



An appeal

- by -

Andy (Chun Cheng) Tsai, a Director or Officer of Davrey Securities Inc.

- 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: Ib S. Petersen

FILE No.: 2000/203

DATE OF HEARING: August 4, 2000

DATE OF DECISION: February 12, 2001

DECISION

APPEARANCES:

Mr. Victor P. Leginsky	on behalf of the Appellant, Mr. Andy Tsai (“Tsai”)
Mr. David Fawkes	on behalf of himself (“Fawkes”)
Mr. Donald Hughes	on behalf of himself (“Hughes”)
Mr. Brad Kopp	on behalf of himself (“Kopp”)
Ms. Belinda Pang	on behalf of herself (“Pang”)
Mr. Jim McPherson	on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by Tsai pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against a Determination of the Director of Employment Standards (the “Director”) issued on February 28, 2000 which determined that he was liable as a corporate director or officer for two months wages to former employees of Davrey Securities Inc. (the “Employer” or “Davrey”), Fawkes, Hughes, Kopp and Pang (the “Employees”) for a total of \$28,447.73. Two corporate determinations were issued on May 3, 1999 against the Employer and ultimately settled in “group” meeting(s)--or “round table” meeting(s)--between the Director’s delegate and other parties. Tsai did not participate in these meetings, though, I hasten to add, he did offer on several occasions to provide information to the delegate and make himself available for an interview. The delegate did not take advantage of these offers.

The Director’s delegate found that Tsai was a director or officer of the Employer at the material time. The basis for his conclusion appears, from the Determination, to include the following:

- Tsai was involved as an investor in a numbered company which purchased 60% of the shares of Davrey, which was owned or operated by Pravin Davrey. The other principals of that numbered company was Terry Silvan and Ed Silvan. Shortly before Davrey closed its doors, Tsai demanded that the Silvans leave the firm to attract other investors.
- Pravin Davrey’s lawyer stated in a letter to the delegate that it was Pravin Davrey’s *understanding* that “Andy Tsai and Ed Silvan ran the company” between June 1997 and January 1998; that Tsai was responsible for the technical side of the business; that Tsai

had some say in the hiring of employees; and, finally, that Tsai closed the office and terminated the employees.

- Pang wrote to the delegate that Tsai was first introduced to her as the “computer technician”. Later, she formed the opinion that Tsai became the president and told her (and other staff) that “he would be taking over the company” and would “eventually have sole ownership.” Pang also explained to the delegate that Tsai had offered to pay her \$500 for pay cheques that bounced.
- Fawkes, Hughes and Kopp “believed” that Tsai was an officer.

This decision has been a long time in the process and for that I apologize to the parties. Their patience in that regard is appreciated.

ISSUE

Tsai argues the Determination against him is wrong. He says that he is not, and was not at the material time, a director or officer of the Employer. There is no dispute between the parties that Tsai was not registered as a director or officer of the Davrey. The issue before me, therefore, boils down to whether or not Tsai, nevertheless, was a *de facto* director or officer by virtue of the manner in which he conducted himself. Tsai’s counsel states there is no issue with the amount of liability should I find that Tsai was a director or officer. In short, the issue simply is whether Tsai functioned as a director or officer.

FACTS

Tsai testified at the hearing. Hughes, Fawkes, Kopp, Pang and Jan Trabant, a former director of the Employer, also testified.

In his direct evidence, Tsai explained--and most of his testimony with respect to his role in the set-up and establishment of Davrey is not controverted--that he met Ed Silvan when both of them worked for a company called Global Securities, a stock broking firm. Ed Silvan was an assistant to brokers at Global Securities; and Tsai was a network specialist there, responsible for maintenance of computers. Tsai operated through his own corporate entity, set up for tax purposes, serving other clients as well. They worked for the branch of Global Securities in Ladner, British Columbia. In 1996, there were some discussions between them with respect to the setting up a firm to deal with “day trading” based on the concept established by a firm operating out of Houston, Texas. Eventually, Tsai and Ed Silvan went to Texas to look at the operations of that firm. At the time, Ed Silvan decided not to pursue the idea and nothing came of it.

However, in 1997, Ed Silvan called Tsai and said that he had the company “ready to go” and was looking for investors. Tsai had indicated to him that he had access to funds. In early

1997, the Silvans and Tsai met and discussed the investment in Davrey. This company was operated by Pravin Davrey. Apparently, he did not know Tsai and would not allow him to invest directly. Accordingly, the Silvans utilized a numbered company. It was Tsai's understanding that he would become a shareholder in the numbered company. He believed that he was a shareholder. Ultimately, he found out that he never became a shareholder of that company, nor did he become an officer or director. In total Tsai invested approximately \$145,000 in the business, half for the shares and another half as a loan.

Tsai also joined the Employer as a computer technician. He testified that the work he did for Davrey was limited to the maintenance and upkeep of the computers. He explained as follows:

- he did not supervise any employees;
- he did not sign any pay cheques;
- he did not have signing authority for Davrey;
- he did not have an office at Davrey;
- he did not instruct other employees at Davrey;
- he did not sign bank documents, loans or mortgages for or on behalf of Davrey;
- he did not hold himself out to be an officer or director of Davrey;
- he did not participate in directors meetings at Davrey;
- he did not participate in executive or management meetings at Davrey;
- his business card from Davrey described him as a “computer technician”;
- he did not make any decision regarding the brokerage business of Davrey;
- he did not make any decision regarding the trades made by Davrey;
- he had no say in how the \$145,000 he had invested were spent;
- he had no role in the hiring of the three traders, Fawkes, Hughes and Kopp;
- he did not hire or fire employees;
- he did not have access to the books of Davrey;
- he did not supervise the traders;
- he did not oversee the trading activities of Davrey.

Though it is clear from the evidence given at the hearing by the Employees that they generally disagree with Tsai, much of his testimony was not contradicted. The Employees are clearly of the view that, at minimum, Tsai did hold himself out to be a “directing mind”

of the Employer (or an director or officer) through his words and deeds on a number of occasions, particularly towards the end of the existence of Davrey in January 1998.

Tsai explained that Davrey was run by Terry Silvan, who had extensive management experience. He also explained that Pravin Davrey, who was a director, was not in the office often. Tsai did not talk to Pravin Davrey much. Tsai explained that Davrey was run by the Silvans and that did not include him in the management meetings. Trabant, who was called to testify by the Employees, also conceded that he was not often in the office and did not have much direct knowledge of Tsai's role. In his testimony, he characterized Tsai as the "computer guy--who gets the computers running." In my view, it was telling that Trabant, who after all was a director of Davrey, stated under questioning by Pang, that he, when he did call in at the office, did not talk to Tsai or ask for him. He stated that "if anybody, [he asked] for Gina [Bains, the office manager]."

The traders confirmed that Tsai did not supervise their trading activities and that the business of Davrey was trading.

At some point, in December 1997-January 1998, Davrey was running out of funds. Apparently, Ed Silvan approached Tsai for more money to invest in the company. Tsai explained that he was reluctant to invest more money in the company. He explained that he had not been kept aware of where the money he already had invested had gone. He found out that some of his initial investment had been used by the Silvans to pay personal credit card expenses and that they could not explain where other funds had gone. In his words "funds were going all over the place." Around this time, Tsai also found out that he had not, as he had expected, become a shareholder in the numbered company which owned a substantial interest in Davrey. Understandably, Tsai was angry with the Silvans. Tsai did testify that he approached some friends for further investment capital. He approached these friends as an investor and stated that he did not seek to take over the Employer. Understandable, in the circumstances, he was not, however, successful in attracting new investors.

In January 1998, Davrey ran out of funds. In January there were some meetings with employees. I understood that there was a meeting on January 16 or 20, 1998. The date of the meeting was not clear. Terry Silvan spoke at the meeting and explained that there was "no money and no salaries". Tsai denied that he, during the meeting on January 16 or 20, told other staff "not to worry" and that they "would get paid". He did attend the meeting as a concerned investor. He did not chair the meeting and did not hold himself out to be a manager of the Employer. Hughes explained that Tsai's role was more active. He "directed questions" and spoke of the company being reorganized and under new direction. According to Hughes, he explained that the staff should not be worried as their wages would be paid. Fawkes also testified that Tsai stood up at the meeting and explained that the staff should not worry about their pay and employment.

At a second meeting, on or about January 23, all employees left the meeting knowing that there was little chance for the survival of the Davrey. Tsai denied that he actively participated in the meeting. When the meeting was over, the three traders stayed behind. Immediately following that meeting, a second meeting occurred. The three traders entered into negotiations with Terry Silvan for compensation. They were particularly concerned about getting back their “risk capital,” in most cases US\$10,000, an amount they had to deposit for trading purposes. As I understood it, the traders would lose this amount if they lost more than \$30,000 on their trades. Hughes explained that Tsai was present for at least some of this meeting. However, as Terry Silvan would be leaving the firm, Hughes understood that Terry Silvan had to confirm any settlement with Tsai. In cross-examination, Hughes confirmed that while Tsai “was in the room” when the traders met with Terry Silvan, he “took no active part.” Fawkes explained that when the traders questioned Terry Silvan’s authority to sign the settlement document (a promissory note) on behalf of Davrey, Silvan turned around and looked at Tsai. Tsai refused to sign. I understood his testimony to be that Terry Silvan called Pravin Davrey and obtained his authorization to sign. That is consistent with the preponderance of the evidence given by Hughes, Fawkes and Kopp. After the meeting the traders left.

In a statement to the delegate, dated December 1, 1999, the traders stated that Tsai was not present at the meeting with respect to the settlement:

“After being informed of our dismissal, Andy left the room and a negotiation took place between ourselves and Terry regarding the violation of our employment contract.”

There was no explanation given for this apparent contradiction in the evidence with respect to Tsai’s role in this meeting given at the hearing and that provided to the delegate in December 1999. In view of that, I approach the testimony of these three Employees with some caution and I am generally inclined to place little weight on it.

Fawkes explained that he had, at one point during his employment, a concern with respect to the requirement to put up \$10,000. Apparently, he had been told by one of the Silvans that his wages would not be paid unless he came up with the money. He says that he spoke with Tsai about it and that Tsai said that he would be “paid anyway.” In his view, therefore, Tsai had authority within the company. He did not agree with the suggestion put to him in cross-examination that Tsai was simply offering his opinion as a friend. In Fawkes recollection, Tsai explained the reason for the company’s decision to pay him. He also said that Tsai had knowledge of the issue with the pay cheque.

Pang, who was the receptionist, testified that it was explained to her that Tsai was part of the management team and that if he asked her “to do something, she was to do it.” She stated that he would meet with clients, either alone or with the Silvans. She also explained that Tsai had once asked her how she felt about her work and when she told him that she was not

happy, he said that after three months, she could have a review and “I’ll get you a raise.” At one point, he told her that the Silvans had been “stealing from him” and that he had owned the company from the beginning. He also told her “I’m the president.” Later, she said, he offered to pay her outstanding wages and wanted to hire her because she was his “responsibility” but that he backed out of that due to legal advice. It was not clear to me from Pang’s testimony whether the clients he met with were Davrey’s or Tsai’s--he had, and continued to operate his own computer business during his involvement with Davrey. She also felt Tsai might have been “bragging” to impress her.

