pursuant to section 112(1) of the Act on the basis that the Delegate erred in law and failed to observe the principles of natural justice at the time the determination was made.

10. In light of this statement, I intend to proceed on the basis that this appeal relates solely to the Section 96 Determination. I wish to parenthetically note that an application for reconsideration of an appeal decision must be filed within 30 days after the decision was issued (see Rule 25(2) of the Tribunal's *Rules of Practice and Procedure*) and thus an intended application to have BC EST # D070/11 reconsidered should have been filed about 11 months ago. Accordingly, both the Corporate Determination and the Tribunal's June 29, 2011, confirmation of that determination now stand as final orders.

11. At this juncture, I am adjudicating this matter based solely on the written submissions filed by Mr. Barahmand's legal counsel. In addition to counsel's submissions, I have also reviewed the delegate's "Reasons for the Determination" and the entire subsection 112(5) "record" that was before the delegate when she issued the Section 96 Determination.

### REASONS FOR APPEAL

12. As previously noted, the appeal is based on the grounds that the delegate erred in law (subsection 112(1)(a)) and failed to observe the principles of natural justice in making the determination (subsection 112(1)(b)). Mr. Barahmand's legal counsel seeks an order cancelling the Section 96 Determination or, alternatively, referring the matter back to the Director.
13. The fundamental thrust of the appeal as it relates to Mr. Barahmand's personal liability for a portion of Mr. Shamsian's unpaid wages is captured in the following excerpts from counsel's appeal submission (the first excerpt relates to the "natural justice" ground and the remaining excerpts concern alleged errors of law):

- No oral hearing was held for the [Section 96] Determination and it appears to have been decided based on only the BC Online Register of Companies Corporate Searches. Mr. Barahmand was not afforded with a pre-determination opportunity to provide any documentary evidence related to his personal liability.
- Mr. Barahmand was not a director of Diar when the unpaid wages were earned or should have been payable. The Delegate committed an error in law in determining that Mr. Barahmand was a director when the unpaid wages were earned or payable and therefore personally liable for unpaid wages...The Corporate Determination found that Mr. Shamsian earned unpaid wages from November 1, 2009 until March 31, 2010...[and] found that Diar had terminated Mr. Shamsian's employment on March 31, 2010 and as such the unpaid wages became payable on April 2, 2010. The Determination confirms that the time period for wages earned or to become payable is between January 2, 2010 and March 31, 2010...Mr. Barahmand was not named a director of Diar in the corporate records until April 10, 2010 and this was 8 days after the unpaid wages became payable. From the incorporation of Diar on June 19, 2009 until April 9, 2010, a time period that encapsulates the relevant time period of January 2, 2010 to April 2, 2010, Abdolla Nozadgagin was the sole director and officer of Diar. As such only Mr. Nozadgagin may be held personally liable for the unpaid wages...[The] corporate records clearly indicate that Mr. Barahmand was not a director or officer of Diar at the relevant times when the wages were earned and when they became payable on April 2, 2010. As such the Delegate committed an error in law in finding him personally liable for wages under section 96 of the Act as he not a named director in the corporate records.

14. Counsel advanced a similar "natural justice" argument regarding Mr. Barahmand's personal liability for the three monetary penalties under subsection 98(2) of the *Act*:

...under section 98(2)...the director must not only have been a director at the relevant times but they must have authorized, permitted or acquiesced to the contraventions. Furthermore, the Tribunal must ensure that the Director [of Employment Standards] has taken extra steps to ensure that the director authorized, permitted or acquiesced to the contraventions and a director must be afforded a meaningful opportunity to respond to any assertion by the Director [of Employment Standards] that they allowed the contravention.

15. The Corporate Determination included three separate \$500 monetary penalties relating to Diar Restaurant's failure to keep payroll records (section 28), failure to pay wages at least semimonthly (section 17) and failure to pay all earned wages following termination of employment (section 18). Subsection 98(2) states: "If a

corporation contravenes a requirement of this Act or the regulations, an employee, officer, director or agent of the corporation who authorizes, permits or acquiesces in the contravention is also liable to the penalty.” As noted above, the Section 96 Determination included an additional \$1,500 representing the three monetary penalties that remained outstanding as of the date of issuance of the Section 96 Determination. The delegate’s reasons for assessing Mr. Barahmand with each of these three penalties are set out at page R3 of her reasons and may be briefly summarized as follows: i) when Mr. Barahmand became a Diar Restaurant director he was aware of Mr. Shamsian’s unpaid wage claim and in the ensuing period Mr. Barahmand took no steps to ensure that this claim was satisfied; ii) Mr. Barahmand attended the complaint hearing that resulted in the Corporate Determination and was, at that time, made aware that Diar Restaurant had a continuing obligation to pay any unpaid wages that might be due Mr. Shamsian; and iii) at the complaint hearing, the delegate also reviewed the provisions of the *Act* relating to director/officer liability regarding section 98 penalties.

16. Counsel for Mr. Barahmand submits:

Mr. Barahmand could not have authorized, acquiesced or permitted these contraventions under the Act as he was not a director or officer at the time of these contraventions, as referenced above and in reference again to the documents in Exhibit “A”, Mr. Barahmand was not a director or officer until April 10, 2010. It was impossible for Mr. Barahmand to authorize, acquiesce or permit the contraventions under the Act at those points in time as he was not a director during the relevant time periods and did not have the ability to provide any pay cheques from Diar to Mr. Shamsian as he did not have signing authority over the corporate accounts at RBC.

## FINDINGS AND ANALYSIS

17. Counsel for Mr. Barahmand says that the Section 96 Determination should be cancelled or, alternatively, referred back to the Director because the delegate failed to observe the principles of natural justice and also erred in law. I shall deal with each ground in turn.

### *Breach of the Principles of Natural Justice*

18. The central thrust of Mr. Barahmand’s appeal on this ground is that the delegate issued the Section 96 Determination without first providing Mr. Barahmand with any notice and a concomitant opportunity to make submissions regarding his personal liability under subsections 96(1) and 98(2) of the *Act*. There is nothing in the record before me indicating that the delegate specifically contacted Mr. Barahmand in advance of issuing the Section 96 Determination so that he could provide any evidence or argument regarding his possible personal liability under the *Act*. In my view, section 77 of the *Act* obliges the Director of Employment Standards to provide at least some form of notice coupled with an invitation to provide relevant evidence and argument before issuing a determination against a director or officer under section 96(1). Section 77 states: “If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.” That said, I do not accept counsel’s assertion that the delegate was obliged to hold an “oral hearing” prior to issuing the Section 96 Determination. In my view, the delegate could have fully complied with the dictates of section 77 by simply requesting a written submission from Mr. Barahmand.
19. Notwithstanding the foregoing comments, Mr. Barahmand clearly was very much aware of the fact that he might be held personally liable for a portion of Mr. Barahmand’s unpaid wages as well as for the three \$500 monetary penalties. At page R3 of the delegate’s reasons supporting the Corporate Determination, she notes that Mr. Barahmand was advised at the complaint hearing about his possible personal liability under the *Act*. The Corporate Determination, at pages D4 – D5, included a notice to Diar Restaurant’s two directors (both

of whom were served with copies of the Corporate Determination) regarding their possible liability under both subsections 96(1) and 98(2) of the *Act* and the salient provisions of both sections 96 and 98 were reproduced in full (see also delegate's reasons regarding the Section 96 Determination, page R2). Finally, in the appeal of the Corporate Determination, Diar Restaurant's legal counsel, who appears to have been taking his instructions from Mr. Barahmand, made the point that Mr. Barahmand was now solely exposed to potential personal liability since his fellow director, Mr. Nozadgagin, was bankrupt. I refer to para. 27 of Tribunal Member Bhalloo's reasons for decision in BC EST # D070/11):

According to counsel, only Mr. Shamsian and the delegate fully understood the proceedings. *He also notes that since Mr. Barahmand is now the sole director of Diar as a result of Mr. Nozadgagin's personal bankruptcy, Mr. Barahmand alone has been "left to shoulder the full weight of the Delegate's decision."* Therefore, it is important that Mr. Barahmand or Diar is provided "the opportunity to properly understand and prepare a defence" and to do otherwise would "embarrass the administration of justice". (my *italics*)

20. It follows from the previous discussion that I am fully satisfied that Mr. Barahmand was aware of his possible personal liability under the *Act* and that when the Section 96 Determination was issued, it did not come as a surprise to him. I also note that he was instructing legal counsel on Diar Restaurant's behalf and I think it reasonable to conclude from the record before me that Mr. Barahmand discussed his potential personal liability with legal counsel prior to the issuance of the Section 96 Determination. Had Mr. Barahmand wished to do so, he certainly could have provided the delegate with any relevant material regarding his potential personal liability. Nevertheless, it undoubtedly would have been preferable if the delegate had given Mr. Barahmand a specific opportunity to provide any relevant evidence or argument prior to the Section 96 Determination being issued. On balance, I am not satisfied that, in the circumstances of this case, the delegate breached the principles of natural justice as is asserted by counsel for Mr. Barahmand.
21. Even if it could be said that the delegate *did* fail to observe the principles of natural justice by not *specifically* inviting a submission from Mr. Barahmand regarding his personal liability prior to issuing the Section 96 Determination, I am of the view that any such breach has been cured by the present appeal proceedings.
22. In *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, the Supreme Court of Canada held that where an original decision was tainted by a natural justice breach but was not otherwise *void ab initio* (say, because the original decision-maker acted without any jurisdiction), the decision is voidable rather than void and the breach is capable of being cured by a later appeal proceeding. More recently, in *Taiga Works Wilderness Equipment Ltd. v. British Columbia (Director of Employment Standards)*, 2010 BCCA 97, the B.C. Court of Appeal addressed when and under what circumstances a natural justice breach by an employment standards officer could be cured by an appeal to the Tribunal. Although the Court of Appeal concluded that the natural justice breach had not been cured, the court affirmed the general principle "that in appropriate circumstances an appellate body does have the ability to cure breaches of the rules of natural justice or procedural fairness" (para. 3). As I read the *Taiga Works* decision, the critical factor in determining whether a natural justice breach is capable of being cured on appeal is whether the Tribunal is able to give full consideration to the evidence and argument that was not before the delegate. The Tribunal must be able to, in essence, adjudicate the issue in question on a *de novo* basis (see paras. 45 – 50)
23. In the present case, Mr. Barahmand's legal counsel has provided a complete submission – including some documents that were not before the delegate – and he submits that a full consideration of this evidence inevitably leads to the conclusion that Mr. Barahmand ought not to have been held personally liable under subsections 96(1) and 98(2) of the *Act*. I could, of course, simply refer this entire matter back to the delegate to be reconsidered but that would open up the possibility of yet another appeal to the Tribunal if Mr. Barahmand were dissatisfied with the delegate's decision. In that event, the Tribunal would be in the same position as is presently the case, namely, it would have to determine if the delegate correctly determined

that Mr. Barahmand was personally liable under subsections 96(1) and 98(2) of the *Act*. In *Harelkin*, the Supreme Court of Canada made several pointed comments about imposing unnecessary cost and delay by refusing to allow a properly constituted and empowered appeal body to deal with an issue by simply referring the matter back to the original decision maker. Section 2 sets out certain purposes of the *Act* and these include “fair treatment” of the parties and “fair and efficient” dispute resolution procedures. In my view, and consistent with these dictates, I believe that the most efficient way to “cure” any natural justice breach that occurred in this case is for the Tribunal to address the matter rather than by unnecessarily prolonging these proceedings (and increasing costs for all parties) by referring the matter back to the delegate.

24. Accordingly, although I am not persuaded that, in this case, the delegate failed to observe the principles of natural justice, I have considered Mr. Barahmand’s new evidence and argument regarding his personal liability under the *Act* and it is to this matter I now turn.

### *Alleged Errors of Law*

25. Mr. Barahmand’s unpaid wage liability under the Section 96(1) Determination is limited to two months’ wages and he has been held liable for Mr. Shamsian’s unpaid wages earned during the two-month period from January 2 to March 31, 2010. The delegate’s reasons, at page R2, include the following findings:

A BC On-line: Registrar of Companies – “Corporate Search” conducted on April 30, 2010, indicates that Diar was incorporated on June 19, 2009. Sardar Barahmand (“Mr. Barahmand”) bought into and became a Director of Diar on January 7, 2010. Mr. Barahmand was listed as a Director in the April 30, 2010 Corporation Search. A further search conducted on February 26, 2013 indicates that Mr. Barahmand was still listed as a Director. The search confirms that Mr. Barahmand was a Director between January 2, 2010 and March 31, 2010 when Mr. Shamsian’s wages were earned or should have been paid.

26. As set out in the Corporate Determination (page R17), Mr. Shamsian’s unpaid wage claim spanned the period from November 1, 2009, to March 31, 2010, and thus Mr. Barahmand’s unpaid wage liability, being limited to two months’ wages under subsection 96(1), spans the period from February 1 to March 31, 2010. Mr. Barahmand’s position is that he did not become a Diar Restaurant director until April 10, 2010, and, accordingly, cannot be held liable for any portion of Mr. Shamsian’s unpaid wages since he was not a director when Mr. Shamsian’s wages “were earned or should have been paid”.
27. Mr. Barahmand’s legal counsel appended several corporate documents and corporate search reports to the Appeal Form. These documents include two “Notice of Change of Directors”. The first indicates that Mr. Barahmand became a “new director” of Diar Restaurant as of April 8, 2010, and that, effective that date, Mr. Barahmand and Mr. Nozadgajin [s/i] were the only directors. The second Notice indicates Mr. Nozadgajin [s/i] ceased to be a Diar Restaurant director on June 19, 2010, and that, as of that date, Mr. Barahmand became Diar Restaurant’s sole director. There is also a “Consent to Act as Director”, signed by Mr. Barahmand, that is dated “effective April 8, 2010” as well as a copy of a “Special Resolution”, passed as of April 8, 2010, increasing the number of Diar Restaurant directors from one to two and appointing Mr. Barahmand as a Diar Restaurant director.
28. The corporate search relied on by the delegate to show that Mr. Barahmand was a Diar Restaurant director at the relevant time is dated April 30, 2010. Thus, Mr. Barahmand’s counsel’s assertions are not necessarily incompatible with the information the delegate had in hand when she issued the Section 96 Determination. Mr. Barahmand’s counsel asserts that “the proper way to characterize Mr. Barahmand’s role from January 2010 to April 9, 2010, could best be characterized as that of an investor or a debtor that had loaned Diar \$50,000.00 but he had no authority or control over the actual business of Diar itself” and that “it took a

longer period of time after Mr. Barahmand was named a director for Mr. Nozadgagin to hand over control of Diar to Mr. Barahmand.”.

29. Corporate records are not necessarily determinative of a person’s status although the Tribunal has repeatedly stressed that corporate records raise a rebuttable presumption regarding the matters recorded in the records (see, *e.g.*, *Director of Employment Standards and Michalkovic*, BC EST # RD047/01). Corporate records may indicate that a person is a director or officer when, in fact, a *bona fide* resignation has not yet been reflected in the corporation’s, or the B.C. Corporate Registry’s, records. Alternatively, although a person is not listed as a corporate officer or director, that person may nonetheless be effectively functioning as a corporate officer or director.
30. Mr. Barahmand’s current position is that he was not formally named as a corporate director until April 10, 2010, (although the Corporate Registry records appended to the Appeal Form indicate that the relevant date was April 8, 2010 – given my view of the matter, nothing turns on this discrepancy). However, there is a considerable amount of evidence indicating, at the very least, Mr. Barahmand *functioned* as a corporate director as and from early January 2010 (persons who “function” as corporate directors can be held personally liable for unpaid wages under subsection 96(1) even though they may not be formally named in the corporate records as a director – see *Penner and Hauff*, BC EST # D371/96, and *Michalkovic*, *supra*).
31. Mr. Barahmand, during the course of his testimony at the complaint hearing relating to the Corporate Determination, testified that he became a corporate director on January 8, 2010, – see delegate’s reasons, page R15 – “...*Mr. Barahmand testified that when he became a Director at Diar on January 8, 2010, there was an outstanding wage amount owed to Mr. Shamsian, which according to the partnership agreement was the responsibility of Mr. Nozadgagin, and Mr. Nozadgagin acknowledged this debt*” (my *italics*).
32. The record before the delegate included a “Partnership Agreement” between Mr. Nozadgagin and Mr. Barahmand, signed by both men on January 7, 2010. Although described as a “partnership agreement”, it is clear that the relationship envisioned by the document was not a partnership under the *Partnership Act* but, rather, it was a unanimous shareholders’ agreement relating to their joint interest in Diar Restaurant. I have reproduced some of the salient provisions of this agreement, below:
- Para. 2: “The name of the partnership will be “Diar Restaurant Ltd.”;
  - Para. 4: “The Partnership will begin on January 7th, 2010 and will continue until terminated as provided in this Agreement”;
  - Para. 14 states that the partners will vote on “decisions regarding distribution of profits, allocation of losses, and the requirements for Additional Capital”;
  - Para. 15 states that profits and losses will be divided equally and para. 17 states that both men will have equal rights to inspect and examine Diar Restaurant’s books of account;
  - Para. 22 states that the “Managing Partner will have management and control of the day-to-day business of the Partnership” and by para. 23 Mr. Barahmand was designated as the “Managing Partner”; and
  - Para. 28: “Each Partner will have authority to bind the Partnership in contract.”
33. The evidence before the delegate at the complaint hearing relating to the Corporate Determination also provides ample evidence about Mr. Barahmand’s significant role in the business affairs of Diar Restaurant as and from early January 2010. Mr. Shamsian testified that, faced with straitened finances, Mr. Nozadgagin started looking for a new “partner” and that “On January 7, 2010, Mr. Barahmand became a director of Diar [and]...injected money into Diar” (page R3). Mr. Nozadgagin testified that Mr. Barahmand invested in Diar



Restaurant in January 2010 and that by May 2010, arrangements were being undertaken whereby Mr. Barahmand would have total control of the company (page R5). Mr. Barahmand testified about the various management matters he attended to after he “became a part of Diar” in January 2010 (pages R7-R8). In *Michalkovic, supra*, the Tribunal provided some guidance about what constitutes “functioning” as a director including: negotiating business transactions, regularly attending the company’s office, provided operating funds, and generally “manage, supervise or control the business and affairs” of the corporation (page 7).

34. It may be that Mr. Barahmand did not formally become recorded in Diar Restaurant’s corporate records as a director until April 8, 2010, but, in my view, the evidence overwhelmingly shows that as and from early January 2010 Mr. Barahmand played a significant role in Diar Restaurant’s business affairs consistent with those duties typically exercised by a corporate director in a small firm. I also wish to note, simply for the sake of completeness, that Mr. Barahmand was also identified in various Diar Restaurant documents as the company’s “president” and while the Section 96 Determination named Mr. Barahmand as a Diar Restaurant director, it would appear that Mr. Barahmand might have been held equally liable for Mr. Shamsian’s unpaid wages as a corporate officer. I do not rest my decision on that position, however, since that was not the basis for the issuance of the Section 96 Determination.
35. Mr. Barahmand’s legal counsel says that since Mr. Barahmand was not a Diar Restaurant director until April 10, 2010, it was not possible for him to have authorized, permitted or acquiesced (see subsection 98(2)) in the *Employment Standards Act* contraventions relating to Mr. Shamsian’s unpaid wages. Three separate \$500 penalties were levied by way of the Corporate Determination and these penalties were carried forward and levied against Mr. Barahmand by way of the Section 96 Determination. The first penalty concerns Diar Restaurant’s continuing failure to keep payroll records relating to Mr. Shamsian (section 28) and the last date of the contravention was March 31, 2010. The second contravention relates to Diar Restaurant’s continuing failure to pay Mr. Shamsian all of his earned wages on at least a semimonthly basis (section 17) and the final instance of this continuing contravention concerned Mr. Shamsian’s wages for the March 1 to March 15, 2010, pay period that were payable by no later than March 24, 2010. The third and final contravention concerned Diar Restaurant’s failure to pay Mr. Shamsian all of his earned wages within 48 hours of his “constructive dismissal” on March 31, 2010, (section 18) and thus the date of this contravention was April 2, 2010. Since I have determined that Mr. Barahmand, at the very least, was functioning as a Diar Restaurant director as and from early January 2010, counsel’s argument regarding Mr. Barahmand’s subsection 98(2) liability is, in my view, misconceived. The evidence before the delegate clearly shows that Mr. Barahmand was well aware of Mr. Shamsian’s unpaid wage claim during the period from January to March 2010; however, Mr. Barahmand was operating on the assumption (false though it was) that Mr. Shamsian’s unpaid wages were solely Mr. Nozadgagin’s responsibility. As recounted in the delegate’s reasons supporting the Corporate Determination, Mr. Barahmand testified as follows (page R7): “He made it clear to both Mr. Shamsian and Mr. Nozadgagin that [Mr. Shamsian’s unpaid] wages were a debt incurred by Diar before he came on board [and that] the money owed to Mr. Shamsian up until January 7, 2010 was a debt owed by Mr. Nozadgagin, that he [Mr. Barahmand] was only responsible for debts incurred from January 8, 2010 onward.”
36. Given his position as a corporate director and company president, Mr. Barahmand could, but chose not to, have arranged for Diar Restaurant to pay Mr. Shamsian’s wages in a timely manner. That being the case, in my view, the delegate did not err in law by imposing a subsection 98(2) liability on Mr. Barahmand.

### **Summary**

37. I am not satisfied that the delegate was obliged to convene an oral hearing prior to issuing the Section 96 Determination and thus she did not fail to observe the principles of natural justice on that account. Further, I am satisfied, in the circumstances of this case, that Mr. Barahmand was well aware that the delegate might be

issuing a determination against him pursuant to one or both of subsections 96(1) and 98(2). While it perhaps would have been preferable for the delegate to have expressly sought Mr. Barahmand's submissions regarding his possible personal liability, I do not find that the delegate's failure to do so constituted a breach of the principles of natural justice.

38. However, even if it could be said that the delegate failed to observe the principles of natural justice by failing to specifically seek Mr. Barahmand's submissions prior to issuing the Section 96 Determination, I am of the opinion that any such failing has been cured by the present appeal proceedings. Mr. Barahmand, through his legal counsel, has provided complete submissions regarding the correctness of the Section 96 Determination and I have given those submissions my full consideration. Having done so, I am of the view that the delegate did not err in law in issuing the Section 96 Determination and, accordingly, it must be confirmed.

### **ORDER**

39. I am not satisfied that either ground of appeal has been met and, accordingly, pursuant to subsection 115(1)(a) of the *Act*, the Section 96 Determination is confirmed as issued in the amount of \$8,087.91 together with whatever further interest that has accrued under section 88 since the date of issuance.

---

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