

An appeal

- by -

Leigh Dasilva  
("Dasilva")

- 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 (as amended)

**PANEL:** James F. Maxwell

**FILE NO.:** 2018A/120

**DATE OF DECISION:** March 21, 2019

## DECISION

### FACTS

1. In July and August, 2018, the Employment Standards Branch (the “Branch”) received complaints from two employees (the “original complainants”) alleging that Atimi Software Inc. (“Atimi”) had not paid all wages in accordance with the provisions of the *Employment Standards Act* (the “ESA”). As a result of these complaints, the Branch conducted an audit and investigation to determine the extent to which Atimi had failed to pay wages to its employees.
2. On October 17, 2018, a delegate of the Branch (the “Delegate”) issued a Determination (the “Determination”) under section 79 of the *ESA* ordering Atimi to pay the sum of \$492,100.20 on account of unpaid wages and interest owed to 21 former Atimi employees, including the appellant in these proceedings, Leigh Dasilva (“Dasilva”). The Delegate also levied \$1,500.00 in monetary penalties against Atimi bringing the total amount payable under the Determination to \$493,600.20.
3. As part of the Determination, the Delegate determined that the sum of \$17,275.87 inclusive of interest was owing to Dasilva.
4. Dasilva was not one of the original complainants. On November 19, 2018, Dasilva filed a timely appeal of the Determination, alleging that the Delegate erred in law in determining the amount owing. Dasilva argued that the Delegate had failed to consider additional amounts owing to Dasilva as Performance-Based Commissions. Dasilva submits that he is owed additional commissions in the amount of \$73,095.39, and thus asks the Tribunal to vary the Determination by increasing his unpaid wage award to \$90,371.26.
5. Dasilva also submitted that he had new and relevant evidence in support of his appeal.
6. Following my initial review of Dasilva’s appeal materials, I was satisfied that it would not be appropriate to summarily dismiss the appeal under subsection 114(1)(f) of the *ESA*. I directed the Tribunal’s Appeals Manager to seek further submissions from the parties regarding the merits of the appeal. On January 14, 2019, the Tribunal gave the Delegate until January 28, 2019, to file their submissions (at which point, in the ordinary course of events, Dasilva would then be given a final right of reply). No submissions were being sought from Atimi as the Tribunal did not have Atimi’s current contact information on file.
7. On January 21, 2019, Mary Walsh, a delegate of the Director (“Delegate Walsh”), wrote to the Tribunal advising that she had been informed by a member of Atimi’s Board of Directors (Mr. Gully) that the company was anticipating filing for bankruptcy under the federal *Bankruptcy and Insolvency Act* (the “BIA”). Delegate Walsh asked for a short extension in order to verify if *BIA* proceedings had been filed, or were immediately contemplated.
8. On January 30, 2019, after the Tribunal had received Atimi’s current contact information, Atimi was given until February 13, 2019, to provide the Tribunal with its submissions regarding the merits of the appeal.

9. On February 13, 2019, Delegate Walsh advised the Tribunal that Price Waterhouse Coopers Inc. (“PWC”), a Licensed Insolvency Trustee, was acting as the trustee for Atimi and that a restructuring proposal would be presented to all of Atimi’s creditors (including its former employees).
10. Delegate Walsh’s submission dated February 13, 2019, was provided to both Dasilva and Atimi, and they were directed to file any reply submission by no later than March 1, 2019. The Tribunal received a response from Dasilva on February 27, 2019.
11. On March 1, 2019, Delegate Walsh forwarded to the Tribunal a Certificate of Filing of a Notice of Intention to Make a Proposal, pursuant to section 50.4(1) of the *BIA*, evidencing Atimi’s intention to take proceedings under the *BIA*.
12. Under section 50.4 of the *BIA*, an insolvent person (including a corporation) may file a Notice of Intention to make a proposal to their creditors. The *BIA* provides for a vote by the creditors on a proposal by a debtor. If accepted and then approved by the bankruptcy court, the creditors’ claims will be dealt with according to the provisions of the proposal. However, if rejected, the debtor is deemed to have made an assignment into bankruptcy (*BIA*, section 57).
13. Section 69.1(1) of the *BIA* provides that upon the filing of a notice of intention under section 50.4, “no creditor has any remedy against the insolvent person or the insolvent person’s property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy”. In effect, proceedings commenced under the *BIA*, including a Notice of Intention to Make a Proposal, act as a stay of all other actions against the debtor.
14. Dasilva’s appeal is, in essence, a claim for further wages beyond those already awarded to him by the Determination and, as such, is a claim provable in bankruptcy (as is the wage claim that has already been determined). Accordingly, his appeal cannot proceed and his unpaid wage claim must now be pursued in the *BIA* insolvency proceedings. Further, if Atimi’s proposal is rejected, the firm is deemed to be in bankruptcy, in which case section 69.3 of the *BIA* provides for a stay until the bankruptcy trustee is discharged.
15. Rule 5(4)(g) of the Tribunal’s *Rules of Practice and Procedure* states: “Without restricting the powers in paragraphs (1), (2), and (3), the Tribunal may, to assist in the timely resolution of matters before it...(g) stay proceedings”. In my view, the Tribunal is legally obliged to stay the adjudication of this appeal until the *BIA* proceedings involving Atimi have concluded and the Trustee is discharged. Accordingly, the adjudication of this appeal is stayed pending the final determination of the *BIA* proceedings involving Atimi. Dasilva is given leave to apply to the Tribunal for whatever relief he believes he may be entitled to under the *ESA* after the *BIA* proceedings have concluded and the Trustee has been discharged.
16. I further note that while a corporate officer may be personally liable for unpaid wages, pursuant to the *ESA*, section 96(2)(b) of the *ESA* provides that such an officer is not liable if the corporation is subject to a proceeding under the *BIA*. For this reason, it is not open to Dasilva to continue with the within appeal as against any corporate officer of Atimi.
17. Having reviewed the Determination, the Appellant’s submissions filed with the appeal, and the materials received from the Director’s delegate related to Atimi’s Notice of Intention to Make a Proposal, I conclude

that this appeal must be stayed pursuant to section 69(1) of the *Bankruptcy and Insolvency Act*, Rule 5(4)(g) of the Tribunal's *Rules of Practice and Procedure*, and section 14 of the *Administrative Tribunals Act*.

**ORDER**

18. I order that the within appeal is stayed.

---

**James F. Maxwell**  
**Member**  
**Employment Standards Tribunal**