Tsai agreed that he was one of the last persons to leave the office of Davrey. He testified that he and Gina Bains, the office manager, were the only ones left in the office. At that time, people came to the office to repossess furniture and equipment and were seeking payment of money owed to them by Davrey. Generally, Gina Bains dealt with these people. If Tsai dealt with them he would explain that they would get paid if the company had any money or received funding. The Silvans had left the office and did not keep in contact. Tsai agreed that he told Pravin Davrey that he would not consider investing any further funds, or recommending investment to his friends, in the company as long as the Silvans remained with the company.

Towards the end of the business, the British Columbia Securities Commission became involved in investigating the operations of Davrey. Tsai denied that he represented Davrey in this investigation. He also denied that he represented Davrey vis-a-vis creditors and lending institutions.

Tsai was described in certain of the Employer’s promotional literature as its “chief technology officer” and as a member of the “management team.” He explained that this material was written by a Bill Cara, whose role in the firm he was unclear on. Hughes testified that Tsai was involved in the presentation of the promotional material at a meeting in September 1997. At that time Tsai expressed “no problem” being described as the “chief technology officer.” Fawkes evidence with respect to the promotional material was much to the same effect.

ANALYSIS

It is trite law that the Appellant has the burden to show that the Determination is wrong.

Section 96 of the *Act* provides for personal liability for corporate directors and officers. They may be liable for up to two month's unpaid wages for each employee, if they were directors and officers at the time the wages were earned or should have been paid. Section 96 provides, in part:

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.

As noted above, the issue before me is whether the delegate erred when he determined that Tsai functioned as a director or officer and, therefore, is liable as such.

First, there is no question that Tsai was not registered or recorded as a director or officer with the registrar of Companies or in the company's records. Where that is the case, the Tribunal has held that a rebuttable presumption arises that the person is a director or officer which may be rebutted by credible and cogent evidence that the Registrar's records are inaccurate (*David Wilinofsky and Ron J. Wilinofsky*, BCEST #D106/99; see also *The Director of Employment Standards*, BCEST #D047/01, reconsideration of D056/00). Where a person is not so registered or recorded, that person may nevertheless still be considered a director or officer for the purposes of the *Act*. As stated in *Okrainetz*, BCEST D#354/97 (see also *Gordon*, BCEST #D537/97 and *Penner and Hauff*, BCEST #D371/96):

“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 ...*” [emphasis added]

Second, I also add that, in my opinion, the determination of director-officer status should be narrowly construed. As stated in *Archibald*, BCEST #D090/00:

“Both our Court of Appeal and the Supreme Court of Canada have repeatedly stressed that employment standards legislation, being “benefits-conferring” legislation, should be interpreted in a “broad and generous manner” On the other hand, our Court of Appeal and the Supreme Court of Canada have both recognized that the imposition of a personal unpaid wage liability on corporate officers and directors is an extraordinary exception to the general principle that directors and

officers are not personally liable for corporate debts. Accordingly, while the Act as a whole is to be interpreted in a broad and generous fashion, *the provisions imposing a personal liability on corporate directors and officers should be narrowly construed*” [emphasis added]

These general principles--first, that a person may be considered a director or officer without being recorded as such for the purposes of the *Act* but, second, that the determination of director/officer status should be narrowly constructed, at least in the context of Section 96 (see *The Director of Employment Standards, above*)--are, in my view, applicable to the case at hand.

In *Penner and Hauff, above*, the Adjudicator found that Penner and Hauff “consciously and deliberately refused to officially serve as director or officers.” The two had appointed their young sons to serve in those capacities and that they had no involvement in the running of the business. On the evidence, in that case, Penner and Hauff were intimately involved in the set up of the business, concluded agreements on behalf of the business, received and reviewed monthly reports, cancelled agreement and negotiated settlements, provided funds to meet payroll and other obligations of the business, directly participated in the management of the business, dismissed employees, and arranged for a sale of the business. In *Okrainetz, above*, referred to by the Appellant, the panel found that the person held to be a director or officer passed out business cards, was introduced to staff and customers as the “owner,” paid some wages to employees, played a major role in hiring, direction and scheduling decisions, and took primary responsibility for “day-to-day management.” In *Kovacs*, BCEST D#076/97, the panel found that the person found to be a director or officer did not fit the role of a passive investor but rather was “intimately involved in the day-to-day management of the firm.” In *Kovacs*, the Adjudicator found that Kovacs regularly attended the office, was regularly consulted and gave directions regarding the hiring and firing of staff, personally owned furniture and equipment, provided funds to meet payroll and other financial obligations, met with investors, attempted to negotiate settlements of wage claims, held himself out to be “chairman of the board”, and dealt with bankers regarding the employer’s deposit accounts. In the circumstances of the instant case, and on balance, I agree with counsel for the Appellant that the activities of Tsai with respect to his involvement in the Employer was more akin to that of an investor than that of a director or officer.

Much of his evidence with respect to his role at Davrey was not contradicted. He did not supervise any employees or sign any pay cheques. He did not have signing authority for Davrey and did not sign bank documents, loans or mortgages on its behalf. He did not participate in directors meetings or in executive or management meetings at Davrey. He did not have an office at Davrey and his business card described him as a “computer technician.” He did not make any decision regarding the trading business of Davrey, nor did he oversee or supervise traders. It was clear that he did not hire any of the traders, nor, indeed, the receptionist.

As mentioned, the delegate found that Tsai was a director or officer of Davrey. I have great concerns with respect to the basis for the conclusion that Tsai was a director or officer of Davrey at the material time. On balance, I am persuaded that the delegate erred such that the Determination should be set aside.

The Determination imposes a substantial liability on Tsai, a little under \$30,000, based on his status as a director or officer. However, there is precious little to support that conclusion. Much of the basis appears to be the perception or understanding imparted by others at the so-called settlement meetings convened by the delegate. It is obvious to me that Trabant and Pravin Davrey, who actually were directors according to the corporate records, and Terry and Ed Silvan, who were not, had an interest in expanding the scope of those potentially liable under the *Act*. The Determination states:

“In the capacity of a director or officer of Davrey, you were among those invited to participate in a settlement meeting with Nupur Talwar [the delegate who conducted the investigation] on July 26, 1999. This meeting was attended by Pravin Davrey or his representative, Trabant or his representative, and both Terry and Ed Silvan. During this meeting it was determined that Trabant was not an officer or director of Davrey when these wages were earned or should have been paid.

This meeting also resulted in a settlement agreement to which, due to your lack of participation, you were not a party. As below, I have determined that you were an officer when these wages were earned or should have been paid. As a director or officer, you remain personally liable for up to 2 months’ unpaid wages for each employee.”

I am concerned about the fairness of this process for number of reasons.

The Determination certainly could be read to support an argument that the delegate had made up his mind about Tsai’s status before the meeting, because he was invited in “capacity of a director or officer.” Prima facie there appears to have been nothing to support that. Quite the contrary, Tsai took issue with the delegate’s characterization. He was not recorded as a director or officer in the corporate records. He also did not fail to participate in the investigation because he did supply a statement through his solicitor and offered to make himself available for questions. I am concerned that the delegate may have based his determination more on the understandings and perceptions imparted by the other participants at the meeting than a proper investigation of the facts. That view of the settlement meeting is further supported by the finding--“during this meeting”--that Trabant was not an officer or director at the material time. There is no basis for that conclusion in the Determination. In fact, Trabant was a director according to the corporate records. From Hughes’ testimony at the hearing it appears that the Employees were content to “let Trabant off the hook” because he had “nothing to do with the Vancouver operation”--something that is consistent with Trabant’s own testimony. The fact that he failed to fulfill his duties as a director is not, in

my view, proper grounds for a determination that he was not a director. It is more probable that he was “let off” because the Employees did not want to pursue their claims against him.

I am also concerned about the settlement that is said to have emerged from this meeting. It is not apparent what the terms of the settlement are, though there are hints in the Determination that Hughes, Fawkes and Kopp “have or will be receiving some money from other directors or officers at Davrey,” it still appears that the determination seeks to make Tsai liable essentially for the full amount of wages owed. As directors are joint and severally liable for amounts owed under Section 96, that is not in itself inappropriate. However, I am concerned that the settlement meeting resulted in a situation where Tsai, who was perceived to have “deep pockets,” was in effect made the “scapegoat” by being labelled a director or officer without much investigation of the facts.

In any event, as mentioned above, the delegate erred in making the determination that Tsai was a director or officer of Davrey.

First, Tsai took issue with being characterized as a director or officer of Davrey. While he refused to participate in the “settlement meeting” arranged by the delegate, he provided a detailed statement through his counsel to the delegate setting out his involvement in Davrey. He also made himself available for questioning on several occasions through his counsel. It appears that the delegate did not take him up on those offers. Importantly, however, it does not appear from the Determination that the delegate in any way considered the information provided by Tsai. What appears from the correspondence from Tsai’s counsel and the evidence presented at the hearing was that Tsai was an investor in the numbered company that purchased 60% of the shares of the Employer. Tsai believed that he was a shareholder in that numbered company, something that, however, turned out not to be the case. He did, however, invest, a little over \$140,000 in the numbered company. In other words, Tsai was not even a shareholder in the company that owned the Employer. He was not a director or officer in the numbered company either. The correspondence from Tsai’s counsel also stated that he did not have signing authority over the Employer’s bank accounts and he did not participate in management decisions. I find it telling that Tsai did not know how his investment had been spent until much later--after the fact. The fact that Tsai was an investor in the company does not make him liable under Section 96 of the *Act*.

Second, even if the promotional material described Tsai as a “chief technology officer” and a member of the management team, I find that, in the circumstances, little weight out to be place on that. There is no doubt that Tsai was responsible for the setting up of the computers at Davrey and maintaining them and, may in that sense, be said to have headed up the technology department. There was little evidence of such a department. Apart from the occasional assistance from a contractor, the department was Tsai. And he was continuing his own business, servicing clients. I note, as well, that Gina Bains, who the delegate determined to be an employee, was similarly described as the head of the Administration Department and a member of the management team. The delegate awarded her compensation. The language

of the promotional material appears to be more designed to impress potential clients with grandiose statements than to accurately portray or reflect the corporate structure.

Third, neither Terry Silvan nor Ed Silvan testified at the hearing. They could have been subpoenaed to appear. Their evidence would have been relevant. It is clear--but not surprising--from the testimony of the Employees that they did not have much direct knowledge of the internal corporate affairs. The evidence before me contradicts what the Silvans appear to have told the delegate. According to the determination Ed Silvan and Tsai created the numbered company which became the majority owner of Davrey. Tsai explained that Ed Silvan set up the numbered company and invited him to invest in that company. There was no evidence to support a finding that Tsai was a shareholder of the numbered company. In fact, his evidence was that he was not. There is, as well, no evidence to support that the delegate even considered that aspect in his investigation. Those records would have been available to him through the corporate registry and demand for records under the *Act*.

Even if I accept that Tsai played a more active role in the January meetings to the effect that he was trying to save the company, and, in my view, Tsai's evidence at the hearing downplayed his role, I do not accept that he thereby became a director or officer. If anything, he was an investor concerned with his investment. I am not of the view that he guaranteed the payroll of the company, as indicated by the Employees. If, as claimed, he handed out cheques from the numbered company to employees, I am surprised these were not introduced into evidence at the hearing. In fact, none of the cheques and agreements entered into evidence had Tsai's signature. In my opinion, in order to meet the functional test as a director or officer, there must be some regularity to the exercise of the typical functions, tasks, or duties that a corporate director or officer would, in the usual course of events, exercise. While I am prepared to accept that Tsai, as an investor, was more than a regular employee, in the circumstances, and on balance, I do not find that Tsai held himself out to be a director or officer in these meetings.

With respect to the finding that Pravin Davrey and Tsai ousted the Silvans, as may well have been the case, at that point--in mid to late January--the employer had ceased to carry on its business, trading securities. Terry Silvan was the person who negotiated the termination agreement with Hughes, Fawkes and Kopp. The evidence of the traders--Fawkes, Hughes and Kopp--support a conclusion that, while Tsai was present for some of the time, anyway, at the meeting where they sought to resolve their dispute over payment of salary and "risk capital"--he was not determinative in that regard. Hughes confirmed that while Tsai "was in the room" when the traders met with Terry Silvan, he "took no active part." From their own evidence, the decision rested with Pravin Davrey. As well, I am concerned about the apparent inconsistency with respect to Tsai's role that is apparent from the document provided to the delegate closer in time to the filing of the complaint. In a statement to the delegate, dated December 1, 1999, the traders stated that Tsai was not present at the meeting with respect to the settlement:

“After being informed of our dismissal, Andy left the room and a negotiation took place between ourselves and Terry regarding the violation of our employment contract.”

Fourth, I am not satisfied that the opinion of the traders--Fawkes, Hughes and Kopp--of Tsai's role in the company is of much assistance. In any event, their opinion would appear to be incorrect on at least a couple of points. The controlling interest was not sold to Tsai and the Silvans. It was sold to a numbered company that Tsai had invested money in. There is no evidence that Tsai hired anyone. Quite the contrary, the evidence is that the traders, for example, were not hired by Tsai nor was he involved in the hiring. Pravin Davrey's "understanding" may be of some interest. However, there is little in the way of particulars to explain what that understanding is based on. Pravin Davrey's understanding was contradicted by much of the evidence at the hearing. Tsai did not supervise any employees or sign any pay cheques. He did not have signing authority for Davrey and did not sign bank documents, loans or mortgages on its behalf. He did not participate in directors meetings or in executive or management meetings at Davrey. He did not have an office at Davrey and his business card described him as a "computer technician." He did not make any decision regarding the trading business of Davrey, nor did he oversee or supervise traders. It was clear that he did not hire any of the traders, nor, indeed, the receptionist. Pravin Davrey's understanding, and the "belief" of Hughes, Fawkes and Kopp, is not cogent evidence of Tsai's directorship.

Pang testified that it was explained to her that Tsai was part of the management team and that if he asked her "to do something, she was to do it." She stated that he would meet with clients, either alone or with the Silvans. It was not clear whether the clients he met with were Davrey's or Tsai's--he had, and continued to operate his own computer business during his involvement with Davrey. Presumably, if the Silvans were present, the clients could be Davrey's. However, she was not in a position to provide evidence of that. She also explained that Tsai had once asked her how she felt about her work and when she told him that she was not happy, he said that after three months, she could have a review and "I'll get you a raise." At one point, he told her that the Silvans had been "stealing from him" and that he had owned the company from the beginning. He also told her "I'm the president--I'm taking over." This, even if I accept this statement on its face, was manifestly incorrect. Later, she said, he offered to pay her outstanding wages and wanted to hire her because she was his "responsibility" but that he backed out of that due to legal advice. She also felt, and I agree, that Tsai might have been "bragging" to impress her. In the circumstances, I have little difficulty agreeing that Tsai was more than a regular employee. However, that is not surprising in view of the fact that he was (indirectly) an investor in the Employer. In my view, Tsai's conduct as evidenced by Pang's testimony was more consistent with him bragging about a role in the company that he did not have.

In the circumstances, I conclude that the appeal should succeed.

ORDER

Pursuant to Section 115 of the Act, I order that the Determination in this matter, dated December 7, 1999 be cancelled.

IB S. PETERSEN

**Ib S. Petersen
Adjudicator
Employment Standards Tribunal**