

An appeal

- by -

Marco Hernandez, a Director or Officer of Delphi International Academy,
Delphi Student Development Inc. and Double D Holdings Ltd. associated
companies pursuant to section 95 of the Employment Standards Act
(“Hernandez”)

- 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

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2001/763

DATE OF HEARING: April 9, 2002

DATE OF DECISION: April 25, 2002

DECISION

APPEARANCES:

Marco Hernandez	on his own behalf
Ryan Douglas	on his own behalf
Paul Massie	on his own behalf
Sean Newman	on his own behalf
France Robert	on his own behalf
Ara Sagherian	on his own behalf
David Tanner	on his own behalf

INTRODUCTION

This is an appeal filed by Marco Hernandez (“Hernandez”) pursuant to section 112 of the *Employment Standards Act* (the “Act”). Mr. Hernandez appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on October 10th, 2001 (the “Determination”).

The Director’s delegate determined that Mr. Hernandez was a director and officer of Delphi International Academy (“Delphi”) and, by reason of section 96(1) of the Act, was personally liable for \$37,510.56 in unpaid wages and section 88 interest owed to 9 former Delphi employees. The employees’ unpaid wage claims span the period from September 2000 to June 30th, 2001.

Delphi operated a now defunct independent school that offered a curriculum tailored to the needs of student-athletes, particularly hockey and baseball players. The respondent employees are all former members of Delphi’s teaching staff. It should be noted that Delphi is not in bankruptcy nor is it party to any other formal insolvency proceeding.

This appeal was heard at the Tribunal’s offices in Vancouver on April 9th, 2002 at which time I heard the testimony of Mr. Hernandez, on his own behalf. Six of the 9 respondent employees appeared at the appeal hearing (primarily in regard to another appeal that was heard concurrently involving Delphi and two other corporate entities) but only one of the employees, Mr. Newman, offered any testimony (and Mr. Newman had very few words to say). No one appeared at the appeal hearing on behalf of the Director.

In addition to the witnesses’ testimony, I have also considered various documents and submissions submitted by the parties to the Tribunal.

ISSUE ON APPEAL

In a 1-page memorandum prepared by legal counsel for Mr. Hernandez and appended to his notice of appeal, it is conceded that Mr. Hernandez “was a Director/Officer of Delphi International Academy commencing in 1994”. Counsel also notes, however, that Mr. Hernandez:

- “...at no time received any monetary benefit whatsoever from his involvement with Delphi [and] at no time received a salary, wages or any alternate form of compensation”;
- acted as an educational “consultant” to Delphi dealing mainly with curriculum and student discipline but was not involved in the finance or business aspects of the school’s operations;
- “...during the years he was Director/Officer he attended approximately 10 board meetings and in total volunteered about 50 hours of his time assisting Delphi”;
- “...was never advised nor was he aware of the provisions or effect of section 96 of the Employment Standards Act [and] therefore...Mr. Hernandez ought not to be obligated with respect to payment of the unpaid wages pursuant to the Determination”; and
- “...involvement [is] best characterized as one of a volunteer and having received no monetary or financial benefit [and] to hold Mr. Hernandez liable for payment of wages in such circumstances...is inequitable and unfair in the extreme”.

ANALYSIS AND FINDING

Mr. Hernandez briefly testified before me and indicated that he originally became involved with the school as a favour to Mr. Al Decker, one of the founders and chief executive officer of the school and a personal friend. Mr. Hernandez was not involved in the business side of the school’s operations and restricted himself to advising with respect to educational and other student-related issues.

I also have before me a submission from the Director’s Delegate dated December 11th, 2001. In that submission, the Delegate stated that she was advised by the school’s accountant that Mr. Hernandez did not receive any compensation for having served as a Delphi director and officer. The Delegate was advised by former school employees that Mr. Hernandez was not involved with the school after the summer of 2000. The Delegate’s submission concludes:

“...it appears that Hernandez did not have an immediate or material interest in the companies. I recommend that the above-noted Determination issued on October 10, 2001 be cancelled”.

In a submission to the Tribunal dated December 22, 2001, Mr. Al Decker (Delphi’s “C.E.O.”) stated that in the summer of 2000 Mr. Hernandez “worked with Delphi Academy as an International sales agent in bringing Mexican students to Delphi Academy and received a commission similarly to all other agents working with Delphi Academy”. Thus Mr. Hernandez’ assertion that he received no compensation whatsoever from Delphi is at least open to argument.

Mr. Hernandez’ position, in my view, quite unlike that of another Delphi director, Mr. Allen Schwabe whose appeal I allowed (see BC EST # D152/02). Mr. Schwabe was a “parent representative” board member whose involvement with the school ended well before the employees’ wage claims arose. Further, Mr. Schwabe actually resigned his position and was no longer a director when the wage claims crystallized – due to sloppy record-keeping practices, however, his resignation was never recorded with the Registrar of Companies.

Mr. Hernandez, on the other hand, appears to have at least some form of business relationship with Delphi. That, in my view, however, is not particularly relevant. Nor, in my view, would it be relevant if he never received any compensation for acting as a director or officer.

The uncontested fact is that Mr. Hernandez *was*, as he acknowledges, a director and officer when the employees' wage claims arose. There is no evidence before me that he resigned from either the board from his office prior to those claims crystallizing. Whether Mr. Hernandez had any knowledge about the reach of section 96 of the Act prior to agreeing to serve as a director and officer is also, in my view, quite irrelevant.

As for the assertion that Mr. Hernandez was a "volunteer", it should be noted that section 45 of the Employment Standards Regulation relieves directors of charitable organizations from any liability under section 96 of the Act so long as such individuals are only reimbursed for reasonable out-of-pocket expenses. Clearly, that provision does not apply here since Delphi never intended to, and did not in fact, operate as a charity.

One perhaps might express, as did the reconsideration panel in *Director of Employment Standards (Michalkovic)*, BC EST # RD047/01, some sympathy for Mr. Hernandez given the circumstances in which he now finds himself. However, and to quote from *Michalkovic*: "Despite all this, our obligation is to apply the law as we find it, and in this case find ourselves unable to ignore the legal reality – a reality with consequences extending beyond the facts of this case – that he falls within the terms of section 96".

The Director's Delegate has recommended that the Determination be cancelled. However, much as I might wish to do so, I am unable to find a proper legal basis for making such an order. I will thus leave it to the Director to determine how she might best choose to exercise her discretion with respect to the matter of enforcement or, perhaps, her power under section 86 of the *Act*.

The appeal is dismissed.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal