

An appeal

- by -

Megastation Productions Inc. operating as MEGAstation.com Inc.; Impulse Media Technologies (BC) Inc. operating as MEGAstation.com Inc.; Ian R. Toews operating as MEGAstation.com Inc.; Curtis Kendall Wong operating as MEGAstation.com Inc.; Arthur Griffiths operating as MEGAstation.com Inc.; Stuart R. Robson operating as MEGAstation.com Inc.; Robert Sundberg operating as MEGAstation.com Inc.; Eric Hawthorne operating as MEGAstation.com Inc.; Derrick Johnson operating as MEGAstation.com Inc.
("Megastation")

- 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: Carol L. Roberts

FILE No.: 2002/314, 2002/315 & 2002/316

DATE OF HEARING: September 24, 2002

DATE OF DECISION: October 17, 2002

DECISION

APPEARANCES:

On behalf of Megastation Productions Inc., and on their own behalfs: I.Toews, C.Wong
Written submissions only by: Robert Sundberg
On behalf of the Director: Jim Ross

OVERVIEW

This is an appeal by Megastation Productions Inc. operating as MEGAstation.com Inc.; Ian R. Toews operating as MEGAstation.com Inc.; Curtis Kendall Wong operating as MEGAstation.com Inc.; and Robert Sundberg operating as MEGAstation.com Inc., pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued May 15, 2002.

Six individuals (Jason Peckham, Jacqueline Quesnel, Joseph Taylor, Michael J. Tupper, Ron Tupper and Fiana Walker) filed complaints with the Director of Employment Standards contending that they had not been paid wages. Their complaints were against Megastation Productions Inc. operating as MEGAstation.com Inc.; Impulse Media Technologies (BC) Inc. operating as MEGAstation.com Inc.; Ian Toews operating as MEGAstation.com Inc.; Curtis Kendall Wong operating as MEGAstation.com Inc.; Arthur Griffiths operating as MEGAstation.com Inc.; Stuart R. Robson operating as MEGAstation.com Inc.; Robert Sundberg operating as MEGAstation.com Inc.; Eric Hawthorne operating as MEGAstation.com Inc.; and Derrick Johnson operating as MEGAstation.com Inc.

Following an investigation, the delegate concluded that Megastation Productions Inc. ("Megastation Productions") and Impulse Media Technologies (BC) Inc. ("Impulse") were under common control or direction pursuant to s. 95 of the *Act*. After further investigation in which only three individual Respondents (Mr. Sundberg, Mr. Hawthorne and Mr. Johnson) made brief contact with the delegate, the delegate concluded that the *Act* had been contravened, and that the companies and individuals noted above owed the complainants wages and interest in the total amount, as amended prior to the hearing, of \$52,985.83. Since the Determination was issued, \$687.06 has been collected, and is being held in trust for the complainants.

ISSUES TO BE DECIDED

The appellants do not dispute that the six individuals are owed money. At issue is whether the three of the individuals (Ron Tupper, Mike Tupper and Mr. Taylor) are employees or self-employed contractors (and thus not protected under the *Act*); which person(s) and/or entity (ies) owes the money; and whether the amounts determined owing are correct.

Preliminary Issue

As a preliminary matter, I also had to determine whether material submitted on appeal ought to be considered at all.

Megastation.com and Megastation Productions, and Mr. Toews and Mr. Wong submitted significant documentation on appeal that had not been previously submitted to the delegate. They contended that neither the named individuals nor Megastation.com or Megastation Productions had knowledge of the complaint or the investigation, and thus had no previous opportunity to respond. They argue that, in the interest of fairness, the material should now be considered.

The delegate contended that he had made numerous attempts to contact the parties by ordinary mail, registered mail, telephone calls, and personal visits to the alleged offices of the Appellants over a period of approximately 10 months, and had no response from any of the parties but Mr. Hawthorne, Mr. Johnson and Mr. Sundberg. None of those replies were substantive in nature. The delegate submits that no new material ought to be considered.

The Tribunal has held on many occasions that it will not accept evidence at a hearing which ought properly to have been put to the Director's delegate at first instance. (see *Tri West Tractor Ltd.* BC EST D#268/96 and *Kaiser Stables* BC ESTD# 058/97) In *Tri West*, the Tribunal said that it would

not allow appellants to "sit in the weeds", failing or refusing to cooperate with the delegate.... and later filing appeals of the Determination when they disagree with it. An appeal under section 112 of the *Act* is not a complete re-examination of the complaint. ... [the appeal procedure is not] to be used to make the case that should have and could have been given to the delegate in the investigative process.

Facts

On October 18, 2001, the delegate sent letters to the last known address of Megastation Productions, and its registered and records office, setting out the allegations and seeking a response. On January 16, 2002, a second letter was sent by registered mail to an office believed to be Megastation's address, and its registered and records office. The letter to the registered and records office was received on January 22, 2002, signed for by an "Ambert Tubbs".

On March 21, 2002, a letter containing the delegate's preliminary findings was sent to all known business and residential addresses of Megastation.com, its directors, and Megastation Productions. Registered mail to Mr. Robson, and Mr. Hawthorne was returned to the Director as unclaimed, to Mr. Johnson returned as moved, address unknown, and several letters to Mr. Griffiths returned for a variety of reasons.

On March 27, 2002, Mr. Hawthorne contacted the delegate by telephone and advised him that Impulse was not part of Megastation Productions. He then sent the delegate a response that included an attachment showing the relationship between Megastation.com, Megastation Productions, Impulse and Impulse Media Technologies (Nevada) Inc. He confirmed that he was hired as the leader of the technology team at Megastation.com.

Mr. Johnson contacted the delegate on April 2, 2002, and advised him that he had been the COO of Megastation.com and would review the delegate's March 21, 2002 letter. No further response was received.

Finally, Mr. Sundberg contacted the delegate by mail on April 16, 2002 and advised him that he had resigned as a Director, Secretary Treasurer, and CFO of Megastation Productions and Megastation.com on January 8, 2001.

No other replies to the delegate's letters were provided. None of the responses challenged the delegate's conclusions that the six individuals were entitled to wages.

Mr. Wong and Mr. Toews, in a joint submission on behalf of Megastation.com and Megastation Productions, contend that they had no knowledge of the delegate's investigation until they received a copy of the Determination. They say they "were not properly served" with notice of the delegate's investigation. Mr. Toews and Mr. Wong also go on to say that "with the exception of Toews and Sundberg, none of the other parties have received the investigation documents and have not had a chance to respond." This statement is not only inconsistent with what is alleged earlier, it also begs the question why Mr. Toews did not respond to the delegate's letters until after the Determination was issued if he had received notice of the investigation.

The documents demonstrate that Megastation Productions' registered and records office received the delegate's January 16, 2002 letter. Furthermore, Mr. Hawthorne, Mr. Johnson and Mr. Sundberg all responded to the delegate's preliminary findings letter of March 21, 2002.

I am satisfied that the corporate respondents had knowledge of the complaint investigation process. I am not persuaded, on the evidence presented, that the individual appellants were not aware that the delegate was conducting an investigation, and of their opportunity to respond. Indeed, Mr. Toews acknowledged in the hearing that he had received a telephone call from Mr. Johnson 2- 3 weeks before the Determination was issued telling him that he would be getting a letter. Mr. Toews acknowledged in the hearing that he was aware that "something was going down", but made no attempt to find out what that might be. Mr. Hawthorne, Mr. Johnson and Mr. Sundberg were all aware of the complaints and the investigation process. Of those three, only Mr. Sundberg filed an appeal of the Determination.

I am not persuaded that the Appellants were denied an opportunity to respond at first instance. On the basis of the principles set out in *Kaiser*, I would deny the appellants, with the exception of Mr. Sundberg, the right to submit additional evidence on appeal. However, I have had the benefit of reviewing the documentation presented, and while it does not persuade me that the Determination is in error in any significant way, it contains information that enhances my conclusions. I have made reference to that information where appropriate and necessary to do so.

FACTS

Megastation.com is a U.S. Corporation, incorporated in Nevada. It is not registered in B.C. The delegate found its directors to be Mr. Wong, Mr. Toews, Mr. Griffiths, Mr. Robson, Mr. Sundberg and Mr. Johnson, plus two other individuals not named in the Determination.

Megastation.com carried out business in B.C. through its wholly owned subsidiary, Megastation Productions, incorporated in BC in February 2000. Mr. Toews and Mr. Wong are the directors.

Impulse was incorporated in BC in September 2000, also with Mr. Toews and Mr. Wong as the directors.

Megastation.com was involved in the development of internet or web-based broadcasting and technology. Each week from December 1, 2000 to April 20, 2001, it produced a series of 1 hour music show for radio stations (21 in total), which were designed for both broadcast and web-cast. In early 2001, when Megastation's business was failing, it decided to sell a part of its technology to Impulse. Megastation Productions and Megastation.com jointly executed a technology transfer agreement in favor of Impulse, with the effective date of the transfer being April 20, 2001.

Impulse's business plan stated that Megastation recently signed a "letter of intent with Impulse to jointly create and market wireless - internet software and services to the radio and television industries." For some time, and at least during the month of February 2001, Impulse shared office space with Megastation.

Megastation ceased operations at the end of April, 2001, and in September 30, 2001, vacated the premises at 1090 W. Georgia Street. Impulse is now in bankruptcy, and is a creditor of Megastation. Mr. Hawthorne advised the delegate that Mr. Toews and Mr. Wong ceased to be directors of Impulse as of September 29, 2001.

On February 19, 2002, the delegate found that Megastation Productions and Impulse were associated corporations for the purpose of s. 95.

The delegate relied on information provided by the individuals, determined that they were employees, that they worked for Megastation in differing capacities for periods of time ranging from January 1, 2000 to June 13, 2001, and were entitled to wages in the total amount noted above.

ARGUMENT

Mr. Toews and Mr. Wong contend that all the employees and consultants were laid off on March 30, 2001 "because the Companies ceased operations on that date".

As noted above, the delegate concluded that Megastation Productions and Impulse were associated corporations for the purpose of s. 95.

Although not advanced as such, I infer that Mr. Wong and Mr. Toews argue that the delegate's determination on this point is in error. They filed no appeal on behalf of Impulse, even though they were, at all relevant times, directors of the company. Mr. Toews and Mr. Wong say that Megastation Productions and Impulse are separate "since a Transfer of Technology Agreement" was executed with Impulse, and that Impulse "was in a different industry from Megastation". Certainly this was Mr. Hawthorne's position to the delegate.

While Mr. Toews and Mr. Wong agree that Ms. Quesnel and Mr. Peckham were employees and entitled to wages, they disputed the quantum arrived at by the delegate.

Finally, Mr. Wong and Mr. Toews also contend that the delegate erred in finding that Ms. Walker, Mike Tupper and Ron Tupper were owed wages, because they were self-employed consultants, not covered by the *Act*. In the alternative, they argue that if Mike Tupper and Ron Tupper are found to be employees, the amounts determined owing are in error.

Common Corporations

Section 95 provides as follows:

If the director considers that businesses, trades or undertakings are carried on by or through more than one corporation, individual, firm, syndicate or association, or any combination of them under common control or direction,

(a) the director may treat the corporations, individuals, firms, syndicates or associations, or any combination of them, as one person for the purposes of this Act, and

(b) if so, they are jointly and separately liable for payment of the amount stated in a determination or in an order of the tribunal, and this Act applies to the recovery of that amount from any or all of them.

As noted by the Tribunal in *Invicta Security Systems Corp.* (BC EST #D349/96), the purpose of s. 95 is to allow the director to

pierce the corporate veil and look behind the legal structure, or form, of a business to the relationships of various entities that in reality comprise the substance of the business. There are four preconditions to an application of Section 95 to the circumstances of any matter before the director:

1. There must be more than one corporation, individual, firm, syndicate or association;
2. Each of these entities must be carrying on on a business, trade or undertaking;
3. There must be common control or direction; and
4. There must be some statutory purpose for treating the entities as one employer

One of the purposes of the *Act* is to ensure employees in the province receive the basic standards of compensation and conditions of employment. The *Act* also provides for a comprehensive enforcement scheme. As the Tribunal noted in *Invicta*, the enforcement provisions include the power of the director to make the one employer declaration for the purpose of facilitating the collection of wages owing under the *Act*.

I conclude that all of the indicia of section 95 have been met.

Mr. Toews and Mr. Wong are (or were) both the sole directors of Megastation Productions, and Impulse.

Megastation Productions executed a "Technology Transfer Agreement" in favor of Impulse in early 2001, when it was failing financially, and for a time, Impulse and Megastation Productions operated out of the same premises. Their businesses were closely related, both physically as well as substantively. Mr. Dawe noted that, "after the transfer of technology, Megastation remained as a significant but non-controlling shareholder" of Impulse. John Dawe, CFA, who provided submissions on behalf of the appellants, characterized Megastation.com as Impulse's "parent" company.

In late 2000 and in early 2002, Ms. Walker's cheques were issued by Megastation Productions. In April 2001, Ms. Walker's cheques were issued by Impulse, and bore the same address as Megastation Productions. All of the later cheques, regardless of the company issuing them, were signed by Mr. Wong. Two journal entries for Megastation Productions carry the following notation: "paycheque for remaining salary outstanding for March ...issued by Impulse on behalf of Megastation Productions Inc... move from payroll clearing to inter-company account."

There is ample evidence to support the delegate's conclusion that Megastation Productions and Impulse were associated companies for the purpose of s. 95. Therefore, they are jointly and severally responsible for the wages owing.

I will now deal with Mr. Sundberg's appeal.

Directors/officers

Section 96 provides:

(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 month's unpaid wages for each employee.

(2) Despite subsection (1), a person who was a director or officer of a corporation is not personally liable for

...

(b) vacation pay that becomes payable after the director or officer ceases to hold office

Mr. Sundberg contended that he had resigned as an Officer, Director and CFO of Megastation.com and Megastation Productions on January 8, 2001. His letter of resignation to Mr. Toews was submitted on appeal. I accept that Mr. Sundberg did resign effective that date. However, I am not prepared conclude that the delegate erred in including him in the Determination. The delegate found that Ron Tupper was owed wages back to December 2000, which falls within the two month period, and for which Mr. Sundberg would be responsible.

Employee/Self Employed Contractors

Section 1 of the *Act* defines employee to include

(a) a person....receiving or entitled to wages for work performed for another, and

(b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee....

Wages are defined to include salaries, commissions or money paid or payable by an employer to an employee for work.

An employer is defined as including a person

(a) who has or had control or direction of an employee, or

(b) who is or was responsible, directly or indirectly, for the employment of an employee.

Work is defined as meaning "the labour or services an employee performs for an employer whether in the employee's residence or elsewhere."

The existence of an employment relationship is not dependent on the intention of one or both of the parties. The *Act* defines what an employee is, and if the relationship falls within that definition, the parties will be bound by the requirements of the *Act*.

I will address the status of each individual separately.

Mr. Taylor

Mr. Taylor filed an appeal contending that he was an employee, entitled to wages. He was found to be an employee by the delegate, and owed wages of \$4,467.39 and interest of \$340.56. Mr. Taylor acknowledged that he had received \$532.61 from Mr. Toews in July 2001, which was to be applied to the amount owed to him.

In a submission to the Tribunal, Mr. Taylor acknowledged that he was initially hired as an independent consultant, and sought to be so categorized, despite taking an opposite position in his complaint.

There is insufficient evidence before me to conclude that the delegate's determination is incorrect in respect of Mr. Taylor. While some documents suggest Mr. Taylor was self employed, they are, as a whole, inconclusive. Therefore, I find no basis to vary this aspect of the determination.

Ms. Walker

There is no dispute that Ms. Walker worked as a legal compliance officer for Megastation Productions, at least until March 30, 2001. The Appellants contend that Ms. Walker's employment was terminated on that date, that her salary was paid in full, and that she is owed \$262.91 for vacation pay.

Megastation Productions issued Ms. Walker a Record of Employment (ROE) on May 14, 2001 indicating that her final pay period ended March 31, 2001. An amended ROE was issued June 8, containing changes to Ms. Walker's total insurable earnings and vacation pay. The contact name of the employer was Derrick Johnson.

Payroll summary sheets issued by Megastation Productions for the months November 2000 through to April 2001 demonstrate that Ms. Walker was paid as an employee, and the applicable employee deductions taken.

From January 1, 2001 to March 30, 2001, Ms. Walker's paycheques were issued by Megastation Productions, bearing the signature of Mr. Wong. The cheques contained an identification of Ms. Walker's wages, as well as the payroll deductions, and set out her available sick and vacation days. From April 4, 2001, Ms. Walker's cheques were issued by Impulse, also bearing the signature of Mr. Wong. The April 4 and April 26 cheques issued by Impulse specified that the funds were salary earned during March on behalf of Megastation Productions. After that time, the cheques indicated that the funds were either "payment on account", or an "employee advance".

There is no dispute that the work Ms. Walker performed after March 31, 2001 was in any way different than the work she performed before March 31. Although Mr. Toews appeared to contend that Ms. Walker made an agreement to become a self employer contractor and work for Impulse after that date, as noted above, the parties' characterization of the relationship is only marginally relevant to their status under the *Act*. I find no basis to vary the determination in this respect.

Ms. Quesnel and Mr. Peckham

The appellants do not dispute that Ms. Quesnel and Mr. Peckham were employees, but contend that their employment was terminated at the end of March 31, 200. The appellants also do not dispute that Ms. Quesnel and Mr. Peckham were owed \$1,710.26, and \$2,414.13, respectively, in salary and vacation pay, but contend that nothing more is owed. I find no basis to vary the Determination in this respect.

Ron Tupper and Mike Tupper

While acknowledging that Ron Tupper is owed \$9000, and Mike Tupper \$4500 after applying a \$1500 payment from Impulse, the appellants argue that the Tupperes, like Mr. Taylor, were consultants, and not covered under the *Act*. In the alternative, they deny that the Tupperes are owed more than what is acknowledged.

Mr. Toews and Mr. Wong argue that Megastation did not take any source deductions such as UIC, CPP or EI from the Tupperes' cheques, and as such, the company "never deemed the Tupperes to be employees."

The appellants rely on Ron Tupper's monthly invoices for work performed on an hourly basis as support for their position that he provided services on his own time, not according to specific hours set out by Megastation. They also contend that Ron Tupper was not supervised, and that Megastation did not provide him with any necessary video or audio equipment to stream video or audio clips on Megastation's web site. Finally, they also contend that both of the Tupperes signed "Consultant's Agreement", and purchased shares in Megastation.com, indicia which would support their position that they were self employed consultants.

At the outset, I note that the appellants failed to provide signed copies of the "Consultant's Agreements" upon which they rely. In any event, those agreements contain clauses which would tend to put the Tupperes in both the employee category, as well as the self employed consultant category. As such, I find them inconclusive on the issue of whether or not the Tupperes were employees. Further, it is entirely irrelevant whether or not the Tupperes purchased shares in any company. This is not a factor which would favor one categorization or the other.

Mike Tupper

Mike Tupper worked at Megastation Productions from February, 2000 to April 2001. The delegate found that he was part of the Streaming Media Team as an employee, reporting to the streaming media senior personnel. He found sufficient evidence of control, integration into the business and an ongoing relationship to conclude that Mike Tupper was an employee.

On June 6, 2001, Canada Customs and Revenue Agency (CCRA) determined that Mike Tupper was an employee under a contract of service to Megastation Productions Inc. It concluded that Megastation provided Mike Tupper with the necessary equipment to carry out his duties, and that it exercised some control over his work.

That ruling has not been appealed. While that determination is not binding on the Tribunal (see *Hill* (BC EST #D219/99 and *B.J. Heatsavers Glass and Sunrooms Inc.* (BCEST #D 137/97)), it does have some evidentiary value, since the CCRA applied several common law tests in arriving at that conclusion, tests which are also applicable to the definition in the *Act*.

Although the appellants contended that Mike Tupper used his own equipment, was never supervised, and did not work regular hours, they conceded that they did not know what equipment he required to perform his job duties, they did not work with him on a daily basis, and were not present when he was hired.

There is no evidence, even in any of the documentation presented on appeal, persuading me that the determination finding that Mike Tupper was an employee, or the amount owing, is incorrect.

Ron Tupper

Ron Tupper worked as Vice President Streaming from March 1, 2000 to April 20, 2001. The delegate concluded that he was an employee editing and encoding audio and video music clips on a weekly basis.

Ron Tupper's evidence, which was not disputed by Mr. Wong or Mr. Toews, was that he was hired by Stuart Robson, who was the CEO of Megastation, in the last week of June 2000, that he was to report to Eric Hawthorne, who was responsible for the streaming media department. They also could not dispute Ron Tupper's evidence that Mr. Robson advised him that he was to work 20 hours per week at a rate of \$750.00 per week, and that he was to undergo a performance review three months after his hire.

There is no evidence Ron Tupper had any authority to authorize purchases or hire staff. There is no dispute that Ron Tupper was assigned a chair, a desk, a computer workstation, had access to a T1 internet connection, a telephone, and a door key and card. There was no dispute that all the software he needed for performing his job duties was either installed on the computer, downloaded as freeware or shareware over the internet, or purchased by him and reimbursed by Megastation.

I am not persuaded that the delegate erred in finding that Ron Tupper was an employee, nor the amount owing to him.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination dated May 15, 2002 be varied as follows:

The amount of the Determination is varied to \$52,985.83, together with whatever interest has accrued from the date of the Determination, pursuant to s. 88 of the *Act*, as follows:

Mr. Taylor:	\$ 4,807.95
Ms. Quesnel:	\$ 2,512.39
Mr. Peckham:	\$ 4,252.90
M. Tupper:	\$10,447.36
R. Tupper:	\$12,792.78
Ms. Walker:	\$18,235.45

Carol L. Roberts
Adjudicator
Employment Standards Tribunal