

An appeal

- by -

Donald K. Dafoe, a Director and Officer of Global Safe Technologies Inc.
(“Dafoe”)

- 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/061

DATE OF DECISION: July 22, 2009

DECISION

OVERVIEW

1. Donald K. Dafoe ("Dafoe") appeals a determination dated March 31, 2009 (the "Determination") issued by a delegate of the Director of Employment Standards (the "Delegate") in which the Delegate determined that Mr. Dafoe was a director and officer of Global Safe Technologies Inc. ("Global Safe") and liable under sections 96 and 98 of the *Employment Standards Act* (the "*Act*") in respect of sums found to be owed arising from a complaint filed by one Stanley M. Schaefer ("Schaefer") against Global Safe, which had resulted in a determination against the company dated October 7, 2008 (the "Corporate Determination").
2. The Determination found Mr. Dafoe liable to pay \$5,330.61 for wages and accrued interest under section 96, and \$1,500.00 under section 98 in respect of penalties imposed on Global Safe, for a total owed of \$6,830.61.
3. I have before me Mr. Dafoe'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.
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 Delegate's Reasons for the Determination say that 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 appeal was unsuccessful, and the Tribunal confirmed the Corporate Determination. Global Safe then requested a reconsideration. That application was also dismissed by the Tribunal.
7. BC Online Registrar of Companies Corporation Searches conducted in respect of Global Safe revealed to the Delegate that Mr. Dafoe was a director and officer of the company between May 1, 2007 and November 8, 2007, the period of time during which the Delegate's Reasons say 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. Dafoe was liable to pay two months' worth of the wages owed to Mr. Schaefer, plus interest, amounting to \$5,330.61, 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. The Delegate also decided that Mr. Dafoe was personally liable for the \$1,500.00 in administrative penalties imposed on Global Safe, as a result of the operation of section 98(2) of the *Act*, which reads:

98(2) 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.

9. In respect of section 98(2), the Delegate's Reasons say that there was evidence contained in the Corporate Determination that showed that Mr. Dafoe, as President and CEO of Global Safe, managed its business activities, including payroll. No details as to what, precisely, that evidence was are provided in the Reasons. The Delegate does say, however, that Mr. Dafoe's activities on behalf of the company are supported by the fact that he drafted a document dated December 15, 2006 for the Provincial Court of British Columbia concerning the payment of wages to Mr. Schaefer, in which Mr. Dafoe stated the following:

Be it acknowledged, that Mr. Stan Schaefer is employed by Global Safe Technologies Inc. While Stan Schaefer's rate of pay is presently \$2500.00 per month, **Global Safe Technologies Inc. has only been able to partially pay Stan Schaefer this amount**, and therefore most of his living expenses are paid in lieu of this... (*emphasis as appears in the Reasons*)

10. The Delegate's Reasons assert that the Corporate Determination found that Global Safe's practices for keeping payroll records and paying wages violated the *Act*. The Delegate then says this:

I find it reasonable to determine that Mr. Dafoe recognized that Mr. Schaefer was not being paid wages in accordance with the Act. On the balance of probabilities, I find Mr. Dafoe authorized, permitted and acquiesced in the contraventions of section 17, 18 and 28 of the Act and he is personally liable to pay these penalties pursuant to section 98(2) of the Act.

11. In his submission delivered with his appeal Mr. Dafoe nowhere takes issue with the assertion that he was a director and officer of Global Safe. Instead, he argues that he should not be found liable under the *Act* because:

- Mr. Schaefer was not an employee of Global Safe. Rather, he and the other principals of Global Safe, including Mr. Dafoe, were partners.
- The evidence Mr. Schaefer provided to the Employment Standards Branch relating to his income, his status as a partner, and the circumstances surrounding his departure from Global Safe, among other things, was untruthful.
- Mr. Dafoe was unable to participate as diligently as he would have liked in the investigation of Mr. Schaefer's original complaint due to an illness, and should not have been prohibited from tendering further evidence going to the substance of Global Safe's defence, merely because it was submitted late.

12. Mr. Dafoe's submission also appears to take issue with the discussion in the Delegate's Reasons regarding the Delegate's efforts to make contact with Mr. Dafoe during the investigation which led to the Determination under appeal. Commencing on January 22, 2009, the Delegate forwarded letters to Mr. Dafoe setting out his potential liability as a director and officer of Global Safe under sections 96 and 98 of the *Act*, having regard to the circumstances of Mr. Schaefer's complaint, and inviting a response. Those letters were sent, by registered mail, to two of the addresses noted for Mr. Dafoe on the corporate searches for Global Safe obtained by the Delegate. Both those letters were returned. The first was returned "unclaimed." As the corporate search information revealed a change of address for Mr. Dafoe as a director, the Delegate forwarded another version of the January 22, 2009 letter to that new address. The second letter was returned with the marking "address incomplete".

13. The Delegate then attempted to engage Mr. Dafoe in the process by means of a phone call to the company to obtain confirmation of his address. The Delegate left a voicemail message requesting a return call from Mr. Dafoe, so that a mailing address could be provided. No one returned the call.

14. The Delegate re-issued the letter to Mr. Dafoe and sent it via email to his attention to the address for Global Safe which the Delegate's Reasons say Mr. Dafoe had employed previously for the purposes of making submissions on behalf of the company during the investigation leading to the Corporate Determination. The Delegate also forwarded the re-issued letter to the registered and records office for Global Safe.
15. The Delegate says that a read receipt on the email to Global Safe was returned indicating that the email had been received and read. The Canada Post information received by the Delegate further confirmed that the letter to the registered and records office for Global Safe had been successfully delivered.
16. Prior to issuing the Determination, the Delegate received no communication from Mr. Dafoe in response to the letters.
17. In his submission on this appeal, Mr. Dafoe states that he did receive correspondence from the Delegate dated March 31, 2009, which I infer is a reference to the Determination and the Delegate's Reasons in support. Mr. Dafoe also states that he has had the same address "since this case began," that he did receive correspondence from the Delegate prior to January 22, 2009, but that he did not receive the letter of that date, or the subsequent correspondence from the Delegate leading up to the March 31, 2009, date on which the Determination was issued.

ISSUE

18. 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

19. 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.

20. 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.

21. Mr. Dafoe has alleged on his Appeal Form that the Determination should be cancelled on the basis that the Delegate failed to observe the principles of natural justice.

22. An allegation that there has been a failure to observe the principles of natural justice raises a concern that the procedure followed by the Delegate in making the Determination was unfair, often in the sense that a party was deprived of the opportunity to know the case he is required to meet, and an opportunity to be heard in

reply. The *Act* makes specific reference to this principle in section 77, which requires that if an investigation is conducted, the Director must make reasonable efforts to give a person under investigation an opportunity to respond.

23. It is to be observed that in order to comply with the principles of natural justice when applying section 77 it is a "reasonable" effort that is required. The inference to be drawn from this language is that if it can be said that the Delegate took reasonable steps to give notice to Mr. Dafoe that he faced possible exposure to liability under sections 96 and 98, and an opportunity to reply, there may be no legitimate challenge to the Determination on natural justice grounds, despite the fact Mr. Dafoe may have received no actual notice that an investigation was taking place.
24. Situations in which a determination is made against a person where the person has received no actual notice that he is being investigated, and therefore has had no opportunity to make representations in reply, will doubtless be rare. However, there is authority from the Tribunal which establishes that at least in circumstances where a person seeks to avoid notice either deliberately or through a course of conduct the person knows or ought to know will prevent him from participating effectively, actual notice of an investigation may not be required (see *Inshalla Contracting Ltd.* BC EST # RD054/06).
25. What constitutes a reasonable effort in a particular case is, I think, largely a fact-driven exercise. Here, the Delegate's attempts to apprise Mr. Dafoe of the investigation, and the basis for the allegation that he might face liability under sections 96 and 98, appear to me to have been reasonable in the circumstances. The Delegate forwarded letters giving notice of the investigation to addresses for Mr. Dafoe that were noted on the corporate searches the Delegate had obtained relating to Global Safe. When those efforts appeared to have failed to provide Mr. Dafoe with actual notice of the investigation the Delegate telephoned Global Safe and left a voicemail message for Mr. Dafoe to return the call so he could provide a correct mailing address. When the Delegate received no return call, he forwarded the letter to Mr. Dafoe's attention at the email address for Global Safe which the Delegate says Mr. Dafoe had used in the past to make submissions on behalf of the company for the purposes of the investigation which led to the Corporate Determination. The email was accompanied by a notification which was subsequently returned to the Delegate informing him that the email had been received and read. The Delegate also forwarded the letter to the registered and records office for Global Safe, and the Delegate states that Canada Post subsequently verified that it had been successfully delivered there. Mr. Dafoe received the Determination, and subsequently appealed it, when the Delegate forwarded it to him. The address for Mr. Dafoe shown on the Determination was one of the addresses for him as a director which appears on the corporate search material the Delegate had obtained for Global Safe. It was the address to which the Delegate had sent one of the versions of the January 22, 2009 correspondence, the one which had been returned marked "address incomplete". The Determination indicates that it was forwarded by registered mail, regular mail, and email.
26. The fact that the Delegate took all of these steps is not contradicted by Mr. Dafoe, at least directly. Instead, Mr. Dafoe states that he received all the communications emanating from the Delegate apart from the January 22, 2009 letter, and the other versions of it that followed prior to the Delegate's issuing the Determination on March 31, 2009. One inference Mr. Dafoe may be inviting me to draw is that the Delegate did not generate, and forward to him, the January 22, 2009 correspondence, and the versions of it that followed. If so, I reject the invitation. There is nothing in the record which would even remotely support an allegation that the Delegate is misrepresenting the efforts he made to provide Mr. Dafoe with notice.
27. In light of this, it is a mystery to me why the Delegate's efforts should not have made Mr. Dafoe aware that he was under investigation for the purposes of determining his personal liability under sections 96 and 98. But even if he was not, I conclude nevertheless that he should have been, and that the steps taken to apprise

him of the investigation were sufficient to withstand a challenge pursuant to section 77. The Delegate states, and Mr. Dafoe does not dispute, that the Delegate had communicated with Mr. Dafoe for the purposes of the investigation leading to the Corporate Determination, and that the Delegate attempted to do so again by the same means during the investigation leading to the Determination now under appeal. The Delegate also states, and again Mr. Dafoe does not dispute, that the Corporate Determination was sent to the directors and officers of the company, and contained a notice to them explaining the possibility of their being found personally liable under the *Act* in the event that Global Safe did not pay the sums found to be owed to Mr. Schaefer, and the penalties imposed.

28. In the circumstances of this case, I have concluded that if Mr. Dafoe did not, in fact, receive actual notice that he was being investigated by the Delegate for contraventions of section 96 and 98, it was not because the Delegate failed to make reasonable efforts to apprise him of this fact, and to give him an opportunity to respond.
29. Even if it can be said I am mistaken in arriving at this conclusion, I am persuaded that any failure on the part of the Delegate to observe the principles of natural justice may be cured on this appeal. That this may occur in proceedings before the Tribunal there can be no doubt (see *Taiga Works Wilderness Equipment Ltd. v. Director of Employment Standards* 2009 BCSC 855). Part of the rationale for this jurisdiction is that it may not contribute to the fair and efficient resolution of disputes under the *Act* if a natural justice infringement is always to result in the matter being referred back to the Director so that the proper procedures may be followed, and a new determination issued, or if a complaint that is otherwise meritorious is simply cancelled. This is especially so in circumstances where all the relevant information is before the Tribunal, and the victim of the breach has had full opportunity to make representations during the proceedings on appeal.
30. Here, the rationale for the imposition of personal liability under sections 96 and 98 on Mr. Dafoe as an officer and director of Global Safe has been set out in the Determination, and I have alluded to it earlier in this decision. Mr. Dafoe has certainly had ample opportunity to address the matter during the course of this appeal.
31. Notwithstanding this, the submission delivered by Mr. Dafoe for the purposes of this appeal does not appear to address the question whether he should be found personally liable as a director and officer, under either of sections 96 or 98. Should the appeal be dismissed, in effect, for this reason alone? I do not believe so. I must still be satisfied on the material before me that the Delegate committed no error in finding Mr. Dafoe liable. This is especially so, I think, in cases involving sections 96 and 98. The reason for this is that these provisions are extraordinary statutory exceptions to the general legal principle that directors and officers of corporations are not personally responsible for corporate debts. It follows that while the *Act* as a whole should be interpreted broadly, so as to give full effect to the benefits it confers, care should be taken when imposing personal liability on individuals for corporate obligations (see *Director of Employment Standards (Re: Laurent Michalkovic)* BC EST # RD047/01).
32. 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 *Wilimofsky* 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.

33. The record contains corporate searches for Global Safe which provide support for the conclusion that Mr. Dafoe was a director and officer of the company at the time the wages found to be owed in the Corporate Determination were earned or should have been paid. Mr. Dafoe has tendered no evidence rebutting the presumption that arises as a result of the information contained in those searches. I discern no basis arising from the grounds of appeal set out in section 112 for disturbing the Delegate's conclusion in the Determination relating to the application of section 96 to Mr. Dafoe. The references in Mr. Dafoe's submission to questions relating to Mr. Schaefer's being a partner and not an employee, his income, the circumstances of his departure from Global Safe, his veracity, and the extent to which Mr. Dafoe was prevented, on behalf of Global Safe, to tender new evidence in the appeal proceedings which resulted from the Corporate Determination are, quite simply, irrelevant to the issues which confront me in this proceeding, which is an appeal relating to an entirely different Determination. As I said recently in another appeal of this sort involving another director of Global Safe (see *Hack* BC EST # D062/09):

Previous decisions of the Tribunal have made it clear that in appeals of this type the doctrine of *res judicata* precludes individuals...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.

34. The appeal regarding section 98 raises different issues. In order for Mr. Dafoe to be found liable under section 98 it is insufficient that it be established he was a director or officer of Global Safe. In addition, it must be shown that he authorized, permitted or acquiesced in the contraventions of the *Act* the Corporate Determination found had been perpetrated by the company (see *Competition Towing Ltd.* BC EST # D392/99). The language imports an obligation to consider Mr. Dafoe's state of mind, and not merely his status as a director or officer. In this case the Global Safe contraventions in question are identified to have been in respect of the section 17 and 18 duty to pay wages to Mr. Schaefer, and the company's obligation under section 28 of the *Act* to keep payroll records.
35. The Delegate has alluded to some evidence on the basis of which a reasonable person, acting judicially and properly instructed as to the relevant law, could have come to the conclusion that Mr. Dafoe authorized, permitted, or acquiesced in Global Safe's failure to pay Mr. Schaefer wages as required under section 17. That section states that an employer must pay to an employee all wages earned by the employee in a pay period at least semi-monthly and within 8 days after the end of a pay period. The document prepared by Mr. Dafoe for the Provincial Court of British Columbia, in which he acknowledged that Global Safe was paying but a part of the monthly sums owing to Mr. Schaefer for his work, was dated December 15, 2006. That was a date that was but a few months prior to the period for which the Corporate Determination found that Global Safe had contravened the *Act* when it failed to pay wages owing to Mr. Schaefer. Since the December 15, 2006 acknowledgement suggests that Mr. Dafoe was aware that Global Safe was not paying the agreed upon sums to Mr. Schaefer on an ongoing basis, and the corporate searches for Global Safe relied upon by the Delegate provide support for the conclusion that Mr. Dafoe continued to be a director and officer of Global Safe from May to November of 2007, the period that was the focus of the inquiry for the purposes of the Corporate Determination, I am of the view that it was also open to the Delegate to infer that Mr. Dafoe continued to authorize, permit, or acquiesce in Global Safe's failure to pay Mr. Schaefer his wages after the December 15, 2006 document was prepared. By this I mean that I am not persuaded that such a conclusion on the part of the Delegate indicates what the authorities call palpable and overriding error, in the sense that it was irrational or inexplicable, because, for example, it was based on no evidence at all.

36. For the same reasons, I am prepared to accept the Delegate's conclusion that Mr. Dafoe authorized, permitted, or acquiesced in Global Safe's failure to pay Mr. Schaefer all the wages owing to him within the specified time following the termination of his employment, as required by section 18 of the *Act*.
37. I take a different view of Mr. Dafoe's becoming personally liable under section 98 with regard to the penalty imposed due to Global Safe's failure to keep proper payroll records. The Delegate's rationale for liability on this basis is much more tenuous. In his Reasons, the Delegate states that the Corporate Determination shows that Mr. Dafoe, as President and CEO of Global Safe, "managed business activities." The Delegate also says that "documented evidence submitted for the Corporate Determination indicated that Mr. Dafoe had overseen payroll activities." General references of this sort to the evidence that may have been generated in another proceeding involving a different, albeit related party, in this case Global Safe, are in my view unhelpful. What the Delegate needed to do was to discuss the specific evidence he had obtained in his investigation, however it had been generated, on which he had relied for the purpose of determining that Mr. Dafoe had authorized, permitted, or acquiesced in Global Safe's failure to keep the payroll records required under section 28 of the *Act*. It is not for the Tribunal to speculate what evidence it was that was generated for the purposes of the Corporate Determination that led the Delegate to draw his conclusions about Mr. Dafoe's exposure under section 98 in respect of this particular contravention by the company. In the absence of a discussion of the evidence on which the Delegate appears to have relied, the general statements the Delegate makes about Mr. Dafoe's activities are entirely too broad, in my view, to support a conclusion as to Mr. Dafoe's state of knowledge relating to Global Safe's practices relating to its payroll records, that would in turn safely ground a determination that Mr. Dafoe authorized, permitted, or acquiesced in the failure of Global Safe to keep the payroll records mandated by the *Act*. A failure to identify the evidence grounding a finding of liability in my view amounts to an error of law.
38. It follows from this discussion that I have decided to confirm the Determination insofar as it renders Mr. Dafoe personally liable for wages under section 96, and for the penalties under section 98 arising from Global Safe's contraventions of sections 17 and 18, but not for the penalty imposed as a result of the contravention of section 28.

ORDER

39. Pursuant to section 115 of the *Act* I order that:
- those parts of the Determination which find Mr. Dafoe liable under section 96 for wages and interest payable to Mr. Schaefer be confirmed.
 - those parts of the Determination which find Mr. Dafoe liable under section 98 for penalties of \$500.00 each in respect of Global Safe's contravention of sections 17 and 18 be confirmed.
 - the part of the Determination which finds Mr. Dafoe liable under section 98 for a penalty of \$500.00 in respect of Global Safe's contravention of section 28 be cancelled.

Robert Groves
Member
Employment Standards Tribunal