

An appeal

- by -

Itera Technologies Inc. and Alliance Technologies Inc. and by Douglas Kind
(Director/Officer of Itera Technologies Inc. and Alliance Technologies Inc.)

- 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.: 2003A/114, 115 and 116

DATE OF DECISION: September 2, 2003

DECISION

OVERVIEW

This is an appeal by Alliance Technologies Inc. (“Alliance”), Itera Technologies Inc. (“Itera”) and Douglas Kind (“Kind”), pursuant to Section 112 of the *Employment Standards Act* (“the Act”), against Determinations of the Director of Employment Standards (“the Director”) issued March 12, 2003 and April 4, 2003.

Eleven former employees of Itera filed complaints with the Director alleging that they were owed regular wages, vacation pay, statutory holiday pay and compensation for length of service.

In a decision dated March 12, 2003, the Director’s delegate found that Itera and Alliance were one legal entity for the purpose of section 95 of the Act. She also found that Itera and Alliance had contravened the Act, and owed the complainants wages and accrued interest in the total amount of \$52,789.44. In a decision dated April 4, 2003, the delegate issued a determination against Mr. Kind as a director/officer of Itera, and as a Director/Officer of Alliance in an amount of \$53,320.71.

Mr. Kind filed appeals on behalf of all the appellants. Alliance claims that the delegate erred in law in concluding that Itera and Alliance were one legal entity for the purpose of the Act, and seeks to have Alliance removed from the Determination. Itera claims that new information has become available that was not available at the time the Determination was made, and seeks a recalculation of the amounts owing. Mr. Kind’s submission claims that the delegate erred in law and seeks a correction to the amounts owing.

The parties were advised by the Tribunal’s Vice Chair that the appeal would be adjudicated based on their written submissions and that an oral hearing would not be held. The Director’s counsel made submissions in response to the appeal. Mr. Kind sought an extension of time to respond to retain counsel to respond to those submissions, which was granted. Nothing was received from Mr. Kind or counsel before the deadline.

This decision is based on written submissions by Diane Roberts, counsel for the Director of Employment Standards. Douglas Kind, on his own behalf and on behalf of Alliance. Although Mr. Kind also submitted an appeal on behalf of Itera, his authority to do so was challenged by the Director. Although some of the employees also made submissions, those submissions did not address the grounds of appeal, and will not be referred to here.

ISSUES TO BE DECIDED

1. Whether the Director erred in law in finding that Itera and Alliance were one person for the purposes of section 95 of the Act;
2. Whether the Director erred in law in finding that the date of Itera’s proposal for bankruptcy was October 18, 2002 rather than December 10, 2001; and

3. Whether new and relevant information has become available that was not available at the time the Determination was made, and which might lead the Director to a different conclusion on the amounts owed to the complainants.

FACTS

The eleven complainants worked for Itera, an electronics manufacturing company. None of the appellants dispute the delegate's determination that the complainants are owed wages. At issue are whether the amounts have been correctly determined, and whether Alliance and Itera were properly determined to be one company for the purpose of the Act.

Itera's operations were conducted from a Delta address until August 2002, when they were moved to an address in Richmond. Alliance, which conducts the same kind of business as Itera, also operated from the same address.

The delegate conducted a company search and determined that three of the four Directors and Officers of Itera resigned before April 2002, leaving Mr. Kind the sole Officer and Director. In May or June, 2002, the complainants' wages were paid by Alliance. The complainants reported that they had been told that Itera would go bankrupt so they would be operating under the name Alliance. One of the complainants was Itera's comptroller. She advised the delegate that, because Itera was having financial difficulties, it could not open a bank account. She further reported that Alliance was a dormant company of Mr. Kind's, which he used to open a bank account and conduct Itera transactions. The delegate's corporate search indicated that Mr. Kind was the sole Officer and Director of Alliance. Invoices and purchase orders were issued under both Itera and Alliance names.

Most of the employees were given lay off notices in mid September indicating that they had been temporarily laid off because of a "shortage of work". The records show that they all had outstanding wages in varying amounts at that time.

The delegate found that Itera filed an assignment in bankruptcy on October 18, 2002. Documents prepared by MacKay & Company ("MacKay"), Trustee in Bankruptcy, indicate that Itera filed a notice of intention to make a proposal to creditors on December 10, 2001. Although the proposal was accepted by the creditors and approved by the Court, the proposal was in default. On October 18, 2002, a B.C. Supreme Court order was issued deeming Itera to have made an assignment into bankruptcy. MacKay took possession of Itera's assets and records after that date.

On November 14, 2002, the delegate advised Itera and Alliance of the employees' claims and sought copies of their payroll records and other supporting documentation. Mr. Kind's response, dated November 15, 2002, advised the delegate that the three other directors had resigned in October 2001 and March 2002, and that he was the person responsible for responding to the complaints.

Mr. Kind indicated that "Itera Technologies Inc. is no longer a going concern and a Trustee in Bankruptcy has been appointed by the Court. Certain of the claims made by individuals are in error and the parties need to establish and agree the facts." [reproduced as written] Mr. Kind further indicated he would be in touch with the delegate. No other evidence or information was supplied by Mr. Kind, either on his own behalf or on behalf of either of the companies.

On November 27, 2002, McKay advised the delegate that it had over 40 boxes in its offices, and that it was unsure where the payroll records were. It indicated that it would contact the delegate when those records were located.

On November 26, 2002, the delegate sent another letter to Itera, Alliance and Mr. Kind indicating she was conducting an investigation of the association of the companies under section 95 of the Act. She noted that both Itera and Alliance were operating at the same site and under common direction and control of Mr. Kind. She asked the parties to submit evidence and information if they disputed the allegations by December 10, 2002. The delegate received no response to this letter.

In a Determination dated March 12, 2003, the delegate indicated that she had reviewed the documentary evidence provided by the employees included their pay stubs, time sheets and records of employment, and memos from the payroll department confirming the amounts they were owed as of mid September, 2002, and concluded that they were owed wages, vacation pay, statutory holiday pay and compensation for length of service.

She also found that, at the time the employees were owed wages, Itera and Alliance operated at the same site and under the control of Mr. Kind, both companies operated the same business, using the same physical assets, employing the same employees and being paid by either Itera or Alliance. She concluded that Itera and Alliance were one company for the purpose of section 95 of the *Act*.

In a Determination dated April 4, 2003, the delegate also reported that corporate searches found that Mr. Kind was the sole Officer and Director of Alliance, and, as of April, 2002, the sole Officer/Director of Itera. She concluded that Mr. Kind was personally liable for outstanding wages in the amount of \$53,320.71 pursuant to section 96 of the *Act*.

ARGUMENT

Mr. Kind's submissions were exceedingly brief.

Mr. Kind alleged, with respect to Alliance's appeal, that the delegate erred in law. He argues that "Alliance did not control Itera," and seeks to have Alliance's name removed from the Determination. Mr. Kind suggests that there was "a general misunderstanding of both the individual cases and the Alliance liability." He further contends that certain Alliance documents and records were seized by MacKay, along with those of Itera.

In a letter of July 17, 2003, Mr. Kind asserted that the Trustee of Itera's estate authorized him to make an appeal on behalf of the estate. With respect to Itera's appeal, he alleged that evidence had become available that was not available at the time the Determination was made. Mr. Kind suggested that "correct information will reduce claim." He also claimed that MacKay took possession of, and still controls the records and documents of Itera. He suggests that the records required to establish that the claims are incorrect are not in his possession.

Finally, with respect to his own appeal, Mr. Kind claimed that the delegate erred in law in finding that Itera filed its bankruptcy proposal on October 18, 2002, and sought a correction to the amounts owing. In his written submission, Mr. Kind suggests that Itera filed its proposal on December 10, 2001. He submitted that, until September 15, 2002, he was a director of Itera, and that Itera was now in bankruptcy

Counsel for the Director submits that Itera's appeal is not properly before the Tribunal since only the trustee or a solicitor or agent employed by the trustee has the authority to appeal the Determination. I infer that her position is that Mr. Kind does not have that legal authority. Counsel further submits that, even if the appeal was properly before the Tribunal, the grounds of appeal have no merit. Counsel argues that Itera has not demonstrated due diligence in an attempt to provide the Director with material evidence during the investigation or at any time. Further, counsel submits, Itera provided no evidence that the delegate's calculations are in error.

With respect to Alliance's appeal, counsel for the Director submits that Alliance has not satisfied the burden of demonstrating that the delegate erred in finding Alliance and Itera to be associated companies for the purpose of the Act.

With respect to Mr. Kind's appeal, counsel for the Director submits that Mr. Kind has not demonstrated how the date on which Itera filed for bankruptcy constitutes an error of law, or how that might be relevant to the Determination. Counsel for the delegate contends that the date on which Itera filed its proposal has no material impact on the employees' rights to recovery under the Act.

ANALYSIS

Mr. Kind asserted that he had authority to advance Itera's appeal on behalf of MacKay, Itera's trustee in bankruptcy. Mr. Kind provided no documentation to support this assertion, and I am not prepared to conclude that he has the authority to do so. I would, therefore, dismiss Itera's appeal.

The burden of establishing that a Determination is incorrect rests with an Appellant. (*Natalie Garbuzova* BC EST #D684/01) On the evidence presented, I am unable to find that burden has been met by any of the Appellants.

Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

- a) the director erred in law
- b) the director failed to observe the principles of natural justice in making the determination; or
- c) evidence has become available that was not available at the time the determination was being made

Errors of law

None of the submissions disclose any error of law, or determinations of fact upon which a legal conclusion is arrived at.

Section 95 of the *Act* gives the Director discretion to consider one or more corporations, entities or individuals are associated for the purpose of protecting employees' wages:

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 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

On the facts as found by the delegate and not disputed by the Appellants, all of these conditions are met. There is no dispute that Itera carried on business and operated at the same address as Alliance during the period approximately April 2002 until September 2002. There is no dispute that Mr. Kind was the sole officer and director of both Alliance and Itera during the time for which wages are owed. There is no dispute that Itera, for whom the claimants worked, was having financial difficulties meeting payroll obligations. There is no dispute that, when Itera began having difficulty meeting its payroll, some of the employees began receiving their wages from Alliance. Finally, there is no dispute that Alliance is not a company in bankruptcy. Whether Alliance “controlled” Itera is not a relevant factor in making a decision under s. 95.

I am unable to conclude that the delegate erred in law in finding that Itera and Alliance were one company for the purposes of section 95, and I deny Alliance’s appeal.

I am also unable to conclude that delegate erred in law when she stated that Itera filed an assignment in bankruptcy on October 18, 2002. The fact is that Itera’s date of bankruptcy was October 18, 2002. It may be that Itera filed its proposal on December 10, 2001. However, I am unable to find that anything turns on this conclusion. As Mr. Kind has provided no explanation of the relevance of those dates, I am not prepared to infer that the Determination is in error in this respect. I deny Mr. Kind’s appeal in this respect.

New evidence

Even if Mr. Kind has the authority to advance an appeal on behalf of Itera, which I am not persuaded he does, I also find no basis for Mr. Kind and Itera’s appeal on these grounds.

In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D171/03 the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:

1. the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;

2. the evidence must be relevant to a material issue arising from the complaint;
3. the evidence must be credible in the sense that it is reasonably capable of belief; and
4. the evidence must have high potential probative value, in the sense that , if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

I am not prepared to find that Itera's payroll information is new evidence. Furthermore, there is no evidence that, with due diligence, Mr. Kind could not have obtained copies of the payroll documents to provide to the delegate during the investigation.

Furthermore, while I acknowledge that Mr. Kind may not have easy access to the payroll records, I am not persuaded that those records would have led the delegate to a different conclusion on the amount of the wages owed. Most, if not all, of the employees provided the delegate with a memo signed by the payroll manager acknowledging and confirming the amounts they were owed as of mid September. I deny the appeals on this ground.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determinations dated March 12, 2003 and April 4, 2003 be confirmed in the amounts of \$54,078.25 and \$53,320.71, respectively, plus whatever interest might have accrued since the date of issuance.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal