

An appeal

- by -

Anna Wagner
("Wagner")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2002/413

DATE OF DECISION: November 5, 2002

DECISION

INTRODUCTION

This is an appeal filed by Anna K. Wagner (“Wagner”) pursuant to section 112 of the *Employment Standards Act* (the “Act”). Ms. Wagner appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on July 29th, 2002 (the “Determination”). By way of the Determination, Ms. Wagner was advised that the Director did not intend to continue investigating the unpaid wage complaint she had filed against RNG Group Inc. (“RNG”).

By way of a letter dated October 21st, 2002 the parties were advised by the Tribunal’s Vice-Chair that this appeal would be adjudicated based on their written submissions and that an oral hearing would not be held (see section 107 of the *Act* and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575).

BACKGROUND FACTS

Pursuant to an order issued by the Ontario Superior Court of Justice on February 11th, 2002, the firm of PricewaterhouseCoopers Inc. was appointed as the interim receiver for RNG Group Inc. as of February 12th, 2002. This latter court Order was made pursuant to the provisions of section 47(1) of the federal *Bankruptcy and Insolvency Act*. Paragraph 9 of that Order provides that no legal proceedings of any kind (save for proceedings taken by a governmental environmental protection agency) may be taken or continued by an RNG creditor against RNG, or the receiver, without either the receiver’s written consent or leave of the Ontario Superior Court. There is nothing in the material before me indicating that the present proceeding under the *Act* was authorized by either the Ontario bankruptcy court or by the receiver.

The Ontario insolvency court Order further provides, in paragraph 15, that all RNG employees are terminated effective 11:59 P.M. on February 12th, 2002 and that the receiver shall not be held liable for any unpaid wages or termination pay that might otherwise be owing to those employees.

The Ontario insolvency court Order was confirmed by order of the British Columbia Supreme Court issued on February 28th, 2002 (Vancouver Bankruptcy Registry No. L020601). The B.C. Supreme Court Order “recognized and confirmed [the Ontario Order] and declared [it] to be in full force and effect in the Province of British Columbia, *nunc pro tunc*, as though the Ontario Order had been pronounced by this Court on February 11, 2002”.

Ms. Wagner was one of several former employees of RNG Group Inc. who filed complaints with the Employment Standards Branch alleging that they were entitled to unpaid wages (principally, vacation pay and compensation for length of service). It would appear that despite the Ontario receivership order, Ms. Wagner’s paid employment continued until April 15th, 2002 when she alleged that she was “fired”; in her complaint she sought vacation pay and compensation for length of service.

THE DETERMINATION

The relevant portions of the Determination (at pages 1-2) read as follows:

Our office received these complaints and commenced an investigation to determine if wages etc. were owed. During that investigation it was found that a Receiver had been appointed in the Province of Ontario pursuant to the Bankruptcy and Insolvency Act and pursuant to section 10 of the Courts of Justice Act of Ontario. The Receiver, PriceWaterhouseCoopers, had the Order of the Ontario Court recognized and made enforceable as an Order of the Supreme Court of British Columbia...

According to the terms of the Court Order appointing the Receiver, the Director of Employment Standards is precluded from continuing its investigation against RNG Group Inc. The subject matter of the proceedings in the Ontario Court is the debts of RNG Group Inc., which includes debts for wages etc. owed to the complainants.

Therefore, pursuant to section 76(2)(f) [sic, (e)] of the Employment Standards Act the Director is stopping the adjudication of the complaints against RNG Group Inc. as “a proceeding relating to the subject matter of the complaint has been commenced before a court...”

I would parenthetically note that although the delegate referred to subsection 76(2)(f) in his Determination, the delegate’s order was issued pursuant to subsection 76(2)(e) of the *Act*:

76. (2) The director may refuse to investigate a complaint or may stop or postpone investigating a complaint if...

(e) a proceeding relating to the subject matter of the complaint has been commenced before a court, tribunal, arbitrator or mediator...

FINDINGS

In her appeal documents Ms. Wagner candidly acknowledges that she is not a lawyer and is somewhat mystified as to why her unpaid wage claim cannot be adjudicated in British Columbia in accordance with the provisions of the *Act*. It is not difficult to accept that Ms. Wagner might be very frustrated by the present turn of events. In one of her submissions she describes herself as being “overwhelmed” by the complexities of bankruptcy law.

Nevertheless, in the case of proceedings under the federal *Bankruptcy and Insolvency Act* (“*BIA*”) claims against the insolvent entity (in this case, the RNG Group Inc.) must be adjudicated in accordance with the provisions of that legislation and in accordance with court orders made by the insolvency court under that legislation--that is the law, unsatisfactory as that may be when viewed from Ms. Wagner’s perspective.

I understand that the total indebtedness of the RNG Group Inc. exceeds \$184 million whereas its assets are valued at less than \$58 million. The federal *BIA* establishes a scheme for prioritizing creditors’ claims and for an orderly distribution of available funds to the insolvent firm’s creditors. Under the *BIA*, secured creditors stand in first position and I understand that the value of the secured claims may well exceed the value of RNG’s assets. Ms. Wagner, whose claim is for unpaid wages, is not a secured creditor. Thus, in all likelihood, Ms. Wagner (as well as the other complainants and, indeed, all other general creditors) will receive little, if any, payment on account of her claim.

However, even if there was some reasonable prospect for ultimate recovery, Ms. Wagner's claim for unpaid wages cannot now go forward under the *Act*--the Ontario insolvency court Order unequivocally prohibits such a procedure (see paragraph 9 of the Order) and, in the event of a formal insolvency under the *BIA*, the dispute resolution procedure contained in the federal *BIA* takes precedence over that found in the *Employment Standards Act*. Ms. Wagner's claim must now be adjudicated in accordance with the paramount federal *BIA*. Further, in light of paragraph 15 of the insolvency court Order, Ms. Wagner cannot advance a claim against the receiver for her unpaid wages.

In my view, the delegate did not improperly exercise his discretion when he determined that he would not continue to investigate Ms. Wagner's unpaid wage complaint. Indeed, so far as I can gather, he had no legal alternative but to discontinue his investigation. It follows that this appeal must be dismissed.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal