Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Director of Employment Standards
("Director" or "Appellant")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Paul E. Love, Panel Chair
Fern Jeffries
Ib S. Petersen

FILE No.: 2001/197

DATE OF DECISION: May 17, 2001

DECISION

OVERVIEW

This is an application for reconsideration, made by the Director of Employment Standards of a decision of the Employment Standards Tribunal ("Tribunal") dated October 18, 2000 (the "original decision"). The Delegate issued a determination, dated July 18, 2000, that Mr. De Souza was a director of Cherylee Enterprises Ltd. (the "company"). De Souza took issue with the conclusion that he was a director of Cherylee Enterprises Ltd. and appealed to the Tribunal. The Tribunal cancelled the Determination.

ISSUES TO BE DECIDED

This case concerns the interpretation of director in 96 of the *Employment Standards Act*, R.S.B.C. 1996, c. 113 and sections 110 and 112 of the *Company Act, R.S.B.C. 1996 c. 62*. The particular issue is whether De Sousa remained a director, by operation of law, at the time the Delegate issued the Determination and the wages were earned by employees. Did the Adjudicator err in finding that Mr. De Sousa was not a director of Cherylee Enterprises Ltd.?

TIMELINESS

This reconsideration application is decided upon written submissions of the Mr. De Sousa ("respondent") and the Director of Employment Standards. The decision in this matter was rendered by the Adjudicator on October 18, 2000 ("original decision"). The appeal of the Director was filed March 5, 2001. The Director's policy advisor, by letter to the Tribunal, candidly advised the Tribunal that there was a mixup in who had carriage of the appeal. We accept the explanation for the delay and, in the circumstances, we are of the view that the appeal was not late. While the Tribunal has dismissed a number of applications for reconsideration based on timeliness, there is, as noted in *The Director of Employment Standards*, BCEST #D330/00, reconsideration of BCEST #D122/00), a "relative paucity of Tribunal decisions regarding what constitutes an 'unreasonable' delay." In the latter case there was a 10 week delay. In the circumstances of the present application, we are not prepared to find that there was an "unreasonable" delay.

FACTS

De Sousa invested money in Cherylee Enterprises Ltd. (the "company"). In return for his investment he received a 25 % shareholding in the company. De Sousa subscribed the memorandum of the company on June 17, 1998. The memorandum was also subscribed by Concepcion Emmanuel Elbar and Remedios Aguil Ancheta.

The company held a first meeting of directors, which was attended by Elbar and Ancheta. It appears that the meeting was held after June 17, 1998 when the subscribers signed the Memorandum. The minutes documenting that meeting are undated. An unsigned consent form with De Sousa's name is dated June 19. On file there are signed consent forms by the other two directors, also dated June 19. De Sousa's uncontradicted submission is that he was given no notice of that meeting, and was not present at the meeting. A set of minutes is in existence, which has a place for De Sousa to sign, however, he did not sign the minutes. According to the minutes De Sousa was elected as a Director of the company. We infer that a meeting took place, without De Sousa, as the two other directors of the company endorsed the minutes.

The company caused to be filed with the Registrar of Companies a notice that De Sousa was a director of the company. There is no evidence that De Sousa ever consented to act as a Director at the first meeting of the directors of the company. Indeed, there is no evidence that De Sousa was aware that he was a director according to the corporate records.

On June 5, 2000, the Delegate issued a determination against the company in the amount of $10,944.51 including interest. Soon after Mr. De Sousa obtained notice of the determination, on or about on June 26, 2000, Mr. De Sousa caused a resignation to be filed with the Registrar of Companies. The Determination was unpaid by the company. The Delegate issued a Determination against Mr. De Sousa, as a Director or Officer of Cherylee Enterprises Ltd. in the amount of $9,643.23. At no time has Mr. De Sousa carried out any functions of a director. Mr. De Sousa says that he did not understand that by signing the memorandum, he became a director of the company.

The Adjudicator held that Mr. De Sousa had not carried out the functions of a director and therefore was not a director of the company. The Delegate argues that the Adjudicator erred in applying a functional test to determine whether Mr. De Sousa was a director. The Delegate says that by operation of law, in particular by the application of s. 110 of the *Companies Act*, a subscriber to the memorandum is a director of the company. The Delegate relies on the records of the Registrar of Companies. The Director says it is open to show that the information in the records was incorrect, or that the person did not consent to the appointment. The burden rests with the individual by cogent and clear evidence to show that the information obtained through a company search was inaccurate.

ANALYSIS

In an application for reconsideration, the burden rests with the appellant, in this case the Director, to show that this is a proper case for reconsideration, and that the adjudicator erred such that we should vary, cancel or affirm the Decision. An application for reconsideration of a Tribunal' s decision involves a two stage analysis, as set out in *Milan Holdings Ltd., BCEST #D186/97*:

At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration: Re British Columbia (Director of Employment Standards), BCEST #D122/98. In deciding this question, the Tribunal will consider and weigh a number of factors. The primary factor weighing in favour of reconsideration is whether the applicant has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases. At this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration. This analysis was summarized in previous Tribunal decisions by requiring an applicant for reconsideration to raise "a serious mistake in applying the law": Zoltan Kiss, supra. As noted in previous decisions,

> "The parties to an appeal, having incurred the expense of preparing for and presenting their case, should not be deprived of the benefits of the Tribunal's decision or order in the absence of some compelling reasons": Khalsa Diwan Society (BCEST #D199/96, reconsideration of BCEST #D114/96).
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> After weighing these and other factors relevant to the matter before it, the Panel may determine that the application is not appropriate for reconsideration. If so, it will typically give reasons for its decision not to reconsider the adjudicator's decision. Should the Panel determine that one or more of the issues raised in the application is appropriate for reconsideration, the Panel will then review the matter and make a decision. The focus of the reconsideration panel "on the merits" will in general be with the correctness of the decision being reconsidered.

The very point of reconsideration being to provide a forum for sober reflection regarding questions which are considered sufficiently important to warrant such review, we consider it sensible to conclude that questions deem worthy of reconsideration - particularly questions of law -should be reviewed for correctness. The reconsideration power is one to be exercised with caution.

We turn now, to the grounds for reconsideration advanced by the Director. The Director raises an important issue of whether a person who subscribes a memorandum, and takes shares, and who is noted in the records of Registrar of Companies, remains a director of the company. In our view, the issue raised by the Director is an important issue of law that warrants reconsideration. We therefore consider the merits of the application.

In *Davrey Securities Inc, BCEST #D065/01 (Petersen)*, the Tribunal held that liability imposed pursuant to s. 96 on a director or officer, for the liabilities of a corporate employer,

was, in law, an anomaly. The approach of the Tribunal is to scrutinize with care liability imposed on directors, and to narrowly construe s. 96 of the *Act*.

It is not appropriate to take a functional approach, however, in this case. The functional approach is typically used by the Tribunal as an aid to interpretation, when a party carries out the functions of a director or officer, but is not named on the records in the office of the Registrar of Companies. Section 1 of the *Company Act*, indicates that a person can be a director if that person fulfils the functions of a Director. See for example *Tsai, a Director or Officer of Davrey Securities Inc, BCEST #D065/01 (Petersen), Penner, BCEST #D 371/96 (Thornicroft).* The *Act* does not distinguish between active and inactive directors: *Brown, BCEST #D193/99*.

In the *Company Act* a "director" is defined to include every person, by whatever name designated who performs the functions of a director. Sections 110 and 112 indicate the different methods by which a person can become a director. Under Section 110(1) the subscribers to the memorandun are the first directors. Section 110(2) provides that succeeding directors must be elected or appointed in accordance with the articles of the company. Secion 112(1) provides that no election of a person as a director is valid unless the person consented to the election or appointment. Consent can be expressed in two ways, either by consenting in writing before the election or appointment, or if elected or appointed at a meeting, by being present and not refusing to act as a director. It follows, in our view, that the Director is correct as a matter of law, that De Sousa, by virtue of s. 110 of the *Company Act*, became a director when he subscribed the memorandum. There is no requirement in s. 110 of the *Act* that a first director need consent to act as a director. A company cannot be formed without subscribers, and endorsing a memorandum is a voluntary and consensual act.

However, that does not end the matter. As noted, Section 112 deals with the appointment of subsequent or succeeding directors. Section 112 requires a consent in writing to become a director. In our view, the Adjudicator erred in applying a functional test in the circumstances of this case. We note that the decision under appeal was made prior to the Tribunal decision in *Director of Employment Standards, BCEST #RD047/01 (Petersen, Jeffries, Falzon) ("Softwex").* However, the Adjudicator correctly disposed of the appeal. De Sousa remained a director of the company until the company had its first meeting on June 19, 1998. At that time, for De Sousa to remain a director it was necessary for him to consent to an election as director, as set out above (s. 112 of the *Company Act*). It is apparent that De Sousa did not consent to remaining or becoming a director. In our view, De Sousa has shown a reason why the records of the Registrar of Companies are incorrect, and therefore we agree in the result with the adjudicator that the Determination must be cancelled.

This conclusion is consistent with the Tribunal's jurisprudence. The Tribunal recently considered the scope of s. 96 in *Director of Employment Standards, BCEST #RD047/01 (Petersen, Jeffries, Falzon) ("Softwex").* The Softwex decision dealt with whether an

individual was an officer of the company. The Softwex case summarized a number of propositions relating to s. 96 of the *Act.* The case law reviewed there stands for the following propositions:

1. The corporate records, primarily those available through the Registrar of Companies or available at a corporations registered and records office, raise a rebuttable presumption that a person is a director or officer. In other words, the Director of Employment Standards may rely on those corporate records to establish director or officer status.

2. It is then open to the person, who, according to the corporate records, is a director or officer, to prove on the balance of probabilities that the company records are *inaccurate*, for example, because the person resigned and the documents were not properly processed, a person is not properly appointed etc.

3. There may well be circumstances where it would be inappropriate to find that a person is a director or officer despite being recorded as such. However, it will be the rare and exceptional case to be decided on all the circumstances of the particular case and not simply by showing that he or she did not actually perform the functions, duties or tasks or a director or officer.

4. The determination of director-officer status should be narrowly construed, at least with respect to Section 96.

In the *Softwex* case, the Panel noted that this case did not involve a situation where the person became an officer in any involuntary manner or without consent. The present case is one of a person becoming a director without his consent and, indeed, without his knowledge. De Sousa was simply an investor in a company. De Sousa asserts--and there is no dispute in that regard-- that he was unaware that he became a director by subscribing the memorandum of the company. By subscribing the memorandum he became a director as a matter of law, and there is, in our view, generally no distinction between “active” and “inactive or passive” directors. The failure of a director to perform the functions of a director does not generally constitute a defence to liability under s. 96 of the *Act.* All the same, because there was a subsequent meeting where directors were elected or appointed and where, under the law, consent to be a director of the company is required. In all of the circumstances, there is cogent evidence of lack of consent and involuntary appointment as a director.

For all the above reasons, we dismiss the application for reconsideration.

ORDER

Pursuant to section 116 of the *Act*, we order that the Decision in this matter, dated October 18, 2000 be confirmed.

Paul E. Love
Adjudicator, Panel Chair
Employment Standards Tribunal

Fern Jeffries
Chair
Employment Standards Tribunal

Ib S. Petersen
Adjudicator
Employment Standards Tribunal