

An appeal

- by -

Cameron Morris
("Morris")

- of a Determination issued by -

The Director of Employment Standards

pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: Kenneth Wm. Thornicroft

FILE NO.: 2018A/122

DATE OF DECISION: March 21, 2019

DECISION

SUBMISSIONS

Cameron Morris	on his own behalf
Mary Walsh	delegate of the Director of Employment Standards

INTRODUCTION

1. This is an appeal filed by Cameron Morris (“Morris”) under subsections 112(1)(a) and (c) of the *Employment Standards Act* (the “ESA”).
2. Briefly, the background facts are as follows. On October 17, 2018, Sophia Wilson, a delegate (the “delegate”) of the Director of Employment Standards (the “Director”) issued a Determination (the “Determination”) under section 79 of the *Employment Standards Act* (the “ESA”) ordering Atimi Software Inc. (“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, Mr. Morris. The delegate also levied \$1,500.00 in monetary penalties against Atimi and thus the total amount payable under the Determination is \$493,600.20.
3. Mr. Morris did not file an unpaid wage complaint under the *ESA*. Rather, his unpaid wages were calculated based on a review of Atimi’s payroll records as part of the Director’s audit to determine what wages were owed to current and former Atimi employees.
4. On November 26, 2018, Mr. Morris filed a timely appeal of the Determination, alleging that the delegate erred in law and also that he had new and relevant evidence (see subsections 112(1)(a) and (c) of the *ESA*). In essence, Mr. Morris’s appeal is predicated on his assertion that the amount of unpaid wages awarded to him under the Determination - \$20,145.87 – understated Atimi’s actual unpaid wage liability to him. Mr. Morris maintains that he is owed additional commissions in the amount of \$53,920.10 and thus asks the Tribunal to vary the Determination by increasing his unpaid wage award by \$53,920.10 (presumably, with additional section 88 interest to be added to this latter amount).
5. Following my initial review of Mr. Morris’s appeal documents, I was satisfied that it would not be appropriate to summarily dismiss the appeal under subsection 114(1)(f) of the *ESA* and, that being the case, 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’s request for additional submissions was sent to the parties. The delegate was given until January 28, 2019, to file her submission (at which point, in the ordinary course of events, Mr. Morris would then be given a final right of reply). No submissions were sought from Atimi at that time because the Tribunal did not have current contact information on file for that firm.
6. However, on January 21, 2019, the Regional Manager of the Employment Standards Branch’s Lower Mainland Region (Ms. Mary 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*”). Ms. Walsh asked for a short extension so that she could verify if *BIA* proceedings had been filed, or were immediately contemplated. On February 13, 2019, Ms. Walsh wrote to the Tribunal confirming that Price Waterhouse Coopers Inc., a Licensed Insolvency Trustee (“*PWC*”) 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).

7. Ms. Walsh’s February 13, 2019, submission was provided to both Mr. Morris and Atimi and they were directed to file any reply submission by no later than March 1, 2019. The Tribunal received a response from Mr. Morris on March 1, 2019. Mr. Morris’s submission essentially reiterates his position regarding his claim for additional wages but does not address any issues in relation to the *BIA*.
8. The record before me indicates that on February 21, 2019, a Notice of Intention was filed with the Office of the Superintendent of Bankruptcy Canada under section 50.4 of the *BIA*.

ANALYSIS AND FINDINGS

9. Under section 50.4 of the *BIA*, an insolvent person (including a corporate person) may file a Notice of Intention to make a proposal to their creditors. Section 54 of the *BIA* provides for a vote by the creditors on the proposal – if the proposal is 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 immediate assignment into bankruptcy (*BIA*, section 57).
10. Insofar as the Notice of Intention is concerned, subsection 69(1)(a) of the *BIA* states that on the filing of a Notice, “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”. Mr. Morris’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 provides for a stay until the bankruptcy trustee is discharged.
11. In due course, if not already, Mr. Morris will be provided with a proof of claim form by the trustee, *PWC*. However, insofar as this appeal is concerned, in my view, it cannot now proceed in light of the stay provisions in the *BIA*. In short, at this juncture, it would appear that all future proceedings regarding Mr. Morris’s unpaid wage claim must be pursued under the *BIA* (see *In the Matter of the Bankruptcy Of Alpine Press Ltd.*, 2000 BCSC 278; appeal dismissed: 2001 BCSC 149). I strongly encourage Mr. Morris to communicate with the Trustee directly regarding his claim for further wages beyond those already awarded to him by way of the Determination.

STAY OF THE APPEAL

12. 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, I propose stay this appeal pending the final determination of the *BIA* proceedings involving Atimi.

13. I also propose to give Mr. Morris 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 (at that point, Mr. Morris may well not be entitled to any relief under the *ESA*, but this is not a matter about which I am making any ruling at this juncture).

ORDERS

14. Pursuant to subsection 103(d) of the *ESA*, section 11 of the *Administrative Tribunals Act*, and Rule 5(4)(g) of the Tribunal's *Rules of Practice and Procedure*, this appeal is stayed pending further order of the Tribunal.
15. Mr. Morris 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 am directing the Tribunal's Registrar to provide a copy of these reasons for decision to the Atimi's Trustee, PWC.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal