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 -

Osvaldo De Sousa
("De Sousa")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2000/546

DATE OF DECISION: October 18, 2000

DECISION

FACTUAL BACKGROUND

On June 5th, 2000 a delegate of the Director of Employment Standards (the "Director") issued a determination against Cherylee Enterprises Ltd. ("Cherylee") in the amount of $10,944.51 on account of unpaid wages (including regular and overtime wages, vacation pay and compensation for length of service) owed to three former Cherylee employees. I shall refer to this determination as the "Corporate Determination". The Corporate Determination was properly served on Cherylee and its directors/officers (including the present appellant); the appeal period has now expired (on June 28th, 2000) and I understand that Cherylee has not, at any time, appealed the Corporate Determination to the Tribunal.

The unpaid wages owed to the three complainants were not paid by Cherylee and, accordingly, on July 18th, 2000 another determination (issued under file number ER 096-148)–*i.e.*, the determination now under appeal (the "De Sousa Determination")–was issued against Osvaldo De Sousa ("De Sousa") pursuant to section 96 of the *Act* on the basis that De Sousa was a Cherylee director or officer when the complainants' unpaid wages were earned or became payable. Taking into account the 2-month "unpaid wage liability ceiling", the amount payable under the De Sousa Determination is $9,643.23.

ISSUES ON APPEAL

De Sousa appeals the De Sousa Determination pursuant to section 112 of the *Employment Standards Act* (the "*Act*"). In a letter dated August 8th, 2000, addressed to the Tribunal and appended to his notice of appeal, De Sousa's solicitors assert that:

- "...De Sousa...never was and never consented to be a Director of the Company Cherylee Enterprises Ltd. At the time of incorporation July 3, 1998 Mr. De Sousa agreed to be a 25% shareholder in the said company, but was never asked, nor did he agree, to be a Director of the said Company.";

- "Mr. De Sousa found out in May 2000 of the listing of his name in the Victoria Records Registry and immediately contacted the Company's lawyer to demand that his name be removed. This document was signed by the lawyer on June 1st and finally filed on June 26, 2000.";

- "The Directors of the Company have refused Mr. De Sousa's repeated requests for access to the Company books to see what has happened to his investment and [*sic*, he?] is launching a civil suit against them for misappropriation of funds."; and

- "Mr. De Sousa denies the claim that he participated in the activities of the Company during the time the wages were earned. He had no role in the

operation of the Company at any time and only invested his money which was subsequently misappropriated."

FINDINGS AND ANALYSIS

The material before me discloses that Cherylee was incorporated in British Columbia on July 3rd, 1998. De Sousa signed the incorporating memorandum, on June 17th, 1998, as a "subscriber" and agreed to take 25 of a total of 100 shares to be issued. I note that the B.C. *Company Act* provides, in section 110, that "the subscribers to the memorandum are the first directors of the company". However, De Sousa never executed a "consent to act as director" [a statutory requirement–see section 112(1)(a)] nor was he, apparently, a signatory to the initial subscribers' minutes in which he was elected as one of three directors.

It would appear that De Sousa did not even attend the initial subscribers' meeting at which he was purportedly elected as a director [which further calls into question his election–see section 112(1)(b)]. De Sousa apparently did not attend the initial (or any other) Cherylee directors' meeting nor was he a signatory to the minutes of that initial meeting at which he was supposedly appointed to the office of "secretary".

There is no evidence before me that De Sousa ever fulfilled the statutory obligations of a corporate secretary–see section 138 of the *Company Act.* De Sousa was recorded in the corporate records as a corporate director until a "Notice of Directors" was filed with the provincial corporate registry on June 26th, 2000 which Notice recorded that De Sousa had "ceased" to be a Cherylee director. This latter notice was prepared and subsequently filed immediately following De Sousa's discovery that he was recorded in the corporate records as an officer/director.

The Director's delegate, in a submission to the Tribunal dated September 8th, 2000, relies entirely on section 110 of the *Company Act* to support his position that the Determination ought to be confirmed. There is absolutely no *evidence* before me–indeed, not even an *assertion*–that De Sousa ever carried out the *functions* of a corporate director or officer. Although there is a reference in the De Sousa Determination to the effect that "former employees...confirmed that [De Sousa] participated in the activities of the company", this supposed evidence is not detailed in any respect and the delegate did not press this point in any fashion in his submission to the Tribunal. Although invited to do so, none of the complainant employees filed a submission with the Tribunal. I would have thought that if De Sousa did have some active role in the business affairs of Cherylee one or more of the employees might have been able to provide some information in that regard. The absence of such evidence is, in my view, telling.

Corporate records–and note that in this case the Director relies *solely* on corporate records–only establish a *rebuttable presumption* that the individual in question was an officer or director, as the case may be, at the material time–see *Wilinofsky,* BC EST #D106/99. The *uncontradicted* evidence before me suggests, on a balance of probabilities, that De Sousa never was lawfully elected as a Cherylee director or lawfully appointed as a Cherylee officer nor did he, at any time, exercise the functions of a Cherylee officer or director. The only reasonable conclusion that I can draw from the material before me is that De Sousa's relationship with Cherylee was solely that of a passive shareholder/investor.

ORDER

Pursuant to section 115 of the *Act*, I order that the De Sousa Determination be cancelled.

Kenneth Wm. Thornicroft

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal