Citation: Molly B. Stevens (Re)
2022 BCEST 1

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Molly B. Stevens
(the "appellant")

- 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.:** 2021/049

**DATE OF DECISION:** January 4, 2022

# DECISION

## SUBMISSIONS

| | |
|---|---|
| Molly B. Stevens | on her own behalf |
| Radu Popescu | on behalf of the Director of Employment Standards |

## INTRODUCTION

1. This decision constitutes my final adjudication of the appeal filed by Molly B. Stevens (the "appellant"). These reasons should be read in conjunction with my earlier interim decision, issued on August 30, 2021 (*Stevens*, 2021 BCEST 71; the "Interim Decision"), where I dismissed the appellant's "natural justice" ground of appeal, and referred one specific issue back to the Director for further investigation pursuant to section 114(2)(a) of the *Employment Standards Act* (the "*ESA*").

2. On April 23, 2021, Radu Popescu, a delegate of the Director of Employment Standards (the "delegate"), issued a Determination under section 79 of the *ESA*, as well as his separate "Reasons for the Determination" (the "delegate's reasons") under section 81 of the *ESA*. The Determination was issued following an investigation triggered by complaints filed by eight former employees of Culinary Capers Catering, Inc. (the "employer") who worked in its catering business.

3. The delegate expanded his investigation to encompass all of the employer's employees, and ultimately determined that no wages were owed to 80 former employees. These employees were identified in "Appendix A" which was appended to the delegate's reasons. There is some confusion regarding the precise number of employees involved in this matter. The delegate's reasons, at page R2, stated that his investigation concerned 108 former employees and "whether any or all…are owed compensation for length of service or any other wages". On that same page, the delegate stated that his reasons "set out the basis for my decision as to employment standards rights with respect to 83 former employees" and that "the employees whom this determination concerns are listed, according to their roles in [the employer's] business, in Appendix 'A' to these reasons". However, only 80 employees are listed in "Appendix A", including only three of the original eight complainants.

4. In a submission to the Tribunal dated June 4, 2021, the delegate confirmed that the Determination affects 80, not 83, former employees. With respect to the five complainants who were not listed in "Appendix A", the delegate indicated that based on his investigation, these former employees were likely entitled to section 63 compensation for length of service, and he "intended to give [the employer] an opportunity to provide [these five former employees] with the appropriate compensation". I am not aware if, in fact, any or all of these five employees were eventually paid section 63 compensation.

5. As set out in the delegate's reasons, by the end of March 2020, the employer had either laid off or terminated most of its workforce. A few employees were recalled to work on the Easter weekend in April, but this was their last shift. For the eight complainants, the "last day worked" indicated in their various section 74 complaints was March 13, March 17, March 18, April 11 (two complainants), or May 11 (three

complainants), 2020. The employer made a voluntarily assignment into bankruptcy on May 11, 2020, over 11 months prior to the Determination being issued.

6. The delegate was in direct contact with the eight complainants (but no other employees), as well the employer's chief executive officer, and its bankruptcy trustee, during the course of his investigation. As noted in the delegate's reasons, at page R14, the only outstanding wage claims were in relation to section 63 compensation for length of service:

> The Trustee in Bankruptcy has advised me that [the employer] has paid all outstanding regular wages, overtime wages, and annual vacation pay to all of its former employees. None of the Complainants has alleged that they have any wages owed other than compensation for length of service. Nor has there been any evidence raised to suggest that any of the Named Employees who did not file complaints are owed any wages other than compensation for length of service, and I see no reason to believe otherwise. As such, I find that none of the Named Employees are owed any wages beyond compensation for length of service.

7. Although it was conceded that none of the employees received any prior written notice of termination, or compensation for length of service in lieu of notice (section 63), or group termination pay (section 64) – see delegate's reasons, page R8 – the delegate determined that no individual or group termination pay was owed in light of section 65(1)(d) of the *ESA*: "Sections 63 and 64 do not apply to an employee…(d) employed under an employment contract that is impossible to perform due to an unforeseeable event or circumstance other than receivership, action under section 427 of the *Bank Act* (Canada) or a proceeding under an insolvency Act".

8. The delegate determined that the employer's business failure (and ensuing bankruptcy) was caused by the Covid-19 pandemic, and the resulting unforeseeable consequences flowing from B.C. public health orders, thus relieving the employer from having to comply with its section 63 and 64 obligations to its employees.

## THE APPEAL

9. The appeal was filed by one of the 80 former employees named in "Appendix A" to the Determination, a person who was not one of the original eight complainants. As far as I am aware, she is the only former employee who appealed the Determination. The appellant alleged that the delegate erred in law and failed to observe the principles of natural justice in making the Determination (see sections 112(1)(a) and (b) of the *ESA*). Although the appellant did not specifically indicate that she was invoking the "new evidence" ground of appeal (see section 112(1)(c)), her materials included many factual assertions not included in the delegate's reasons, or in the section 112(5) record, that could be characterized as "new evidence.

10. The appellant's "natural justice" ground of appeal was based on her assertion (confirmed in the delegate's reasons at page R4) that the delegate never contacted her prior to issuing the Determination. The error of law ground of appeal was based on the appellant's assertion that the delegate erred in interpreting section 65(1)(d) of the *ESA* so as to deny the former employees' section 63 and 64 compensation in this case. In particular, the appellant says that the employer's voluntary decision to assign itself into bankruptcy cannot relieve it from its sections 63 and 64 obligations. The appellant also challenges certain

of the delegate's findings of fact, such as his finding that it was "impossible" for the employer to continue operations, notwithstanding the pandemic and the impact of consequent public health orders. The appellant says that the employer was not compelled by exigent economic circumstances to file for bankruptcy, and that not less than ten separate catering companies that "all pivoted and survived the pandemic". These latter assertions were supported by statements (most, if not all, of which were hearsay), that were not before the delegate when he issued the Determination.

## THE INTERIM DECISION (2021 BCEST 71)

11. In the Interim Decision, I dismissed the appellant's "natural justice" ground of appeal, holding that since she never filed a section 74 complaint, she was not *entitled* to participate in the delegate's investigation. At para. 21 of Interim Decision, I held:

> While a delegate conducting an investigation certainly can seek submissions from a non-complainant employee (or anyone else who might have relevant information), I am not satisfied that a delegate has a duty to contact anyone whose rights might be affected by a determination other than the "person under investigation" (section 77) and the complainant(s). It follows that I do not accept the delegate breached the principles of natural justice by failing to seek submissions from the appellant prior to issuing the Determination. (italics in original text)

12. I did not rule on the appellant's "error of law" ground of appeal which, in turn, was largely predicated on evidence that was not before the delegate.

13. Finally, and in light of the fact that the Determination was issued well after the employer entered bankruptcy (a fact known to all parties while the investigation was underway), I made a section 114(2)(a) order referring the possible impact of the *Bankruptcy and Insolvency Act* "stay" provision back to the Director for further investigation and report. I noted the following (at paras. 27-30):

> On May 11, 2020, the employer entered bankruptcy. The Determination was issued over 11 months after the employer entered bankruptcy. Although the actual bankruptcy documents are not before me, it appears that there was a voluntary assignment into bankruptcy. The delegate was well aware, from the outset of his investigation, that the employer was in bankruptcy (five of the original complaints referenced this fact); the section 112(5) record indicates that the delegate had many communications with the employer's bankruptcy trustee during the investigation.
>
> The *Bankruptcy and Insolvency Act (the "BIA")* contains several "stay" provisions, including sections 69(1)(a), 69.1(1)(a), 69.2(1), 69.3(1), and 69.41(2). The language in each of these provisions is quite similar. By way of example, section 69.3(1)(a) states: "Subject to subsections (1.1) and (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy" (my italics). The former employees' claims for unpaid section 63 and section 64 compensation would appear to be claims "provable in bankruptcy", and thus caught by the *BIA* stay provisions.
>
> The Tribunal has held, in several decisions, that once an employer enters into bankruptcy, any employee claims for monies that flow from *ESA* entitlements must be pursued in the bankruptcy proceeding if they constitute "claims provable in bankruptcy" (see, for example, Okrainetz, BC EST # D354/97; ICON Laser Eye Centres Inc. et al., BC EST # D649/01, confirmed on

> reconsideration: Director of Employment Standards, BC EST # RD201/02; International Steelworks Industries Ltd., BC EST # D294/02; More Marine Ltd., BC EST # D078/08 and BC EST # D079/08, confirmed on reconsideration: More Marine Ltd., BC EST # RD118/08; Kovic, BC EST # D048/09; Varseveld, BC EST # D028/15; Dasilva, 2019 BCEST 25; and Morris, 2019 BCEST 26).
>
> The delegate did not address the stay provisions in the *BIA*. It also appears that the bankruptcy trustee never raised the possible application of the stay provisions with the delegate. There may be a valid reason why the stay proceedings are inapplicable here. However, on the face of things, it appears that the Determination was issued contrary to the stay proceedings contained in the BIA. Accordingly, I propose to exercise my discretion under section 114(2)(a) of the *ESA* and refer this issue back to the Director for further investigation.

14. My formal order is set out, below:

> Pursuant to section 114(2)(a) of the *ESA*, the possible applicability of a *BIA* stay provision is referred back to the Director for further investigation. The Director shall prepare and file a report with the Tribunal regarding this latter matter within 30 days of the date of this decision. If the Director wishes to do so, this report may also address the appellant's "error of law" ground of appeal and the appellant's "new evidence".

15. I also indicated that the Director's report would be provided to the appellant and to the employer's bankruptcy trustee so that they could file a response, should they wish to do so, and that with all the parties' submissions in hand, I would then issue a final decision addressing the *BIA*, and also the appellant's error of law and new evidence grounds of appeal. The delegate submitted his report on October 18, 2021. The appellant filed a reply submission, but neither the employer's bankruptcy trustee nor the employer filed reply submissions.

## THE *BANKRUPTCY AND INSOLVENCY ACT* "STAY" PROVISIONS

16. The employer made a voluntary assignment into bankruptcy on May 11, 2020, about 11½ months prior to the Determination being issued. The eight unpaid wage complaints were filed between May 12 and July 3, 2020.

17. After a corporation enters into bankruptcy, the stay provisions in the *Bankruptcy and Insolvency Act* (the "*BIA*") immediately become operative. Section 69.3(1) of the *BIA* states:

> Subject to subsections (1.1) [trustee discharged] and (2) [secured creditors realizing on their security] and sections 69.4 [judicial order] and 69.5 [income tax and pension plan withholdings], on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy. (my underlining)

Neither section 69.4 (the court's authority to lift the stay *vis-à-vis* a particular creditor), nor section 69.5 (regarding sums withheld for income tax or pension plan remittances) is relevant here. The section 69.3(1) stay continues in force until the bankrupt's trustee is discharged (section 69.3(1.1)), and the trustee had not been discharged before the Determination was issued. An individual with an unpaid wage claim against the bankrupt is not a secured creditor under the *BIA*.

18. There are other *BIA* stay provisions that each contain language that is very similar to that set out in section 69.3(1), including section 69(1)(a) regarding Division I proposals, section 69.2(1) regarding consumer proposals, and section 69.41(2) regarding family support claims.

19. A "claim provable in bankruptcy" is somewhat unhelpfully defined in section 2 of the *BIA* as follows:

> *"claim provable in bankruptcy"*, "*provable claim"* or "*claim provable"* includes any claim or liability provable in proceedings under this Act by a creditor…

However, section 121(1) provides further guidance:

> All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.
> (my underlining)

20. Employees of a bankrupt corporation are entitled to file a "proof of claim" with the bankrupt's trustee. Proofs of claims for unpaid wages may be filed by the employee, or by an agent on behalf of the employee, under section 126(2) of the *BIA*:

> Proofs of claims for wages of workers and others employed by the bankrupt may be made in one proof by the bankrupt, by someone on the bankrupt's behalf, by a representative of a federal or provincial ministry responsible for labour matters, by a representative of a union representing workers and others employed by the bankrupt or by a court-appointed representative, and that proof is to be made by attaching to it a schedule setting out the names and addresses of the workers and others and the amounts severally due to them, but that proof does not disentitle any worker or other wage earner to file a separate proof on his or her own behalf.

21. Following the bankrupt's discharge, the bankrupt is released from all claims provable in bankruptcy (section 178(2)), save for those claims which are not extinguished by reason of section 178(1) – such as claims in relation to court-ordered fines, alimony, an award of damages for sexual assault, or debt claims arising from the bankrupt's fraudulent conduct.

22. The Tribunal has issued several decisions addressing the effect of the *BIA* stay provisions. I will now briefly review the *BIA* decisions that are relevant to this appeal.

## TRIBUNAL DECISIONS CONCERNING THE *BIA* STAY PROVISIONS

23. The Tribunal has addressed the *BIA* stay provisions in several decisions including: *International Steelworks Industries Ltd.*, BC EST # D294/02; *More Marine Ltd. et al.*, BC EST # D078/08 and BC EST # D079/08, both confirmed on reconsideration: BC EST # RD118/08; *Kovic*, BC EST # D048/09 and D066/09; *Varseveld*, BC EST # D028/15; *Dasilva*, 2019 BCEST 25; and *Morris*, 2019 BCEST 26. In each of these decisions, the Tribunal held that the Director of Employment Standards and/or the Tribunal was not permitted to continue to adjudicate an unpaid wage complaint in light of ongoing *BIA* proceedings.

*International Steelworks*

24. In *International Steelworks Industries Ltd.*, BC EST # D294/02, a section 95 "associated employers" declaration was made involving two corporations, one of which (the employer of record) was an undischarged bankrupt at the time the section 95 determination was issued. An order to pay wages to former employees of the bankrupt corporation was issued against the latter and its "parent" corporation. While upholding the Director's right to associate a bankrupt corporation with another corporation not in bankruptcy (see also *ICON Laser Eye Centers Inc., et al.*, BC EST # D649/01, confirmed on reconsideration, *Director of Employment Standards*, BC EST # RD201/02), the Tribunal held (at page 3) that the order to pay wages was a nullity as against the bankrupt employer of record:

> Undoubtedly, the unpaid wage and other monetary claims filed by [the bankrupt corporation's] former employees constitute "claims provable in bankruptcy" and thus the orders to pay issued against [the bankrupt corporation] are invalid inasmuch as such orders constitute, in each case, an "action, execution or other proceeding" against [the bankrupt corporation]. However, although the determinations (or at least the orders to pay) are a nullity as against [the bankrupt corporation], the determinations may (assuming section 95 has been properly applied) nonetheless be valid as against [the parent corporation] – see ICON Laser Eye Centres Inc. et al., BC EST # RD201/02.

*More Marine*

25. In *More Marine Ltd. et al.*, BC EST # D078/08 and BC EST # D079/08, both confirmed on reconsideration: BC EST # RD118/08, the determination under appeal concerned the unpaid wage claims of two former employees of More Marine Ltd. (the two appeal decisions addressed the separate claims of each employee). More Marine Ltd. ("More Marine") was the subject of a section 95 "associated employers" declaration together with two related corporations. More Marine and one of the associated employers, "More Management" were both subject to *BIA* proceedings when the determinations were issued. As set out in the appeal decisions, the third firm ("Morecorp") was solvent and not subject to any insolvency proceedings.

26. The Tribunal noted (BC EST # D078/08, para. 50) the Director's position regarding why it was appropriate to issue a determination, notwithstanding the bankruptcy of two of the three firms named in the determination:

> In response to More Group's submission that the Director, in making the Determination, is circumventing the process under the *BIA* which both More Marine and More Management are involved in, the Director submits that the Delegate has addressed in the Determination that there is a stay of proceedings in place with respect to both More Marine and More Management and that the "primary reason for the issuance of the Determination was to establish whether [More Marine] and [More Management] and Morecorp were associated employers within the meaning of Section 95 of the *Act*". The Director further points out that this point is significant "in that Morecorp is not involved, as a debtor, in the *BIA* proceedings and is not covered by any stay of proceedings".

27. In *More Marine*, the insolvency proceedings commenced following the filing of "notices of intention" under section 50.4 of the *BIA* by More Marine and More Management. Section 69(1)(a) of the *BIA* states:

> Subject to subsections (2) and (3) and sections 69.4, 69.5 and 69.6, on the filing of a notice of intention under section 50.4 by an insolvent person,
>
> > (a) 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…

28. The determination named all three firms and ordered these three firms to pay about $19,000 in total unpaid wages to the two employees. On appeal, the Tribunal held that the Director was not entitled to proceed against the two insolvent firms (BC EST # D078/08, para. 75):

> If it were not for More Marine and More Management seeking the protection of the *BIA*, I would have no difficulty in affirming the Delegate's decision in its entirety as I find the Director's decision compelling and agree with his substantive analysis leading to the finding that More Marine, More Management and Morecorp are associated employers within the meaning of Section 95 of the *Act*. However, since More Marine and More Management both filed their NOIs under the *BIA* prior to the Determination while the investigation into the Complaint was underway, I find that Section 69(1) of the *BIA* is an obstacle for the Delegate as concerns any proceeding or order against More Marine and More Management. Section 69(1) is quite clear in providing that that none of the debtors' creditors "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 light of this provision, it is my view that the Delegate, in this case, was without jurisdiction to proceed with the Complaint and make a determination against More Marine and More Management. I find that the Delegate erred in law in ordering these companies, in the Determination, to pay the amounts found owing to McMillan and the related administrative penalties. In my view, once both More Marine and More Management filed their NOIs under Section 50.4 of the *BIA* thereby triggering a stay of proceedings under Section 69(1) of the *BIA*, McMillan's claim against More Marine and More Management could only be addressed in accordance with the scheme of distribution provided in the *BIA*. Therefore the Determination against More Marine and More Management must fall.
>
> (see also BC EST # D079/08, para. 59 to like effect)

29. Ultimately, the Tribunal issued orders cancelling the determination as against More Marine and More Management but confirming the determination as against Morecorp. (see D078/08, para. 77 and D079/08, para. 61). Morecorp unsuccessfully applied to have the two appeal decisions reconsidered under section 116 of the *ESA*, but it did not challenge the appeal decisions as they concerned the *BIA* stay provision. Rather, Morecorp argued that the Director had no jurisdiction over it, since it was a federally-regulated entity carrying on a federal work, undertaking or business (a position the Tribunal rejected – see BC EST # RD118/08 at paras. 35-36).

30. I should note, simply for the sake of completeness, that the *More Marine* decisions did not reference the "regulatory body" exception set out in section 69.6 of the *BIA*. So far as I can determine, this provision was never put before the Tribunal for its consideration in either the appeal or reconsideration decisions. Since the bankruptcy proceedings in *More Marine* involved notices of intention filed under section 50.4 of the *BIA*, the section 69(1) stay may have been subject to section 69.6(2). However, I also note that since the determination included a payment order, the correctness of appeal decisions may not be in question. I also wish to be clear that I am not necessarily finding that the Director of Employment Standards is a

"regulatory body" for purposes of section 69.6(1). Further, it should be noted that the *BIA* stay provision involved in this appeal is neither of section 69 nor 69.1 of the *BIA* but, rather, section 69.3 (and a section 69.3(1) stay is not subject to section 69.6 of the *BIA*).

*Kovic*

31. In several respects, *Kovic*, BC EST # D048/09 and D066/09, raised issues similar to those raised in this appeal. The appellant was the subject of a section 96 director/officer determination. Ms. Kovic made a voluntary assignment into bankruptcy about two months before the determination was issued. The Tribunal, held that the employee's unpaid wage claim was a claim "provable in bankruptcy", and additionally, after referring to the same *BIA* stay provision that applies here, namely, section 69.3(1), referred the matter back to the Director under section 115(1)(b) of the *ESA*. The Tribunal observed, at para. 21 (D048/09): "…it is questionable whether or not the Director had jurisdiction to issue the Section 96 Determination against the bankrupt Kovic in January 2009 after Kovic had filed an assignment in bankruptcy and before her discharge." As of the date of the appeal decision, Ms. Kovic expected to be discharged from bankruptcy in about three months' time. The Tribunal made the following order: "…I refer this matter back to the Director with instructions to obtain appropriate legal advice and reconsider the Section 96 Determination in light of the *BIA* provisions I have referred to" (see also *Blanchard*, BC EST # D173/05, where an essentially identical order was issued; the *Blanchard* matter does not appear to have ever been returned to the Tribunal for final adjudication).

32. Following receipt of the Director's "referral back" report, the Tribunal issued an order cancelling the Section 96 Determination. The relevant portions of the Tribunal's decision in this regard are as follows (D066/09, paras. 2 and 5):

> On May 25, 2009, the Tribunal received a report from the Director advising that he had obtained legal advice and considered the matter and "now acknowledges that the BIA stay precludes the issuance of the Determination against the bankrupt director Beverly Anne Kovic". The Director further stated that he "does not object to the cancellation of the Determination" against Kovic and has now changed "his standard operating policy so that in the future, determinations will not be issued to bankrupt directors".
>
> Having reviewed the Director's report, I find that the appropriate course of action in this case is to cancel the Determination against Kovic made on January 28, 2009.

*Varseveld*

33. In *Varseveld*, BC EST # D028/15, the delegate advised the complainants that the Director of Employment Standards would not be proceeding with their complaints. This decision was taken pursuant to sections 76(3)(b) and (f) of the *ESA* – i.e., the *ESA* did not apply to complaints, and the matter was properly before another adjudicative body. The complainants' former employer had made an assignment into bankruptcy, and the Director's delegate's decision was predicated on the *BIA* section 69.3(1) stay provision. The Tribunal upheld the delegate's decision holding, at paras. 32-36, as follows:

> …proceeding with the Hearing of the Complaints in the face of [the employer's bankruptcy] would arguably run afoul of section 69.3(1) of the *BIA*, as any order against Ocion [the employer] to pay

> the Varsevelds by the Director would have constituted an "action, execution or other proceeding" against the debtor, Ocion, under section 69.3(1) of the *BIA*.
>
> It is also noteworthy that in *Vachon v. Canada Employment and Immigration Commission*, [1985] 2 S.C.R. 417 (S.C.C.), Beetz J. states of the predecessor legislation to the *BIA* (at page 426):
>
> > The *Bankruptcy Act* governs bankruptcy in all its aspects. It is therefore understandable that the legislator wished to suspend all proceedings, administrative or judicial, so that all the objectives of the *Act* could be attained.

Therefore, the delegate's decision to rely upon section 69.3(1) of the *BIA* and to stay the Hearing and to cease any further action in respect of the Varsevelds' Complaints was correct, in my view.

I also find the Director's reliance on subsections (b) and (f) of section 76(3) of the *ESA* appropriate as these subsections provide that the Director may refuse to accept, review, mediate, investigate or adjudicate a complaint, or may stop or postpone reviewing, mediating, investigating or adjudicating a complaint if the *ESA* does not apply to the complaint or a proceeding related to the subject matter of the complaint has been commenced before a court, a tribunal, an arbitrator or a mediator. In the case at hand, the *BIA* supersedes the *ESA*, and once an assignment was filed under the *BIA*, the Varsevelds could not carry on their claim under the *ESA* but their remedy lay under the *BIA* as creditors of Ocion.

In these circumstances, I do not find the Varsevelds' appeal has any reasonable prospect of succeeding.

*Dasilva*

34. In *Dasilva*, 2019 BCEST 25, the employer filed a *BIA* section 50.4 notice of intention to file a proposal. In his appeal, Mr. Dasilva was seeking further wages beyond that awarded to him under a determination. The Tribunal stayed the appeal holding, at paras. 14-15 and 17:

> 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.
>
> …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.
>
> …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*.

I note that section 69.1(a) of the *BIA*, which provides for a stay following the filing of a notice of intention, is virtually identical to the section 69.3(1) stay provision under review in these proceedings.

*Morris*

35. *Morris*, 2019 BCEST 26, was an appeal by another employee of the same employer involved in *Dasilva*, who also sought wages beyond that awarded to him in the determination. After the appeal was filed, the Tribunal received a communication from the Regional Manager of the Employment Standards Branch's Lower Mainland Office advising that the Employer had filed a section 50.4 notice of intention. As in *Dasilva*, the Tribunal stayed the appeal, holding (at paras. 10-11 and 14):

> 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.
>
> 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.
>
> 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.

## THE REFERRAL BACK REPORT AND REPLY SUBMISSION

36. Curiously (and surprisingly), although the Interim Decision identified all of the above-discussed *BIA* "stay provision" decisions – and specifically referred the "stay" issue back to the Director for further investigation and report – the delegate did not address any of these decisions in his report.

37. In his report, the delegate provided some information that was not set out in the Determination. The delegate noted that the first complaint was filed one day after the employer made a voluntary assignment into bankruptcy. About two weeks later, the bankruptcy trustee contacted the delegate seeking information about the employees' unpaid wage claims and was "seeking a determination…because he was in communication with the federal government's Wage Earners Protection Program (WEPP)" and that "the Trustee provided a list of 108 individuals on whose entitlements under the *Act* he sought a finding". The delegate's report continues:

> Upon the conclusion of the investigation, the Determination was issued and addressed the claims of 80 of these individuals, finding that they had no entitlement to compensation for length of

> service due to operation of s. 65(1 )( d) of the *Act*. As a result of the investigation, I also made an assessment that 26 of the remaining 28 individuals were likely to be entitled to wages under the *Act*…No determination has yet been issued in respect of these remaining 28 individuals.

38. The delegate's position is that he "was properly empowered to issue the Determination and doing so was not contrary to the *BIA*." The delegate says that while the *collection* of unpaid wages is caught by the *BIA* stay provision, the Director is nonetheless entitled to conduct investigations and make findings with respect to unpaid wage claims:

> The Director does not dispute that steps taken to collect wages from a bankrupt employer may be stayed by operation of the *BIA*…In the case of a bankrupt employer, the Director is free to investigate and make findings that unpaid entitlements exist under the *Act*. Were this not the case, neither the Director nor the employees would have the necessary information to file a proof of claim in the bankruptcy process. Once a proof of claim is filed, it falls to the Trustee to decide whether the entitlements are made out through the allowance process. The effect of s. 69.3(1) of the *BIA* is to stay the Director from ordering the collection of or enforcing those entitlements.

39. The delegate says that since the Determination does not include a wage payment order, it cannot be characterized as an "action, execution or other proceedings, for the recovery of a claim provable in bankruptcy". The delegate submits that the *investigation* of an unpaid wage claim (including making findings of fact) is an entirely separate matter from the *collection* of unpaid wages, and that while the latter activity is caught by the *BIA* section 69.3(1) stay provision, the former activity is not.

40. The delegate also notes that "there are several other valid purposes for issuing a determination which serve the public interest", including assisting employees who may have claims under the WEPP since "the issuing of a determination confirming an employee's entitlements [under the *ESA*] may well assist that employee in obtaining owed wages, even when the Director herself is unable to formally order their payment."

41. The delegate says that the issuance of a determination assists employees who must file proofs of claims with the bankruptcy trustee, and that the determination "provides the trustee, the bankrupt corporation and the employees with accurate information about the bankrupt employer's statutory obligations to the employee [and] while the Director may not engage in collections activities on an employee's behalf where an employer is bankrupt, a determination both assists the employee in filing an accurate proof of claim, and assists the trustee in assessing proofs of claim." In this latter regard, the delegate notes that section 126(2) of the *BIA* specifically provides that a proof of claim in relation to unpaid wages can be filed "by a representative of a federal or provincial ministry responsible for labour matters".

42. With specific reference to the appellant (whose claim for section 63 compensation for length of service, it must be remembered, has been foreclosed by the Determination), the delegate says:

> In the present case, the issuance of the Determination does not affect the Appellant's ability to file a proof of claim with Mr. McNair [the trustee], nor does it affect his ability to allow or disallow her claim. The issuance of the Determination has not impinged in any way upon the Appellant's right to be involved in the bankruptcy proof of claim process and has not enabled her to avoid the process.

If the Determination was properly issued, it may be the case that the appellant's section 63 claim for compensation for length of service – and the section 63 claims of all the other employees listed in "Appendix A" – may not be revisited by the delegate due to the doctrine of issue estoppel. The delegate did not address this possible complication.

43. The delegate maintains that the filing of a complaint is not a "commencement" of an "action, execution or other proceedings for the recovery of a claim provable in bankruptcy". Further, the delegate says that unless the employee's claim is crystallized in a determination, the *BIA* section 69.3(1) stay provision does not apply because, absent a determination, there is no claim provable in bankruptcy, and thus the Director is not a "creditor" for purposes of the *BIA*. The delegate further submits: "Even as a creditor, however, the Director may still be able to conduct investigations, issue determinations, and make orders, provided that her actions are not in the nature of collections."

44. The delegate also advanced two further points regarding whether the *BIA* section 69.3(1) stay applies in this matter. First, the delegate says that the Determination was issued at the specific request of the bankruptcy trustee. The delegate says that "by all appearances, [his] investigation and the resulting findings of fact and law, expressed in the Determination, assisted [the trustee] in carrying out his duties in properly administering the bankruptcy, rather than hindering him."

45. Second, the delegate says that since none of the employees named in the Determination (including the appellant) was awarded any compensation for length of service (or any other form of wages), "the question of whether the Director is stayed by the provisions of the *BIA* is moot".

46. As previously noted, the delegate's report does not address, in any fashion, the numerous Tribunal decisions that have addressed the *BIA* stay provisions. The delegate's report did reference four judicial decisions, none of which, in my view, has any relevance to the *BIA* issue raised in this appeal. I shall now briefly review these decisions.

47. In *Newfoundland and Labrador v. AbitibiBowater Inc.*, [2012] 3 S.C.R. 443, the Supreme Court of Canada ("SCC") addressed insolvency proceedings under the federal *Companies' Creditors Arrangement Act*. The province of Newfoundland issued several site remediation orders against an insolvent firm. The SCC held that the remediation orders were monetary claims provable in the *CCAA* proceedings. I fail to see the relevance of this case to the instant appeal, other than with respect to what constitutes a provable debt for purposes of insolvency legislation. Insofar as this appeal is concerned, the employees' claims for unpaid wages clearly constitute claims provable in bankruptcy under *BIA* – the Tribunal has repeatedly said so (see, for example, *International Steelworks*, *supra* at page 3; *More Marine*, BC EST # D078/08 at para. 75 and *More Marine*, BC EST # D079/08 at para. 59; *Kovic*, supra at para. 20; *Varseveld*, *supra* at paras. 30-32; *Dasilva*, supra at para. 14; and *Morris*, *supra* at para. 10), and that position has also been accepted by the Director in previous cases.

48. About seven years later, the SCC decided *Orphan Well Association v. Grant Thornton Ltd.*, [2019] 1 S.C.R. 150, a case involving a receivership, and a later bankruptcy, of an oil and gas producer. The SCC held that Alberta's regulator, responsible for enforcing well site end-of-life abandonment remediation orders, was not asserting a claim provable in bankruptcy (as there was no debt), and that the bankrupt's trustee was obliged to comply with the regulator's orders. As previously noted, in this appeal, the employees' unpaid wage claims are claims provable in bankruptcy. The delegate says *Orphan Well* is relevant here because,

as a regulator that is not necessarily a creditor, the Director of Employment Standards is not bound by the distribution scheme set out in the *BIA* (whereby the bankrupt's assets are distributed among its creditors in a specified manner). The short answer to this submission is that the creditors in this case are the employees – the Director is merely the administrative tribunal charged under the *ESA* (absent a bankruptcy) with adjudicating those unpaid wage claims at first instance. I accept that the Director could be characterized as a creditor with respect to section 98 monetary penalties, but no such penalties were issued by way of the Determination. Further, although the section 87 lien provision states that unpaid wages crystallized in a determination constitute a secured debt in favour of the Director, it does not follow from that provision that individual employees cannot be unsecured "creditors" of the bankrupt firm insofar as their unpaid wages are concerned.

49. The delegate also referred to an Ontario Securities Commission decision, *Gold-Quest International et al.*, 2010 ONSEC 30, where the Commission held that it was entitled to pursue one of a corporation's principals (Donald Buchanan) for civil penalties notwithstanding his assignment into bankruptcy (which occurred about one month after the proceedings before the Commission began). The Commission concluded, at para. 34 as follows:

> …we concluded that the Commission is currently not a creditor of Buchanan within the meaning of section 69 of the *Bankruptcy and Insolvency Act* [citation omitted]. Any order we would make for financial sanctions would be subject to the determination of the bankruptcy court as to how that order would be treated for purposes of Buchanan's bankruptcy. We deferred to any decision of the bankruptcy court in that respect.

The delegate says that "an order for the payment of wages in a determination as a consequence of finding that the [*ESA*] was contravened is the action that would make the Director a creditor of bankrupt employer". The delegate says that since no wage payment order was issued, the Director cannot be a creditor. However, without taking any position regarding the correctness of that assertion, I note that the *BIA* stay involved in this case concerns the complainants' (and the other former employees') right to continue to pursue unpaid wage claims under the *ESA* in the face of the employer's bankruptcy.

50. Finally, the delegate referred to an Ontario Supreme Court decision, *Wing*, 2019 ONSC 4063, where the bankrupt applied to court to have an Ontario Securities Commission "freeze order" (regarding about $1.9 million in certain pension plan funds, and which was made prior to Mr. Wing's bankruptcy) lifted. The Commission sought an order allowing it to proceed to collect certain monetary penalties notwithstanding Mr. Wing's bankruptcy. The court dismissed Mr. Wing's motion and allowed the Commission's motion. Regarding the latter, the court held that the Commission was undertaking a public duty and was not enforcing a debt as an ordinary creditor as of the date of Mr. Wing's bankruptcy. Further, and with respect to monetary penalties, the court observed (at para. 43):

> A monetary penalty imposed post-bankruptcy may well be become an enforceable debt and constitute the regulatory authority as a creditor once it is made but, in the circumstances of this case, that is a liability that arises post-bankruptcy and cannot, therefore, be a claim provable in bankruptcy.

However, to repeat, this appeal does not concern monetary penalties, and thus *Wing* is simply not relevant.

51. Although specifically invited to file a submission by way of reply to the delegate's report, the trustee declined to do so. The fact that the trustee would not provide a submission about why the *BIA* stay does or does not apply here (and also to confirm, clarify or contradict the delegate's report as it concerns the trustee's and delegate's communications) is, in my view, regrettable. I certainly could have benefitted from the trustee's views regarding the section 69.3(1) stay provision.

52. The appellant filed a reply to the delegate's report, but it does address the Tribunal's jurisprudence regarding the *BIA* stay provisions. The appellant's principal position is that the *BIA* stay provisions "dovetail" with section 65(1)(f) of the *ESA*, since this provision states that the "impossible to perform/unforeseeability" defence, which relieves an employer from having to pay either section 63 or section 64 compensation, does not apply if the "impossibility" or "unforeseeable event or circumstance" is "a proceeding under an insolvency Act". As the appellant put it: "Every former employee whose employment is terminated without cause or notice upon a company filing for bankruptcy protection is entitled to have his/her statutory entitlements considered as unsecured debt when the bankruptcy trustee liquidates the estate [of] a bankrupt and distributes the net proceeds to the unsecured creditors (after the secured creditors take their collateral and bankruptcy administration costs are paid)."

53. As I read the appellant's submission (although this is not entirely clear), it appears that the appellant filed a proof of claim with the bankruptcy trustee, but the trustee denied her claim based on the findings set out in the Determination: "…the Trustee relied [on the Determination in finding] that my 'claim for length of service compensation (aka severance) is hereby denied pursuant to a determination issued by the Director of Employment Standards of British Columbia on April 23, 2021'".

54. The delegate's report and the appellant's reply submission also addressed the other two issues before me in this appeal, namely, the "error of law" and "new evidence" grounds. However, since the *BIA* issue is a threshold issue, I shall first turn to that matter.

## FINDINGS AND ANALYSIS – APPLICATION OF THE *BIA* STAY PROVISION

*The Legal Framework*

55. The *BIA*, in section 2, defines a "creditor" as meaning "a person having a claim provable as a claim under this Act". A "claim provable in bankruptcy…includes any claim or liability provable in proceedings under this Act by a creditor". Section 121(1) of the *BIA* states:

> All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

A creditor of a bankrupt firm is expected to file a proof of claim under section 124 of the *BIA*, and it is the bankruptcy trustee's obligation, under section 135 of the *BIA*, to examine the proofs filed in order to assess their validity, and the amount of each valid proof of claim filed. The trustee may disallow a proof of claim, in whole or in part, in which case the creditor may challenge that decision under section 135(4) of the *BIA*.

56. After a firm makes a voluntary assignment into bankruptcy, section 69.3(1) states that, subject to certain exceptions that do not apply here, "no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy".

57. Under the *ESA*, section 63 compensation for length of service is presumptively payable to all employees dismissed without cause – or deemed to have been dismissed under section 66 – and is payable within 48 hours following termination (section 18). In addition to the individual compensation payable under section 63, section 64 "group termination" pay is presumptively payable if not less than 50 employees are terminated within a 2-month period. Section 64(6) states that employees are entitled to group termination pay "whether the employment is terminated by the employer or by operation of law".

58. In *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, the employees lost their jobs when their employer went bankrupt. The Ontario equivalent of B.C.'s Employment Standards Branch filed proofs of claims with the bankruptcy trustee on account of unpaid termination pay. The trustee disallowed the claims, holding that the loss of employment due to bankruptcy was not a "termination" entitling the employees to termination pay under Ontario's employment standards statute. Ultimately, the SCC held that termination of employment by reason of bankruptcy was a termination "by an employer", and that being the case, a claim for unpaid termination pay was an unsecured claim provable in bankruptcy within section 121 of the *BIA*.

*The Relevant Facts*

59. According to the delegate's reasons, most of the employer's employees (about 75%) were either laid off or terminated by mid-March 2020, and by early April 2020 "only 14 employees remained on the payroll" (page R6). In mid-April 2020, the employer sought professional advice regarding possible insolvency proceedings and "filed for bankruptcy on May 11, 2020, bringing a de facto end to the employment of its remaining employees" (page R7).

60. The appellant was laid off on March 17, 2020 and was never recalled to work. On May 11, 2020, she was notified by the bankruptcy trustee that the employer had ceased operations, that the trustee had taken control of the employer's assets, and that her employment was terminated effective May 11, 2020 (although, it could perhaps be argued that the appellant was actually terminated as of the date of her layoff if her employment contract did not include – as appears to have been the case – a temporary layoff provision (see *Rennie Equipment Inc.*, BC EST # D072/17). The section 112(5) record includes a standard form 1-page letter from the trustee, headed "Dear Employee" and, among things, states: "***The Trustee writes to advise that your employment with [the employer] has terminated effective May 11, 2020.***" (***italicized boldface*** in original text).

61. Following the employer's bankruptcy, eight former employees (not including the appellant) filed unpaid wage complaints during the period from May 12 to July 3, 2020. Six of the complainants claimed section 63 compensation for length of service. One complaint, the employer's former "operations coordinator, sought nearly $75,000 in unpaid regular wages, while another former employee, a sous chef, sought about $7,700 in unpaid regular wages. The two complainants who sought regular wages are not listed in "Appendix A" to the Determination.

62. The delegate commenced an investigation into these complaints, and later expanded his investigation to include all of the employer's employees (without giving any notice to these other employees). As previously noted, during the course of his investigation, the delegate contacted the eight complainants, as well as the employer's former CEO (also a corporate director) and the bankruptcy trustee. The delegate never contacted any of the "non-complainant" employees during his investigation.

63. Nearly one year after the first two complaints were filed, the delegate issued the Determination in which he held that none of the 80 former employees listed in "Appendix A" was entitled to section 63 compensation for length of service, or section 64 group termination pay. This decision was based on the delegate's interpretation and application of section 65(1)(d) of the *ESA*, which states that sections 63 and 64 do not apply to an employee "employed under an employment contract that is impossible to perform due to an unforeseeable event or circumstance other than receivership, action under section 427 of the *Bank Act* (Canada) or a proceeding under an insolvency Act".

*Applicability of the BIA Stay Provision*

64. In my view, the delegate should not have issued a Determination in this case. The three complainants, and presumably the other former employees also listed in "Appendix A", were seeking section 63 compensation for length of service. In each case, the claim was one for unpaid "wages" (see *ESA*, section 1(1) definition of "wages"). The former employees' wage claims crystallized when the employees were either formally terminated prior to the date of the bankruptcy, or on the date of the bankruptcy filing (*Rizzo*, *supra*). These employees were "creditors" under the *BIA*, as they all had "claims provable in bankruptcy" since the section 63 compensation claims constituted "debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt" (*BIA*, section 121(1)).

65. The complainants' (and the other employees') proper avenue to pursue their unpaid wage claims was by filing proofs of claims under section 124 of the *BIA*, not by way of proceedings under the *ESA*. I agree with the delegate that the Director of Employment Standards is entitled, under section 126(2) of the *BIA*, to file a proof of claim on behalf of employees of a bankrupt firm who may have unpaid wage claims. However, there is a very large difference between filing a proof of claim with the bankruptcy trustee regarding unpaid wages (i.e., following the precise procedure set out in the *BIA*), and issuing a determination with respect to those same wages under the *ESA*.

66. A proof of claim is merely, as its name implies, a *claim* against the bankrupt's estate. It falls to the trustee to pass on the merits of the claim, and either allow it or disallow it in accordance with section 135 of the *BIA*. Contrariwise, a determination is a *final adjudication* (subject, of course, to the *ESA*'s appeal procedures and possible judicial review) of the unpaid wage claim in question. The fundamental principle that underpins the section 69.3(1) stay is to ensure that creditors' claims against the bankrupt are not addressed in a haphazard and piecemeal fashion by various decision-makers, such as the civil courts and administrative tribunals. The *BIA* mandates a particular adjudicative process for the bankrupt's creditors who have claims provable in bankruptcy. This process includes a specified scheme of distribution of the bankrupt's estate amongst different classes of creditors, initial decisions regarding creditors' claims by the bankruptcy trustee, and review of those decisions by the bankruptcy court. Following a voluntary assignment into bankruptcy by an employer, the adjudication of its employees' unpaid wage claims is a matter for the bankruptcy trustee, not the Director of Employment Standards

67. This Tribunal has consistently held: firstly, that unpaid wage claims against a bankrupt firm are "claims provable in bankruptcy"; and, secondly; that the *BIA* stay provisions prevent the Director of Employment from adjudicating unpaid claims against a bankrupt employer (see *International Steelworks*, *supra*; *More Marine Ltd.*, *supra*; *Kovic*, *supra*; *Varseveld*, *supra*; *Dasilva*, *supra*; and *Morris*, *supra*). The delegate, in his submission, did not address any of these decisions.

68. I further note that the Director of Employment Standards has *never* challenged the Tribunal's position as set out in these decisions prior to this proceeding, either by reconsideration or judicial review. Indeed, in *Kovic* the Director of Employment Standards, after having taken legal advice, conceded that the *BIA* stay provision (section 69.3(1) – the same provision at issue here) applied, and that future determinations would not be issued against bankrupt persons. In *Varseveld*, the delegate refused to proceed to adjudicate the appellants' unpaid wage claims in light of section 69.3(1) of the *BIA*. The delegate's present position stands in marked contrast to the position taken by the Director of Employment Standards in these latter two decisions.

69. I do not see anything inappropriate about the trustee seeking information from the delegate about the complainants', and other former employees', unpaid wage claims. Nor do I see anything inappropriate about the delegate providing such information. However, under the *BIA* it was up to the *trustee* to adjudicate the merits of these claims; the delegate should not have issued the Determination thereby, in effect, usurping the trustee's adjudication obligation and function. If the doctrine of issue estoppel were to be applied, the trustee would be bound to defer to the Director's Determination regarding the employees' unpaid wage claims. Even if the trustee, as the delegate asserts, "never sought to have any action on this file stayed", and requested that the Determination be issued, I am not aware of any provision in the *BIA* that empowers the trustee to waive the section 69.3(1) stay provision for a particular class of unpaid wage claims.

70. The delegate submits that he was entitled to conduct an investigation and issue the Determination; he was only prohibited from taking any collection proceedings with respect to any unpaid wage order he might have ultimately issued. The delegate says that his investigation was protected by a public interest regulatory exception. The delegate, in his report, did not directly reference, but perhaps had in mind, section 69.6 of the *BIA* which provides as follows:

> 69.6 (1) In this section, "regulatory body" means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.
>
> (2) Subject to subsection (3), no stay provided by section 69 [notice of intention] or 69.1 [Division I proposals] affects a regulatory body's investigation in respect of an insolvent person or an action, suit or proceeding that is taken in respect of the insolvent person by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.

71. Although the Director of Employment Standards might be a "regulatory body" as defined in the above section, the subsection (2) provision enabling regulatory bodies to continue to investigate a bankrupt person does not apply to a *section 69.3(1) stay* – the stay provision that applies here.

72. Finally, the delegate says that any consideration of whether the section 69.3(1) stay applies is "moot", since no wages were awarded by way of the Determination. There are two points to be made in response to this submission. First, the question is not whether wages were, or were not, awarded under the Determination but, rather, who has the legal authority to adjudicate the employees' entitlements, if any. In my view, that power rests solely with the bankruptcy trustee. Second, in light of section 69.3(1) of the *BIA*, the delegate was without jurisdiction to issue the Determination

73. For the reasons set about, above, I am of the view, that the Determination must be cancelled as the delegate was barred, by section 69.3(1), from proceeding to adjudicate the complainants', and any other former employees', unpaid wage claims. The employees' unpaid wage claims should be adjudicated by the trustee in accordance with the process outlined in the *BIA*.

74. In the event that I have erred with respect to the "stay" issue, I will now also address the other issues that have been raised in this appeal.

**FINDINGS AND ANALYSIS – ERROR OF LAW & NEW EVIDENCE**

75. In the Interim Decision, I dismissed the appellant's "natural justice" ground of appeal. I now turn to the two outstanding grounds of appeal, namely, "error of law" and "new evidence"

76. The delegate did not award the appellant, or any other employee listed in "Appendix A" to the Determination, any compensation for length of service. The delegate determined that these individuals lost their employment due to the unforeseeable financial consequences visited on the employer due to the Covid-19 pandemic (see section 65(1)(d) of the *ESA*). The appellant says that her loss of employment was due to a "proceeding under an insolvency Act", and thus the section 65(1)(d) exception does not apply to extinguish her claim for section 63 compensation.

77. The appellant's evidence is that she was laid off on March 17, 2020, and never recalled to work. The employer's bankruptcy trustee confirmed her termination on May 11, 2020. In my view, the events that precipitated the appellant's dismissal related to the pandemic (and, in particular, the provincial health orders that effectively eviscerated the employer's business), not the employer's bankruptcy. The appellant's services were no longer required as and from mid-March 2020 for the simple reason that there was no work for her to do. This latter fact was due to an unforeseeable event or circumstance – the pandemic – and not due to the employer's bankruptcy (which was still about two months' away when the appellant's employment ended). The employer's bankruptcy was the *consequenc*e of the financial havoc caused by the pandemic. The evidence before the delegate showed that the pandemic was the unforeseen event or circumstance that triggered the appellant's loss of employment in mid-March 2020.

78. It may be that the federal government introduced various income support programs precisely because of the situation the appellant, and other workers, faced – loss of employment with no right to termination pay due to the pandemic. However, regardless of whether the appellant qualified for, or received, any federal income support, I do not find that the delegate erred in finding that section 65(1)(d) extinguished her section 63 entitlement.

79. Although the appellant did not formally raise the "new evidence" ground of appeal in her appeal submissions, it is clear that she relies on evidence that was not before the delegate to support her appeal.

In general, this evidence is tendered to demonstrate that the employer could have avoided bankruptcy, as other catering firms were apparently able to do. All of this evidence, leaving aside its probative value, was "available" when the Determination was being made. But since the delegate never contacted the appellant prior to issuing the Determination (because she never filed a section 74 complaint), the delegate never had the benefit of this information. This state of affairs should not operate to the appellant's detriment. Therefore, I would not dismiss this ground of appeal solely because the appellant's "new evidence" was "available" when the Determination was being made.

80. Nevertheless, virtually all of the proffered evidence is uncorroborated hearsay, and I also question its relevance or probative value. The fact that other firms may have been able to avoid bankruptcy (and, I have no reliable information about these other firms' individual financial circumstances), does not speak to whether the employer's operations were significantly, and adversely, affected by health orders issued as a result of the pandemic. The evidence before the delegate demonstrated that the employer's operations were very significantly, and adversely, affected by the pandemic and consequent provincial health orders.

81. It follows that I do not consider the appellant's "error of law" and "new evidence" grounds of appeal to be meritorious. If this appeal were properly before me, I would issue an order dismissing the appeal and confirming the Determination.

82. However, my consideration of the section 69.3(1) *BIA* stay provision, leads me to conclude that the Determination should be cancelled.

## ORDER

83. Pursuant to section 115(1)(b) of the *ESA*, the Determination is cancelled.

**Kenneth Wm. Thornicroft**
**Member**
**Employment Standards Tribunal**