

An appeal

- by -

Khalid Sami Ataya, a Director or Officer of Assure Capital Finance Inc.  
(“Mr. Ataya”)

- 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:** Shafik Bhalloo

**FILE No.:** 2011A/119

**DATE OF DECISION:** October 27, 2011

## DECISION

### SUBMISSIONS

Sheng Wang on his own behalf

Chantal Martel on behalf of the Director of Employment Standards

### OVERVIEW

1. This is an appeal pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) brought by Khalid Sami Ataya (“Mr. Ataya”) of a determination that was issued on July 26, 2011 (the “S.96 Determination”) by a Delegate of the Director of Employment Standards (the “Director”). The S.96 Determination concluded that Mr. Ataya was a Director of Assure Capital Finance Inc. (“ACF”), an employer found to have contravened provisions of the *Act*, and was personally liable by operation of section 96 of the *Act* for an amount of \$14,136.09.
2. Mr. Ataya has appealed the Section 96 Determination on the ground the Director breached the principles of natural justice.
3. Pursuant to section 36 of the *Administrative Tribunals Act* (the “*ATA*”) and Rule 17 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. In my view, this appeal can be adjudicated on the basis of the section 112(5) “record”, the written submissions of the parties and the Reasons for the Determination.

### ISSUE

4. Has Mr. Ataya established that the Director failed to observe the principles of natural justice in making the Section 96 Determination?

### FACTS

5. Mr. Sheng Wang (“Mr. Wang”) was an employee of ACF and filed a complaint under section 74 of the *Act* alleging that ACF had contravened the *Act* by failing to pay him regular wages, expenses and vacation pay.
6. On March 3, 2011, the Delegate conducted a hearing of Mr. Wang’s complaint and issued a determination against ACF on April 13, 2011, (the “Corporate Determination”) finding ACF to have contravened the *Act* in respect of the employment of Mr. Wang, and ordered ACF to pay him wages and interest totalling \$14,015.14. The Corporate Determination also imposed two (2) administrative penalties on ACF for \$500.00 each pursuant to section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”).
7. The Corporate Determination included a notice to Directors and Officers explaining their personal liability under the *Act* and was sent to ACF, with copies to its registered and records office and to Mr. Ataya.
8. ACF did not make any payments required under the Corporate Determination and the appeal period for the Corporate Determination expired on May 24, 2011, without any appeal being filed.

9. On October 1, 2010, the Delegate conducted an insolvency search through the office of the Superintendent of Bankruptcy, Canada and the search failed to show that ACF was in receivership or subject to bankruptcy proceedings.
10. On October 12, 2010, the Delegate conducted a BC On-Line corporate search that indicated ACF was incorporated on December 7, 2009, and Mr. Ataya was listed as its director since ACF's incorporation. As a result, the Delegate found, in the S.96 Determination, that Mr. Ataya was a director within the meaning of S.96 of the *Act* when Mr. Wang's wages were earned and should have been paid and ordered Mr. Ataya personally liable for up to two (2) months' unpaid wages of Mr. Wang, plus interest thereon. Based on the calculation of Mr. Wang's monthly wages in the Corporate Determination, the Delegate concluded that Mr. Ataya owed him \$14,015.14, plus interest of \$120.95 for a total of \$14,136.09.
11. The Delegate did not find sufficient evidence to hold Mr. Ataya responsible for administrative penalties levied against ACF in the Corporate Determination and did not impose those penalties on Mr. Ataya in the S.96 Determination.

### **SUBMISSIONS OF MR. ATAYA**

12. Mr. Ataya does not make any submissions with respect to the natural justice ground of appeal he has checked-off in the Appeal form. Instead, he explains the financial difficulties ACF encountered in its business due to a cut in its financing from the funding company that went bankrupt. This ultimately led to the closure of ACF's office.
13. He also notes that at some point, ACF's landlord "moved in and seized the office and all of its contents". As a result, he had difficulty in finding any information to present to the Tribunal in this appeal. He states that the information "would have showed that Mr. Wang was not entitled to the wages he claims he is owed" and that he was fully "paid for his time as an employee".
14. Mr. Ataya further submits Mr. Wang was "informed immediately" of ACF's "financing problem" and was told ACF was "no longer able to continue as a business and no longer ... able to pay" him. Mr. Wang, states Mr. Ataya, decided that he "would be returning to school to finish his Canadian Business Valuation degree" and "removed all his belongings and vacated the office". Sometime thereafter, ACF's landlord seized ACF's office.
15. Mr. Ataya, in his submissions, then goes on to criticize the work of Mr. Wang while he was employed with ACF. I do not find these submissions relevant or pertinent to the appeal of the Section 96 Determination and therefore do not set them out here.
16. Mr. Ataya also points out that his personal financial situation is not particularly good and he is contemplating "filing for bankruptcy". He states he is unemployed and has no income. He is pleading to the Tribunal to cancel the Section 96 Determination against him.

### **SUBMISSIONS OF MR. WANG**

17. Mr. Wang indicates that Mr. Ataya "had possession of ACF's office at least until August 17, 2010" as he was given his Record of Employment by Mr. Ataya on that date, although he removed his personal items from ACF's office on July 31, 2010. Mr. Wang is unaware of when the landlord seized ACF's office and its contents, but states that the seizure "did not happen before August 17, 2010".

18. Mr. Wang then goes on to respond to some of the allegations of Mr. Ataya pertaining to his work performance, which I do not find relevant in the appeal of the Section 96 Determination and will not reiterate here.

### **SUBMISSIONS OF THE DIRECTOR**

19. The Director states that Mr. Ataya has failed to produce any evidence to support his allegation that the Director failed to observe the principles of natural justice in making the Section 96 Determination.
20. The Director also submits that while Mr. Ataya states that Mr. Wang was “fully aware of the difficult financial situation” of ACF, this does not address the matter before the Delegate. The Director further submits that Mr. Ataya was the sole director of ACF when Mr. Wang’s wages were owed and should have been paid, and, therefore, the Section 96 Determination was correctly made, and Mr. Ataya’s appeal should be denied.

### **ANALYSIS**

21. Subsection 96(1) of the *Act* states that a person who is a director or officer of a corporation at the time wages of an employee were earned or should have been paid is personally liable for up to two (2) months’ unpaid wages for each employee. Subsection 96(2) exempts a director or officer of a corporation from personal liability if, among other things, the corporation is in receivership or is subject to an action under section 427 of the *Bank Act* (Canada) or to a proceeding under an insolvency Act. According to the Delegate’s corporate search, Mr. Ataya was listed as a director of ACF and was its director at all material times when the wages of Mr. Wang were earned. Mr. Ataya has not argued otherwise in his appeal.
22. I also note that Mr. Ataya has not adduced any evidence of formal receivership or statutory insolvency proceedings and, therefore, the exemptions in subsection 96(2) do not apply in this case.
23. Mr. Ataya has also failed to discharge the burden on him to show that the Director breached the principles of natural justice in making the Section 96 Determination. His “natural justice” ground of appeal is without any evidentiary foundation; he is simply appealing the case because he is dissatisfied with the result in the Section 96 Determination.
24. With respect to Mr. Ataya’s personal financial situation, while I do sympathize with his predicament, his alleged inability to pay the Section 96 Determination and his current unemployment are not proper considerations for this Tribunal in this appeal. In the circumstances, I reject Mr. Ataya’s appeal.

### **ORDER**

25. Pursuant to section 115 of the *Act*, the appeal is dismissed and the Determination dated July 26, 2011, is confirmed together with any accrued interest.

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**Shafik Bhalloo**  
**Member**  
**Employment Standards Tribunal**