

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act, S.B.C. 1995, c. 38

-by-

Jim Kovacs

(“Kovacs”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 96/706

DATE OF HEARING: February 17th, 1997

BC EST # D076/97

DATE OF DECISION: February 19th, 1997

DECISION

APPEARANCES

Stephen G. Price Legal Counsel for Jim Kovacs

John Amenhauser
Nicole Black
John Pavlovich
Laurie Rennie on their own behalf

Jennifer Ip, I.R.O. for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Jim Kovacs (“Kovacs”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from Determination No. DDET 000517 issued by the Director of Employment Standards (the “Director”) on November 5th, 1996. The Director determined, *inter alia*, that Kovacs was a director and/or officer of Assured Card Corporation (“Assured Card” or the “employer”) and thus, by reason of section 96 of the *Act*, was personally liable for up to two months’ unpaid wages owed to each of six former employees of Assured Card. It is common ground that all of the employees’ claims in this case fall below the two months’ threshold. The amount due under the Determination, including interest to date of issuance, is \$29,694.31. While Assured Card is not, so far as I can gather, the subject of any formal insolvency or bankruptcy proceedings, the company has ceased operations and is apparently defunct.

The appeal hearing in this matter was held at the Tribunal’s office in Vancouver on February 17th, 1997. I heard submissions from Mr. Stephen Price, on behalf of Kovacs, and testimony from Kovacs and four of the six employees named in the Determination (John Amenhauser, Nicole Black, John Pavlovich and Laurie Rennie).

ISSUE TO BE DECIDED

The Director does not assert that Kovacs was, at any time, duly elected as a director of Assured Card, or that he was ever formally appointed as a corporate officer. The employer's corporate records, and the records maintained by the B.C. Registrar of Companies, show that Assured Card was incorporated on September 15th, 1994 and that the sole director and officer was one Maynard Dokken. However, the Director submits that Kovacs was a director or officer by reason of the "functional test" set out in the B.C. *Company Act* and, therefore, liable for the six former employees' unpaid wages.

FACTS AND ANALYSIS

Assured Card was established to, in effect, stand between the major credit card companies and major credit card holders. Assured Card acted as a financing company, paying customers' credit card debts directly to the credit card company. Assured Card intended to earn its profits by charging membership fees and by levying interest charges (at somewhat lower interest rates compared to the major credit card companies) on the monies advanced on their customer's behalf. At its peak, Assured Card employed some thirty employees and had 4000 members, however, the company did not thrive and has now gone out of business.

At the outset of his relationship with Assured Card, Kovacs may well have been "simply an investor"--it was not a prudent investment as Kovacs now claims to have lost approximately \$450,000. However, irrespective of Kovacs' original intent, or indeed status, it is clear that by the time the wage claims of the six employees named in the Determination crystallized, Kovacs was deeply involved in the day-to-day affairs of Assured Card. I must determine if such involvement was sufficient to fix Kovacs with a personal liability under section 96 of the *Act*.

The terms "director" and "officer" are not defined in the *Employment Standards Act*. Thus, one must look to the *Company Act* for guidance. In this latter enactment, the terms "director" and "senior officer" are defined in section 1(1) as follows (the term "officer" is not defined):

"director" includes every person, *by whatever name he is designated, who performs the functions of a director;* (emphasis added)

"senior officer" means the chairman or any vice-chairman of the board of directors, the president, any vice president, the secretary, the treasurer or the general manager of the corporation *or any other individual who*

performs functions of the corporation similar to those normally performed by an individual occupying any of those offices, and the 5 highest paid employees of the corporation, including any individual referred to in this definition; (emphasis added)

Thus, the law appears clear that a person may be a director or senior officer of a corporation even though he or she does not formally hold such a title. The key point is not whether an individual is formally named in the corporate records as an officer or director but, rather, whether that person exercises the typical functions, tasks, or duties that a corporate director or officer would, in the usual course of events, exercise [see *G. Elmitt Construction Ltd. v. Kaplan* (1992) 1 C.L.R. (2d) 219; see also *Penner and Hauff*, B.C. E.S.T. Decision No. D371/96, December 27th, 1996].

In the present case, the evidence before me (most of which was provided by Kovacs himself) is that Kovacs:

- regularly attended at the office of the company where he had a private desk in room which he shared with the two senior officers of the company;
- was regularly consulted and gave directions to Assured Card employees regarding the hiring and firing of staff;
- personally owned the office furniture and equipment on site at Assured Card's Vancouver office;
- signed a Personal Property Registry Financing Statement, in which Assured Card granted to "Kovacs and or Global Holdings Inc." a "first charge" on certain furnishings and equipment, as "authorized agent" for Assured Card;
- provided funds to meet ongoing financial obligations of Assured Card including payroll obligations;
- travelled to Houston, Texas to meet with potential investors in Assured Card;
- attempted to negotiate a settlement directly with Laurie Rennie regarding the latter's wage claim;

- held himself out, and was referred to by other Assured Card employees, as the “Chairman of the Board”--both on Assured Card business cards and on internal corporate documents;
- dealt with Assured Card’s bankers regarding its deposit accounts;

Kovacs’ position with respect to the foregoing evidence is that he was not acting as an officer or director but merely as an “investor” who was doing what was necessary to protect his investment. It may well be the case that Kovacs’ intent throughout his involvement with Assured Card was to restrict his role to that of “investor”. However, I cannot agree that Kovacs fits the profile of the passive investor. He was intimately involved in the day-to-day management of the firm and, in my view, exercised the sort of functions normally ascribed to corporate officers and directors. Therefore, in light of section 96 of the *Act*, it follows that the Determination was properly issued against him.

ORDER

Pursuant to section 115 of the *Act*, I order that Determination No. DDET 000517 be confirmed as issued 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