

An appeal

- by -

Jonathan Hack  
("Hack")

- 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:** Robert Groves

**FILE No.:** 2009A/036

**DATE OF DECISION:** June 16, 2009

## DECISION

### OVERVIEW

1. Jonathan Hack ("Hack") appeals a determination dated February 16, 2009 (the "Determination") issued by a delegate of the Director of Employment Standards (the "Delegate") in which the Delegate determined that Mr. Hack was a director of Global Safe Technologies Inc. ("Global Safe") and liable in that capacity under section 96 of the *Employment Standards Act* (the "*Act*") for \$5,307.60 of the wages and accrued interest found to be owed by Global Safe to one Stanley M. Schaefer ("Schaefer") in a determination dated October 7, 2008 (the "Corporate Determination").
2. I have before me Mr. Hack's Appeal Form and attached submission, the Determination and the Reasons for the Determination, a submission from the Delegate and the record the Delegate says was before him at the time the Determination was being made, as well as a final submission from Mr. Hack.
3. I have also received a copy of a submission from a Randy Siteman ("Siteman") on behalf of Global Safe. That submission was received by the Tribunal after the date set for final submissions. Notwithstanding this, I have reviewed Mr. Siteman's submission, but I find that it does not add appreciably to the information contained in the other written materials provided to the Tribunal within time on behalf of Global Safe.
4. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 17 of the Tribunal's *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. No participant has requested any one or more of the particular types of hearing contemplated. My review of the material before me persuades me that I may decide this appeal on the basis of the written documentation before me without conducting an oral, or for that matter an electronic, hearing.

### FACTS

5. The Corporate Determination was issued as a result of a complaint filed by Mr. Schaefer under section 74 of the *Act* alleging that Global Safe had contravened the *Act* when it failed to pay him wages. The Corporate Determination ordered Global Safe to pay wages and interest of \$17,689.41, and administrative penalties amounting to \$1,500.00.
6. Global Safe appealed the Corporate Determination. In BC EST # D005/09, the Tribunal dismissed that appeal. Global Safe sought reconsideration. In BC EST # RD046/09, the Tribunal dismissed Global Safe's application, and confirmed the decision in BC EST # D005/09.
7. BC Online Registrar of Companies Corporation Searches conducted in respect of Global Safe revealed to the Delegate that Mr. Hack was a director of the company between May 1, 2007 and November 8, 2007, the period of time during which the Delegate decided the wages found to be owed to Mr. Schaefer in the Corporate Determination were earned, or should have been paid. The Delegate therefore determined that Mr. Hack was liable to pay \$5,307.60 under section 96 of the *Act*, the relevant portion of which reads:

96(1) 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.

8. I note that in this appeal Mr. Hack does not dispute that he was a director of Global Safe during the relevant period. Indeed, he has delivered information which reveals that he resigned as a director on March 10, 2008, a date after the period during which his liability would have arisen under the *Act*.
9. Instead, Mr. Hack asserts that he should not be responsible for paying wages to Mr. Schaefer because:
- Mr. Schaefer was not an employee of Global Safe. Rather, he and the other principals of Global Safe, including Mr. Hack, were partners.
  - Mr. Hack never personally undertook to pay wages to Mr. Schaefer.
  - Mr. Schaefer represented Global Safe poorly, and appropriated corporate opportunities for his personal benefit.
  - The T4 information provided by Global Safe in respect of Mr. Schaefer reveals that his salary was much lower than the rate of pay attributed to him in the Corporate Determination.
  - Much of the wage amount the Corporate Determination found was owed to Mr. Schaefer had been paid to him in the form of reimbursement for expenses.

## ISSUES

10. Is there a basis for my deciding that the Determination must be varied or cancelled, or that the matter must be referred back to the Director for consideration afresh?

## ANALYSIS

11. The appellate jurisdiction of the Tribunal is set out in section 112(1) of the *Act*, which reads:

112(1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:

- (a) the director erred in law;
- (b) the director failed to observe the principles of natural justice in making the determination;
- (c) evidence has become available that was not available at the time the determination was being made.

12. Section 115(1) of the *Act* should also be noted. It says this:

115(1) After considering whether the grounds for appeal have been met, the tribunal may, by order,

- (a) confirm, vary or cancel the determination under appeal, or
- (b) refer the matter back to the director.

13. Mr. Hack has alleged that the Determination should be cancelled on the basis of all three prescribed grounds in section 112. In my view, the appeal cannot be sustained on any of these grounds, and must be dismissed.

14. The principal difficulty with Mr. Hack's appeal is that it seeks to re-visit the decision made in the Corporate Determination, I suspect in the hope that I may be persuaded that it is wrong, and that the decisions of the Tribunal which reviewed it are likewise flawed.
15. Previous decisions of the Tribunal have made it clear that in appeals of this type the doctrine of *res judicata* precludes individuals like Mr. Hack from arguing whether Global Safe was properly found liable in the Corporate Determination. The policy reason underlying this approach is that the enforcement mechanisms of the *Act* are meant to operate quickly and inexpensively, and permitting corporate directors to re-litigate a finding of corporate liability would undermine the fulfillment of that goal (see *Steinemann*, BC EST # 180/96). I suppose one might say this principle applies *a fortiori* in circumstances where, as here, Global Safe appealed the Corporate Determination, and later applied unsuccessfully for a reconsideration of the Tribunal's decision to dismiss that appeal.
16. It follows that issues relating to Mr. Schaefer's employment status, his rate of pay, and the amount of wages owed to him, all of which were canvassed in the Corporate Determination, and reviewed in detail in the appeal proceedings which arose from it, are not properly before me.
17. Mr. Hack's assertions that Mr. Schaefer's performance on the job was lacklustre, and that he appropriated corporate opportunities to his own advantage are, to the extent they are important in proceedings brought pursuant to the *Act*, relevant for the purposes of determining whether Mr. Schaefer should be entitled to compensation for length of service, or be deprived of that relief due to his having given cause for dismissal. In this case, the Corporate Determination also appears to have dealt with the question of compensation for length of service, stating that Mr. Schaefer was not entitled to that remedy. Mr. Schaefer has not, to my knowledge, challenged that decision. The facts supporting such a finding are, therefore, entirely irrelevant to the matters before me on this appeal brought by Mr. Hack.
18. For the purposes of section 96, the principal issue is whether the person from whom a delegate seeks the payment of a corporate liability for wages imposed under the *Act* was a director or officer of that corporate body at the time the wages were earned or should have been paid. On this point, the following comments of the Tribunal in *Wilnofsky*, BC EST # D106/99 have been oft-quoted:

...where an individual is recorded as an officer or director of a company in the records maintained by the Registrar, a rebuttable presumption arises that the individual actually is a director or officer, as the case may be, of the company in question. This presumption, however, may be rebutted by credible and cogent evidence that the Registrar's records are inaccurate – the burden of proving that one is not a corporate director or officer lies with the individual who denies such status.
19. It will be seen from this passage that it matters not whether Mr. Hack personally undertook to pay Mr. Schaefer his wages. Mr. Hack's obligations as a director are statutory, and are not dependent on the particular arrangements he may or may not have made with Mr. Schaefer.
20. In this case, Mr. Hack tenders no evidence supporting a conclusion that the Delegate erred in finding he was a director of Global Safe during the relevant period in 2007 when Mr. Schaefer's wages were earned or should have been paid. Indeed, the inference to be drawn from his having advised that he had resigned as a director effective March 10, 2008 is that he was a director at all material times before that date. There is nothing before me supporting a conclusion that the records of the Registrar of Companies are inaccurate. Mr. Hack has, accordingly, failed to rebut the presumption intrinsic to an analysis of section 96.

**ORDER**

21. Pursuant to section 115 of the *Act*, I order that the Determination dated February 16, 2009, be confirmed.

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**Robert Groves**  
**Member**  
**Employment Standards Tribunal**