

An appeal

- by -

Mega-Site Software Development Inc.
(“Mega-Site”)

- 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: Kenneth Wm. Thornicroft

FILE No.: 2002/90

DATE OF HEARING: June 12, 2002

DATE OF DECISION: July 10, 2002

DECISION

APPEARANCES:

R. S. Henderson, Barrister & Solicitor	for Mega-Site Software Development Inc.
Norman Gangnes	on his own behalf
Henry Karnowski	on his own behalf

OVERVIEW

This is an appeal filed by Mega-Site Software Development Inc. (“Mega-Site”) pursuant to section 112 of the *Employment Standards Act* (the “*Act*”). Mega-Site appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on January 31st, 2002 (the “Determination”).

The Director’s delegate determined that Mega-Site owed four former employees a total sum of \$21,376.88 on account of unpaid wages and section 88 interest. Although Mega-Site does not concede that two of the four individuals, namely, Jay Gangnes and Jenna McMillan, were Mega-Site employees (Mega-Site says they were independent contractors), it nonetheless is not appealing the Determination with respect to those two individuals.

Mega-Site’s appeal relates only to the awards made in favour of Mr. Norman Gangnes (“Gangnes”) and Mr. Henry Karnowski (“Karnowski”). The Director’s delegate awarded Mr. Gangnes the sum of \$5,290.37 (including section 88 interest accrued to January 31st, 2002) and Mr. Karnowski the sum of \$12,791.16 including section 88 interest.

This appeal was heard at the Tribunal’s offices in Vancouver on June 17th, 2002 at which time I heard the testimony of Mr. Iqbal Ladha (Mega-Site’s president and also a director) and Messrs. Gangnes and Karnowski each of whom testified on his own behalf. The Director was not represented at the appeal hearing

In addition to the witnesses’ testimony, I have also considered the various documents and submissions submitted by the parties to the Tribunal.

ISSUES ON APPEAL

Mega-Site’s position is that neither Mr. Gangnes nor Mr. Karnowski was an “employee” as that term is defined in section 1 of the *Act*. Further, Mega-Site claims that even if Mr. Gangnes was an employee, his unpaid wage claim is grossly overstated and that his “employment” ended as of the end of December 2000. Accordingly, Gangnes claim for unpaid wages for the period January to mid-March 2001 ought not to have been allowed. A similar argument was advanced by Mega-Site with respect to Mr. Karnowski whose claim extended until the end of May 2001.

I propose to address each of the two claims in turn after first setting out some relevant background information.

BACKGROUND FACTS

At all material times, Mega-Site's two principals were Mr. Ladha and Mr. Brent Potratz. Messrs. Potratz and Ladha each controlled 50% of the voting stock and were both directors and officers of Mega-Site, a company that was incorporated under the federal companies legislation. The Mega-Site business concept appears to have been the brainchild of Mr. Potratz. I might add, at this point, that Mr. Potratz did not appear before me and has more or less abandoned any involvement with Mega-Site. His current whereabouts is uncertain. Mega-Site is no longer operating and has no marketable assets; although the company has not entered into bankruptcy, nor is it in receivership, at the present time, for all practical purposes, it is a "shell" company.

Mr. Potratz's failure to take an active role in these proceedings is problematic inasmuch as he was the principal day-to-day executive responsible for Mega-Site's business operations. Mr. Ladha appears to have been primarily an investor and was not an active principal in the business. For the most part, Mr. Ladha has limited personal knowledge about the facts and circumstances relating to the individual claims of Mr. Gangnes and Mr. Karnowski since he only infrequently attended Mega-Site's business premises which were located in the Steveston area of Richmond.

It would appear that Mr. Potratz, who was known to Mr. Ladha as a principal of a website design firm (and had done some work for one of Mr. Ladha's companies), approached Mr. Ladha sometime in late 1999 with a business proposal, namely, the development of a website specifically targeted to all aspects of the marine industry. Revenue would be generated through the sale of advertising that would be placed on the site. Mr. Ladha, along with some other individuals, agreed to invest in the business and over time he invested a substantial sum in the business. Mr. Ladha, who appears to have been one of the main investors, obtained--through a holding company--a 50% shareholding in the business (Mega-Site).

The software necessary to support the website was never completed, there was a continuous cash-flow problem, the business produced very little revenue (from some activity unrelated to the proposed core business), a sufficient number of new investors could not be secured and, in light of these circumstances, the business closed sometime in the spring of 2001.

THE CLAIM OF NORMAN GANGNES

Mr. Gangnes' status

As noted above, Mega-Site now says that Mr. Gangnes was not a Mega-Site employee. I reject this submission for several reasons.

First, Mega-Site, in its initial dealings with the delegate, effectively conceded that Mr. Gangnes was an employee [see letter dated September 17th, 2001 from Ms. Sabrina Arai ("Investor Relations"); see also, Mr. Potratz's letter to the delegate dated September 4th, 2001 in which he states that Mr. Gangnes was "laid off as of Christmas"]. Second, payroll records were maintained by Mega-Site for Mr. Gangnes. Third, in a company document entitled "Corporate Overview" dated March 30th, 2001, Mr. Gangnes was recorded as a member of the "Management, Staff & Associates" who was responsible for "sales". Fourth,

he was provided with a Mega-Site business card which indicated his responsibility for Mega-Site's "Marketing & Sales". Fifth, he had a Mega-Site "e-mail" address ["norm@megasitesoftware.com"]. Sixth, the "letter of intent" dated October 10th, 2000 between Gangnes and Mega-Site is in the nature of an employment agreement--it sets out his remuneration, it provides for nonvoting shares to be issued to Mr. Gangnes upon reaching certain performance targets and in that agreement Mega-Site agrees to reimburse Gangnes' vehicle and entertainment expenses. Seventh, Mega-Site paid Mr. Gangnes compensation in the form of wages and those wages represented Mr. Gangnes' only source of income (he received \$3,000 per month from October to December 2000 and continued to receive some monies in January and February 2001) during the relevant period and he regularly attended at Mega-Site's business premises. Finally, the evidence before me shows that the services provided to Mega-Site by Mr. Gangnes--seeking investors, doing internet "research", identifying potential customers, preparing sales literature, preparing for a Toronto boat show appearance (although, ultimately, Mega-Site did not attend that show), supervising other part-time staff--were in the nature of employment services.

Mr. Ladha may well believe that Mega-Site did not have any employees--he referred to all of the people working at Mega-Site's office as "contractors". He may not have fully appreciated the nature of the agreement reached between Mr. Potratz and Mr. Gangnes. Nevertheless, in my view, Mr. Gangnes clearly falls within the definition of "employee" contained in section 1 of the *Act*. Although Mr. Gangnes was paid a "gross wage" without the appropriate payroll deductions having been made, this fact, standing alone, does not covert Mr. Gangnes' status into that of an independent contractor. Indeed, this latter fact only indicates that Mega-Site did not abide by its statutory obligations under federal law with respect to deductions and remittances on account of income tax, the Canada pension plan and employment insurance.

It was argued before me that Mega-Site did not receive any tangible economic benefit from the services that were provided by Mr. Gangnes. That may well be so (although, the evidence is far from clear on that point), however, this is not a case like *Metrotel Communications Inc.*, B.C.E.S.T. Decision No. D095/99 (cited by counsel for Mega-Site) where there was no credible evidence of any services having been provided. If Mega-Site was of the view that Mr. Gangnes' services could not be economically justified, its remedy was to terminate his employment. The fact that the costs of an employee's services are not offset by the economic returns generated by those services does not determine whether the person is, under the *Act*, an employee.

Duration of employment

Mega-Site says that even if, as I have found, Mr. Gangnes was a Mega-Site employee, his employment ended on or about the end of December 2000 and that he ought not to have been awarded compensation for the period from January to mid-March 2001.

The fundamental problem with this latter assertion is that there is no credible evidence to support it. Indeed, Mega-Site's own documents tend to support Mr. Gangnes' position. For example, if Mr. Gangnes' employment ended as of December 2000, why did Mega-Site continue to pay him during January and February 2000? Why was Mr. Gangnes recorded in the March 30th, 2001 "Corporate Overview" as being responsible for corporate sales? Mr. Ladha testified that the company continued some form of operations until October 2001 and that he never formally terminated Mr. Gangnes' employment at any time. There is no evidence before me of any other Mega-Site official terminating Mr. Gangnes' employment at any time, let alone at the end of December 2000.

If Mr. Gangnes was terminated in late December 2000, one would have expected Mega-Site to issue an appropriate Record of Employment (no such record was ever issued). Mr. Ladha's involvement in the day-to-day operations of Mega-Site was peripheral and fleeting; his evidence does not, in my view, call into question the delegate's determination that Mr. Gangnes was employed until he resigned, due to not being paid (which circumstance could, in fact, be characterized as a constructive dismissal by Mega-Site), in or around the end of March 2001.

In sum, this appeal is dismissed as it relates to Mr. Norman Gangnes. I now turn to the claim of Mr. Karnowski.

THE CLAIM OF HENRY KARNOWSKI

Mr. Karnowski's status is not nearly as readily determinable as that of Mr. Gangnes. Mega-Site (or, perhaps, more correctly, Mr. Ladha) submits that Mr. Karnowski was, in fact, a principal in the firm and not an employee.

The key piece of evidence supporting this latter assertion is found in the evidence regarding the ownership of Mega-Site's shares. Prior to the incorporation of the federal Mega-Site company (*i.e.*, the appellant in this appeal), there existed a provincially-incorporated company with the identical name. This company, which at all material times consisted of a single principal, namely Mr. Karnowski, was incorporated on April 4th, 2000; a change of name to 604742 B.C. Ltd. was effected as of August 10th, 2000. This latter numbered company held the 50% shareholding in the federal Mega-Site company; the other 50% was held by a holding company controlled by Mr. Ladha.

On balance, I accept Mr. Karnowski's explanation that, in effect, he was a "trustee" for the shares he nominally held in the numbered company and that the "true owner" was Mr. Potratz. Mr. Karnowski testified that he was asked by Mr. Potratz (his roommate at the time) to hold the shares in his (Karnowski's name) so that this state of affairs could be concealed from Mr. Potratz's ex-wife and other creditors. By participating in this scheme, Mr. Karnowski may well have been a party, even if unwittingly, to an unlawful attempt to defeat the legitimate claims of Mr. Potratz's various creditors.

However, as noted, I am nonetheless satisfied that Mr. Karnowski was not the true owner of the shares in question. The evidence before me clearly shows that Mr. Potratz, and not Mr. Karnowski, to be the "guiding hand" behind Mega-Site. Mr. Ladha testified that he knew when he met Mr. Potratz that the latter was facing "legal troubles" and that it was Mr. Potratz who presented the business opportunity to him. Mr. Ladha described Mr. Potratz, not Mr. Karnowski, as his "partner" in the business.

It was Mr. Potratz and Mr. Ladha who agreed to become 50% shareholders in Mega-Site. Mr. Karnowski took his instructions from Mr. Potratz, not the other way around. In the previously-mentioned "Corporate Overview", Mr. Potratz is identified as a Mega-Site officer/director whereas Mr. Karnowski is stated to be a "Research Analysis and Network Administrator". A letter dated July 27th, 2000 from Mega-Site (signed by Mr. Potratz) to the company's corporate solicitor states that only Mr. Potratz and Mr. Ladha (through their "holding companies) will be voting shareholders (each holding 3 such shares) in the federally incorporated Mega-Site company. In the May 2001 "Business Plan" Mr. Potratz is identified as the company's "founder", "senior vice-president", 43% "owner" (as is Mr. Ladha) and "contact" person whereas Mr. Karnowski is not identified as an owner, shareholder, director or officer but is simply referred to as a "research analyst".

In sum, I accept that Mr. Karnowski was an employee, and was not a principal of, Mega-Site. In concluding that Mr. Karnowski was an employee, I note the following:

- he was paid, albeit irregularly, the gross sum of \$2,000 per month as “wages” which payments were documented as such;
- he was economically dependent on Mega-Site having previously quit his job with a large telecommunications company;
- he took directions from, and was otherwise controlled by, Mr. Potratz and, occasionally, also received directions from Mr. Ladha;
- Mega-Site business cards (identifying him as a “research analyst”) were provided to him and in carrying out his duties, he worked out of Mega-Site’s office and used Mega-Site’s office equipment;
- the only Mega-Site “shares” that were ever issued (and there is some doubt about that) to Mr. Karnowski were worthless (then and now) nonvoting shares;
- finally, the evidence before me regarding Mr. Karnowski’s actual job duties shows them to be essentially administrative and clerical and that he did not have any policy-making function whatsoever.

With respect to Mr. Karnowski, Mr. Ladha testified that Mr. Karnowski “was paid depending on whether money was in the account” and that Mr. Karnowski did “accounting, looked after the bank account and office administration” and that he did not truly know Mr. Karnowski’s “official designation”, only that he was “there to help Brent [Potratz]” and that Mr. Potratz “directed” Mr. Karnowski’s day-to-day activities. Accordingly, and based on Mr. Ladha’s own evidence, there appears to be little doubt that Mr. Karnowski was an employee and not a principal in Mega-Site.

The delegate accepted Mr. Karnowski’s assertion that he was employed by Mega-Site until the end of May 2001 at which time he quit since he was not being paid. There is no credible evidence before me to call into question this latter finding. I have before me quite a number of documents indicating that Mr. Karnowski was undertaking tasks on behalf of Mega-Site up until May 2001. Among other documents, Mr. Karnowski is identified as Mega-Site’s “research analyst” in its March 31st, 2001 “Corporate Overview” and in its May 2001 “Business Plan”--thus, Mega-Site’s own documents are consistent with Mr. Karnowski’s claim that he was employed up until the end of May 2001. Mr. Ladha did not terminate Mr. Karnowski’s employment at any time, nor is there any other evidence before me to show that Mr. Karnowski was terminated. Further, there is no evidence before me to indicate that Mr. Karnowski “quit” (in fact, he may have been constructively dismissed) at a point in time prior to May 31st, 2001.

In light of the foregoing, Mega-Site’s appeal is also dismissed as it relates to Mr. Karnowski.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **\$21,376.88** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal