

EMPLOYMENT STANDARDS TRIBUNAL

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

Employment Standards Act, R.S.B.C. 1996, c. 113

-by-

Mike Gabriele
("Gabriele")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 97/681

DATE OF HEARING: May 20th, 1998

DATE OF DECISION: July 2, 1998

DECISION

APPEARANCES

Richard C. Baker for Mike Gabriele

Catherine Hunt &
Dave MacKinnon for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Mike Gabriele (“Gabriele”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) from Determination No. DDET 00958 issued by the Director of Employment Standards (the “Director”) on August 25th, 1997 under file number 024-470 (the “Determination”).

The Director’s delegate determined that Gabriele was a director or officer of D.E. Installations Ltd. (“DEI”) and by reason of that status, and in accordance with section 96 of the *Act*, was liable for \$70,280.15 in unpaid wages owed to 22 former DEI employees.

This appeal and an essentially identical appeal involving Frank Folino (“Folino”)--who was also found liable for \$70,280.15 in unpaid wages by reason of his status as a director or officer of DEI--were heard at the same time. Both Gabriele and Folino were represented by the same legal counsel, Richard C. Baker, and it was agreed between Mr. Baker and counsel for the Director, Catherine Hunt, that all of the evidence submitted by the parties would be common to both appeals.

ISSUES TO BE DECIDED

Gabriele’s appeal is based on the following grounds:

1. Gabriele is neither an officer nor a director of DEI;
2. In any event, the Director erred in calculating the amount due to the former DEI employees and, therefore, the Director erred in calculating Gabriele’s liability under section 96 of the *Act*; and
3. Further, and in any event, the Director’s interpretation of section 96 is in error; specifically, Gabriele says that under section 96 “the maximum liability is not two months wages, but rather the amount unpaid for a two month period”. Thus, Gabriele can only be liable for “the difference between what the employee was paid and he should have been paid for a two month period”.

FACTS AND ANALYSIS

A determination was issued against D.E. Installations Ltd. under number CDET 006434 on June 20th, 1997 in the amount of \$96,207.26 representing unpaid wages owed to some 22 former D.E. Installations Ltd. employees. These wages were found to be due and payable in accordance with the *Skills Development and Fair Wage Act* and the *Skills Development and Fair Wage Regulation*. I shall hereafter refer to this latter determination as the “corporate determination”.

Subsequently, D.E. Installations Ltd. appealed the corporate determination and following four days of hearings (resulting in two separate Tribunal decisions--D397/97 issued January 14th, 1998 and D165/98 issued April 21st, 1998), the corporate determination was varied to reflect a total liability to the 22 employees named in the determination of \$87,532.46 plus some additional accrued interest (see section 88 of the *Act*). Thus, the question with respect to the total liability to the 22 employees is now *res judicata*. The only remaining “quantum” issue that might arise is whether or the Director properly calculated Gabriele’s “two-month wage” liability under section 96 of the *Act*.

Section 96 of the Act

As noted above, Gabriele asserts that the Director’s delegate misinterpreted section 96 of the *Act* which provides as follows:

Corporate officer's liability for unpaid wages

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.

(2) Despite subsection (1), a person who was a director or officer of a corporation is not personally liable for

(a) any liability to an employee under section 63, termination pay or money payable under a collective agreement in respect of individual or group terminations, if the corporation is in receivership or is subject to action under section 427 of the Bank Act (Canada) or to a proceeding under an insolvency Act,

(b) vacation pay that becomes payable after the director or officer ceases to hold office,
or

(c) money that remains in an employee's time bank after the director or officer ceases
to hold office.

(3) This Act applies to the recovery of the unpaid wages from a person liable for them under subsection (1).

None of the limitations set out in subsection 96(2) is relevant here.

Gabriele submits that section 96(1) of the *Act* creates a statutory liability for unpaid wages based on the total amount owed to an employee in any 2-month period, although which 2-month period one is supposed to choose was not made clear to me--presumably, the 2-month period that leaves the greatest wage liability.

This latter argument was also raised by Tracey Docherty in her appeal of an essentially identical determination in which she was also held liable, under section 96 of the *Act*, as an officer or director of DEI for \$70,280.15 in unpaid wages. For the reasons set out in my decision in Ms. Docherty's appeal (EST Decision No. D248/98) I cannot accede to Gabriele's submission with respect to the proper interpretation of section 96 of the *Act*.

Given the Tribunal's earlier variance (from \$96,207.26 to \$87,532.46) of the amount due under the corporate determination (EST Decision No. D165/98), it may be that Gabriele's current liability as set out in the Determination (\$70,280.15) is not accurate. Accordingly, I believe it appropriate to refer that matter back to the Director for review, and if appropriate, recalculation provided that Gabriele is an officer or director of DEI for purposes of section 96 of the *Act*. It is to this issue that I now turn.

Is Gabriele an officer or director of DEI?

Gabriele is not named in any document filed with the B.C. Registrar of Companies as either an officer or director of DEI. Nevertheless, this Tribunal has consistently held that that in order for a person to be held liable under section 96 of the *Act*, it need not be established that the individual is specifically named in corporate records as an officer or director. Although the terms "director" and "officer" are not defined in the *Employment Standards Act* one can 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, a person may be a corporate officer or director without having been formally designated as such. 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*, EST Decision No. D371/96; *Kovacs*, EST Decision No. D076/97; *Okrainetz*, EST Decision No. D354/97].

In determining that Gabriele was an officer or director of DEI, the Director's delegate relied on the following documents:

i) a Canadian Imperial Bank of Commerce ("CIBC") form letter, dated May 9th, 1989 and signed by Tracey Docherty as president and secretary and Robert Docherty as "signing officer", "certifying" that Tracey Docherty, Frank Folino, Robert Docherty and Mike Gabriele [sic] were "officers" of DEI--Tracey Docherty was stated to be the president and secretary, the other three gentlemen were named as "signing officers".

ii) a written direction, in the form of a director's resolution, to the CIBC dated May 9th, 1989 in which Gabriele was appointed as one of three individuals authorized to sign cheques and other instruments on behalf of DEI (two signatures were required). This resolution is signed by Tracey Docherty as president and secretary of DEI and by her husband, Robert Docherty, as a DEI "signing officer".

iii) an agreement apparently registered under the provisions of the Personal Property Security Act pursuant to which Tracey Docherty, Robert Docherty Gabriele and Folino personally guaranteed DEI's indebtedness to the CIBC.

In addition to the foregoing documents, the Director also relies on the fact that Gabriele had signed a number of DEI payroll cheques as well as the relationship between a company known as McRae Electric Ltd. ("McRae")--in which Gabriele holds a minority share interest via a holding company--and DEI.

DEI is a commercial electrical subcontractor; some ten years ago DEI found itself in a financial bind and approached McRae for some assistance. McRae--an electrical installation and repair company, primarily in the marine sector--has been in business since 1947; Folino became involved with McRae in the latter part of 1980 and is currently McRae's president, secretary and "general manager" as well as being a director. Gabriele is also a McRae officer (Treasurer) and director. Folino, through a holding company, owns 52% of McRae's shares; Gabriele, via a holding company, owns 24% of McRae's shares as does a third party.

Upon being approached by DEI, McRae provided some security by guaranteeing a DEI \$100,000 line of credit with the CIBC. This guarantee was not only given by McRae but also by Folino and Gabriele in their respective personal capacities. In consideration of their respective guarantee obligations, both Folino and Gabriele's personal holding companies were issued DEI shares although I understand both holding companies, taken together, only held a minority position in DEI. No dividends have ever been issued and there is no evidence before me that Gabriele ever received any sort of financial return for his guarantee. There is no evidence before me that Gabriele ever received any monies from DEI, whether it be on account of wages, expenses, loans or any other account.

Upon signing the personal guarantee in favour of the CIBC, Gabriele was also given signing authority on DEI's CIBC account and, in that capacity, signed a number of cheques (but by no means the majority of cheques drawn on DEI's account) including payroll cheques.

The uncontradicted evidence before me is that Gabriele, other than signing some cheques, played no role whatsoever in DEI's day-to-day operations. Gabriele never hired or fired any DEI personnel; he never even knew the names of DEI employees. Gabriele did not have any input in setting DEI wage rates; he never attended a DEI job-site; he never played any operational role in DEI's business such as bidding. It should also be noted that while Gabriele was aware that he was given signing authority (note that two signatures were required) on DEI's CIBC account, he never actually saw the documents given to the CIBC to formalize such authority and he is not a signatory to them--as noted above the CIBC documents were signed by Mr. and Mrs. Docherty. Indeed, his name is misspelled on both the "certification" letter and on the DEI director's resolution.

The Director called three witnesses--Messrs. Dennis and George Rossi and the delegate who issued the Determination, Mr. Dave MacKinnon. Neither Dennis nor George Rossi's testimony linked Gabriele to the management of DEI; indeed, Dennis and George Rossi never even mentioned Gabriele's name during the course of their testimony. Similarly, Dave MacKinnon was unable to point to any event that suggested Gabriele had any role in managing DEI's affairs other than signing some cheques.

Despite being invited to do so, counsel for the Director specifically refused to indicate whether it was proceeding against Gabriele as a director, an officer, or both. In short, the Director simply submitted that Gabriele was one or the other. The Determination states that Gabriele is liable as "a director or officer". I now turn to an analysis of the sorts of functions that are typically exercised by corporate directors and officers.

In a modern corporation, the directors are usually elected by the shareholders and owe a fiduciary responsibility to the corporation itself. This fiduciary duty is, in part, crystallized in the *Company Act* provisions that require directors to "manage or supervise the management of the affairs and business of the company" [section 117(1)] and to "act honestly and in good faith and in the best interests of the company" while exercising "the care, diligence and skill of a reasonably prudent person" [section 118(1)]. While directors can, and usually do, delegate the day-to-day management authority over the affairs of the corporation to officers and employees, the ultimate residual authority to manage the business rests with the directors. Directors could be said to be charged with the responsibility for the strategic decisions of the business and for ensuring that such decisions are implemented. Usually, the implementation of such strategic decisions will be the responsibility of officers and other corporate employees with the directors maintaining an ongoing monitoring function.

There is nothing in the evidence before me that shows Gabriele exercised any day-to-day or residual management authority over the affairs of the business. Other than signing some cheques, which were prepared by other DEI personnel and which included at least one other signature, Gabriele had literally nothing to do with the business affairs of DEI. In my opinion,

Gabriele's involvement in the affairs of DEI amounted to nothing more than an investor (consistent with his "beneficial", via his holding company, shareholding). Gabriele did secure for himself signing authority but that authority was reserved in order to monitor his investment (and particularly to ensure that DEI's principal, Mr. Robert Docherty, was not taking excessive draws from the corporate account), not for the purposes of managing or supervising the business affairs of DEI. In fact, Gabriele, although characterized as an investor, did not actually inject any funds into DEI; his "investment" was in the form of a guarantee of a line of credit and I have no evidence before me that he was ever required to make any payments to the CIBC pursuant to that guarantee.

Directors are, for the most part, elected by the shareholders; officers, in turn, are generally appointed by the directors (see section 133 of the *Company Act*). By reason of section 135 of the *Company Act*, officers similarly are fiduciaries vis-à-vis the company in terms of their authority to "manage or supervise the management of the affairs of the company". The only two offices a company is required to fill are those of president and secretary--offices that were held by Mrs. Docherty. It seems to me that before a person can be held liable under section 96, one must determine whether or not that individual held some other office--such as president, secretary, vice-president, treasurer or general manager (see the definition of "senior officer" in section 1 of the *Company Act*)--based on the functions typically ascribed to that office including responsibility for the management of the affairs of the business.

Thus, whether or not one is characterized as a director or an officer, one of the hallmarks of the position is the duty and obligation to manage the business affairs of the corporation. There is nothing in the evidence before me, other than possibly the signing of cheques, that suggests that Gabriele played any role in the management of the DEI. In my view, the fact that Gabriele signed some DEI cheques, standing alone, does not suggest that he was an officer or director of DEI--something more is required otherwise a host of lower-level employees, who nonetheless have signing authority (for example, a company bookkeeper), might be brought within the ambit of section 96. It is my view that the statutory vicarious liability imposed on directors and officers under section 96 of the *Act* was intended to be attached to what the Supreme Court of Canada referred to as "top management" in *Canadian Aero Service Ltd. v. O'Malley et al.* (1973), 40 D.L.R. (3d) 371 and not to mere shareholders, investors, guarantors or lower-level employees.

Inasmuch as I do not find that the signing of DEI cheques, in the circumstances of this case, to be determinative of Gabriele's status, it follows that the two CIBC documents designating him as a DEI "signing officer" similarly have little probative value insofar as section 96 is concerned. Finally, I cannot conclude that Gabriele's minority share position in DEI, via a holding company, is sufficient, either alone, or in concert with any of the other factors relied on by the Director, to fix him with liability under section 96. A person's shareholding in one or more related companies is clearly relevant to an inquiry under section 95 of the *Act*, but I fail to see how an individual can be characterized as an officer or director of a corporation simply because they happen to own shares in that corporation--to do so would be tantamount to redrafting section 96 by including "shareholders" along with "officers" and "directors".

ORDER

Pursuant to section 115 of the *Act*, I order that the within Determination in this matter be cancelled.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal