

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of appeals pursuant to Section 112 of the
Employment Standards Act, R.S.B.C. 1996, C.113

- by -

Aubrey McGinnis, Director/Officer of Western Outdoor Advertising Inc., and
Kenneth Ross Meiklejohn, Director/Officer of Western Outdoor Advertising Inc.
("McGinnis" and "Meiklejohn")

- of two Determinations issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Michelle Alman

FILES Nos.: 2000/476 and 2000/478

DATE OF DECISION: November 9, 2000

DECISION

OVERVIEW

This decision addresses appeals filed pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) by Aubrey McGinnis (“McGinnis”) and Kenneth Ross Meiklejohn (“Meiklejohn”) from Determinations issued against them individually on June 14, 2000 by a delegate of the Director of Employment Standards (“the Director”). The Determinations found McGinnis and Meiklejohn liable as directors or officers of Western Outdoor Advertising Inc. (“Western Outdoor” or “the Company”), pursuant to s. 96 of the *Act*, for two months’ wages owing to Phyllis Dunning (“Dunning”). A Determination issued May 10, 2000 found Western Outdoor liable to Dunning for wages, vacation pay, statutory holiday pay, and interest in the amount of \$4,950.89. Western Outdoor failed to appeal in a timely fashion from the Determination against it. Because Western Outdoor had properly been served at its Registered and Records Office, which was then McGinnis’ home address, I decided against extending the time limit for the Company to file an appeal in a decision I rendered on September 22, 2000.

The parties made written submissions on the issues of whether or not McGinnis and Meiklejohn were directors or officers of the Company at the time relevant to Dunning’s complaint. McGinnis provided written submissions in reply to those of the Director’s delegate in his appeal. McGinnis’ further written submissions dated October 13, 2000 in response to those of Dunning were received after the date of assignment of his appeal to me and were not considered in my rendering of this decision.

ISSUE

The issue is whether McGinnis and Meiklejohn were directors or officers of Western Outdoor at the time of Dunning’s employment with Western Outdoor.

THE FACTS AND ANALYSIS

Western Outdoor is an enterprise engaged in securing land leases, obtaining permits for erecting billboards, and selling or renting billboard signs. Dunning was employed between July 7, 1998 and December 22, 1998 by Western Outdoor as a sales representative to obtain land leases for the purpose of erecting billboards. She was paid on a commission basis. Dunning filed her complaint for unpaid wages with the Employment Standards Branch in 1999, and a Determination issued against the Company on May 10, 2000.

My September 22, 2000 decision against extending the time for Western Outdoor to appeal from the Corporate Determination means that the Company’s liability cannot be the subject of appeal for a director or officer of the Company. The decisions of the Tribunal in *Kerry Steinemann*, BC EST #D180/96, and *Perfekto Mondo Bistro Corporation*, BC EST #D205/96, make it clear that where no Corporate Determination appeal has been filed, the only issues which a director or officer may appeal are:

1. that they were not directors or officers at the material time; or
2. that the Determinations issued against them exceeded the two-month wage limit set out in section 96(1) of the *Act*.

In their appeals McGinnis and Meiklejohn raise only the issue of whether they were directors or officers at the material time.

McGinnis' Appeal

McGinnis alleges on page one in his appeal submissions that he resigned from his position as sole director of the Company on June 30, 1998. He provides a copy of his resignation letter, which states that he resigned from his position as director as of June 30, 1998. On page 2 of his same appeal submissions he alleges that he resigned on June 28, 1998 as a director of the Company. On page 3 of his same appeal submissions, McGinnis reverts to alleging that he resigned on June 30, 1998. He denies that he was asked by the Director's delegate to provide further information supporting his allegation that he was not a director of Western Outdoor, and asserts that he told the Director's delegate that he was "unable to provide further information in regard to Mr. Meiklejohn's position in the company." McGinnis subsequently acknowledges in his reply to the Director's delegate's submissions that he sent her a copy of his letter of resignation in response to her faxed letter of March 16, 2000 asking him and Meiklejohn to supply information on the issue of their being directors of Western Outdoor when Dunning was employed. Apparently for the first time in the handling of Dunning's complaint, McGinnis submits with his appeal a letter from Meiklejohn dated July 4, 2000 which alleges that Meiklejohn received McGinnis' resignation letter at a date "sometime around July, 1998."

McGinnis also asserts in his submissions in reply to the Director's delegate that he "sent a copy" of his resignation to the Registrar of Companies in November, 1999, "when...[he] became apprised of the difficulty." He continues by saying that the Registrar of Companies informed him "that sending my resignation to them would be of no effect, and indeed, I am still registered as a director of this company despite my resignation and my informing them of the same by mail." The Determination against McGinnis recites that McGinnis alleged to the Director's delegate that "Meiklejohn is the true director and officer of the company," and in his appeal submissions, McGinnis refers to Meiklejohn as the President of Western Outdoor. McGinnis did not supply copies of any correspondence to indicate he actually sent his resignation to the Registrar of Companies as stated or received any reply.

In his appeal McGinnis also alleges that he is not now, and never was, an officer of Western Outdoor. He admits that he incorporated the Company and other companies for Meiklejohn. A Corporate Registry search on July 4, 2000 indicates that Western Outdoor was incorporated as a non-reporting company in British Columbia on May 8, 1998. The same Corporate Registry search reflects that McGinnis is still listed as the sole director of the Company. McGinnis' then-residence is listed as the same address as the Registered and Records Office address of the Company. In her submissions Dunning includes a copy of a letter from Meiklejohn to the Director's delegate dated July 4, 2000 in which he asserts that the Company's address was moved "years ago" from the listed Registered and Records Office address (also then McGinnis' listed residence address as sole director) to Meiklejohn's home address. No documents were supplied by either McGinnis or Meiklejohn to support this contention, though a change of

address must be filed to effect legal change of address for a company's Registered and Records Office under s. 40 of the *Company Act*, R.S.B.C. 1996, c. 62.

McGinnis admits in his appeal that he "may have been a shareholder for a short period of time, but certainly not after June 28, 1998." McGinnis denies that he acted in any way as a director of Western Outdoor at any time after June 30, 1998, in spite of running the Company for Meiklejohn as "an independent contractor" on an "occasional" basis. When running the Company, McGinnis alleges he was paid \$20 per hour and merely followed Meiklejohn's directions "without any discretion in deciding what was to be done." McGinnis alleges, too, that he acted under Meiklejohn's "direct supervision" when Meiklejohn "was away from Vancouver." He states he ran Meiklejohn's various companies (which McGinnis had incorporated) by collecting and receiving mail, sending faxes, depositing cheques (though he denied having signing authority at any of the Company's banks), delivering cheques to Meiklejohn's agents and salespersons, and answering telephone inquiries to take or relay messages for Meiklejohn. McGinnis denies any supervisory dealings with the Company's employees, and denies any exercise of authority to bind the Company in any way after the date of his resignation.

McGinnis cites s. 130 of the *Company Act* in arguing that his delivery of his resignation letter to the Company "sometime around July, 1998" invalidates the Determination against him because he was no longer a director of Western Outdoor when Dunning was employed by the Company. Section 130 of the *Company Act* states in part:

Ceasing to hold office

- (1) *A director ceases to hold office when his or her term expires...or when he or she*
 - (a) *dies or resigns*
- (2) *Every resignation of a director becomes effective at the time a written resignation is delivered to the registered office of the company or at the time specified in the resignation, whichever is later.*

Section 113(1) of the *Company Act* states that a company must, within 14 days after the appointment or election of a director, file a notice with the Registrar of Companies of that director's appointment or election. Some of the provisions of s. 116 of the *Company Act* pertain:

Register of directors

- 116** *Every company must keep a register of its directors and enter in it the*
- (a) *full names and resident addresses of the directors,*
 - (b) *date on which each director was elected or appointed,*
 - (c) *date on which each former director ceased to hold office as a director...*

Section 163(1) of the *Company Act* lists the records that every company must keep at its Records Office. Among those records are a copy of the company's register of directors, and a copy of every document filed by the company with the Registrar of Companies. Section 164(1) of the *Company Act* permits every director, and every former director, to examine and take extracts from the records listed in s. 163(1) without charge. The expense-free right to examine and take record extracts of former directors is limited to records that relate to the time when he or she was a director. Under s.164(4), for a small fee any person may examine and take extracts from most of the records of a non-reporting company listed in s. 163(1), including the register of directors and documents filed with the Registrar of Companies. Section 165 requires a company to provide copies for a small fee per page for copies of documents available for review under s. 164.

Neither McGinnis nor Meiklejohn supplied a copy of the register of directors of Western Outdoor to indicate proof of the date of McGinnis' alleged resignation as a director. Neither McGinnis nor Meiklejohn supplied a copy of the notice of change of Registered and Records Office address required to be filed under s. 40 of the *Company Act* with the Registrar of Companies to effect a legal change in the Company's address from McGinnis' home address to Meiklejohn's.

There is some merit to McGinnis' argument that he could legally resign as a director of the Company simply by delivering his written resignation to the registered office of the company, as set out in s. 130(2) of the *Company Act*. Unlike the change of a company's Registered and Record Office, the provisions of s. 130 do not specify that a cessation of status as a director can only have legal effect upon the filing of notice of the change with the Registrar of Companies. McGinnis, however, asks that I accept a strained set of facts. To have resigned, he must be believed to have delivered his resignation to the Company's registered office, to wit, his own address, on either June 28 or June 30, 1998 according to McGinnis, and "sometime around July, 1998" according to Meiklejohn.

In deciding the issue of credibility, I rely not on the style of the written assertions of the interested witnesses presenting their accounts, but on my assessment of which versions of events were most likely to have occurred in all of the circumstances. I must determine which story was most probable in each of the then-existing circumstances, and "its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions...": *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.).

There are numerous internal inconsistencies in McGinnis' account of the date of his resignation. Meiklejohn's late-written and late-produced letter offers little firm support, and in all of the circumstances, is given no weight whatsoever. I say this because the Tribunal has often decided that evidence that should have been provided at the investigation stage of a proceeding should not be allowed to be brought for the first time to the appeal of a Determination: see, e.g., *Kaiser Stables Ltd.*, BC EST #D058/97; *Tri-West Tractor Limited*, BC EST #D268/96; *Specialty Motor Cars (1970) Ltd.*, BC EST #D570/98; and *N. Poretsis and V. Poretsis dba Aristocrat Cleaners*, BC EST #D370/98. There are also inconsistencies in McGinnis' account of his receipt of an inquiry about his director's status from the Director's delegate. There are further inconsistencies in McGinnis' story of how he carried out his tasks in running Western Outdoor "directly under" Meiklejohn's supervision when Meiklejohn was out of town.

To support his position that he'd resigned in June, 1998, McGinnis legally could have obtained at minimal or no cost copies of the Company's register of directors to prove his effective date of resignation. Nothing in this vein was provided at any point. McGinnis incorporated several companies for Meiklejohn, which activity implies modest familiarity with the provisions of the *Company Act*. Under the provisions of the *Company Act*, McGinnis could have, while still a director of the Company, sent the Registrar of Companies a change of Registered and Records Office address and a notice of his resignation as a director of Western Outdoor, to take effect at a **future** date. He apparently did not do either of these things despite desiring to end his responsibility to the Company not long after he'd incorporated it. I find that it is not probable under all of the circumstances that McGinnis resigned as a director of Western Outdoor in June or July, 1998, given his familiarity with the provisions of the *Company Act* and the ease of the steps which he might have taken to ensure his removal as a director from the Company's registered information. I find that McGinnis retained legal status as a director Western Outdoor at least until his alleged efforts to contact the Registrar of Companies in November, 1999. This renders McGinnis liable for two months' wages owing to Dunning for her work for Western between July and December, 1998 pursuant to s. 96 of the *Act*.

Meiklejohn's appeal

Meiklejohn's appeal submissions consisted primarily of identical copies of the submissions he made in seeking an extension of time to file an appeal by Western Outdoor. I denied that request on September 22, 2000. Meiklejohn's appeal did include a small amount of additional argument, but no new evidence, despite citing some as being available.

Section 108 of the *Company Act* requires that every company must have at least one director, and s.133(1) requires that every company must have a president and a secretary, who must be different persons unless the company has only one member. Furthermore, section 134 states:

Chair and president

134 (1) *A person must not be the chair of the directors or president of a company unless the person is a director of the company.*

In his appeal submissions, McGinnis referred to Meiklejohn as the "President" of the Company. According to section 134 of the *Company Act*, if Meiklejohn is the President of Western Outdoor, then he legally must be a director. I am bolstered in concluding that Meiklejohn is an officer and director of Western Outdoor when considering that he made oral representations on behalf of Western Outdoor when discussing Dunning's complaint with a delegate of the Director during the investigation stage of the proceedings. Those discussions took place prior to the issuance of the Determination on May 10, 2000. Dunning alleges that at some point prior to the issuance of the Company Determination, Meiklejohn represented to the Director's delegate that he was a director of the Company.

In July, 2000 Meiklejohn sought an extension of time to appeal from the Determination against Western Outdoor. He alleged in his application for an extension of time that he was not a director of the Company but only "management." In his submissions to the Tribunal dated August 16, 2000, Meiklejohn denies that he is a director of the Company and that he had any responsibility to provide information to the Director's delegate as to who currently might be the Company's directors. Meiklejohn denied being a shareholder or "controlling mind" of the

Company, and alleged his “only role was one of management.” He admitted to having signing authority on behalf of the Company with the Company’s bank and alleged he had that authority as a way to ensure that he would be repaid for a loan he had made to the Company.

Based on the authority Meiklejohn exercises in controlling Western Outdoor’s affairs and the provisions of the *Company Act*, I found in my decision of September 22, 2000 that he must be an officer or director of Western Outdoor. His actual title as President of Western Outdoor was not clarified until my review of the appeal submissions of McGinnis. I find that Meiklejohn is an officer and director of Western Outdoor and liable for 2 months’ wages owed to Dunning pursuant to s. 96 of the *Act*.

ORDER

Pursuant to section 115 of the *Act*, I confirm the Determinations issued against McGinnis and Meiklejohn and dismiss their appeals.

Michelle Alman

Michelle Alman

Adjudicator

Employment Standards Tribunal