

**EMPLOYMENT STANDARDS TRIBUNAL**  
In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act R.S.B.C. 1996, C. 113*

- by -

Bogey Enterprises Inc. operating as Cheam Golf Centre  
("Bogey" or "the Employer")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Geoffrey Crampton

**FILE NO.:** 98/799

**DATE OF HEARING:** February 8, 1999

**DATE OF DECISION:** February 12, 1999

**DECISION**

**APPEARANCES**

Earl Francis	on behalf of Bogey Enterprises Inc.
Kevin McConachie	on his own behalf
William Bull	on behalf of the Director of Employment Standards

**OVERVIEW**

This is an appeal by Bogey Enterprises Inc. operating as Cheam Golf Centre (“Bogey”), under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination which was issued by a delegate of the Director of Employment Standards (the “Director”) on November 30, 1998. The Determination dealt with complaints by two former employees: David H. Griffiths and Kevin McConachie. At the commencement of the hearing on February 8, 1999 I was advised by the Director that Mr. Griffiths had reached an agreement with Bogey which constituted a full and final settlement of his complaint. Mr. Griffiths and Mr. Francis, on behalf of Bogey, confirmed the settlement. As a result, Bogey’s appeal was revised to deal only with those aspects of the Determination which pertain to Mr. McConachie.

Bogey’s appeal is based on three principal grounds:

- the Director erred by finding that Mr. McConachie was entitled to be paid commissions in addition to his base monthly salary;
- it was not given an opportunity to respond to the allegations made by Mr. McConachie before the Director issued the Determination;  
and
- the Director placed undue weight on information given to Mr. Bull by Ed Fitzgerald, a former shareholder/partner and General Manager of the Cheam Golf Centre.

A hearing was held on February 8, 1999 at the Tribunal’s offices at which time evidence was given under oath by Earl Francis, Kevin McConachie, David Griffiths and William Bull.

**ISSUES TO BE DECIDED**

1. Did the Director err in determining that Kevin McConachie is entitled to receive “wages” (in the form of commissions), vacation pay and accrued interest?
2. Was Bogey denied an opportunity to respond to contrary to Section 77 of the *Act*?

**FACTS**

Kevin McConachie was employed by Bogey as an “assistant golf pro” at Cheam Golf Centre from April 3, 1997 to October 16, 1997. There was no written employment agreement between Bogey and Mr. McConachie. He worked full-time (at least 40 hours per week) in the “pro shop” at Cheam Golf Centre throughout his period of employment (April-October, 1997). Thus, any golf lessons which he taught were “on his own time”.

In his complaint dated May 4, 1998 Mr. McConachie stated that under a verbal employment contract he was to receive a commission of “3% of total gross sales over \$100,000” in the pro shop. The commission was to be paid by November 1, 1997 which was subsequently changed to February 1, 1998 (Bogey’s financial year-end) and then to April 30, 1998. There is no dispute that Mr. McConachie has not been paid any commissions by Bogey.

The prospect of an employment opportunity with Bogey arose when Kevin McConachie met David Griffiths (“golf pro” at Cheam Golf Centre) at the BCPGA golf industry show in Vancouver in February, 1997. In late March, 1997 Mr. McConachie visited the Cheam Golf Centre to pursue that opportunity further. He met Earl Francis for a formal employment interview on April 3, 1997 at which time he was offered and accepted employment as “assistant golf pro”. Mr. McConachie testified that Mr. Francis told him that his compensation package would be the same as Griffiths and, when the interview concluded, he was directed to speak to Dave Griffiths. When he met with Mr. Griffiths, he was informed that he would be paid a salary of \$1500.00 per month, a 60% commission on private golf lessons and a commission on pro-shop revenues (2% of merchandise sales if revenues are less than \$100,00 and 3% if revenues exceed \$100,00). Throughout his employment with Bogey, he reported to Mr. Griffiths (golf pro) and Mr. Fitzgerald (general manager) and saw Mr. Francis only on 3 or 4 occasions at the golf centre.

David Griffiths testified that while he recommended Mr. McConachie for the position as “assistant pro”, the decision to employ him was made by Ed Fitzgerald and Earl Francis. Neither of them informed him about Mr. McConachie’s compensation. However, immediately after his interview with Mr. Francis on April 3rd., Mr. McConachie told Mr. Griffiths that they were to be paid on the same commission structure and asked him for details. Mr. Griffiths explained that he received 2% if pro-shop revenues were less than \$100,000 and 3% if revenues exceeded \$100,000.

Earl Francis (Bogey's president and major shareholder) testified that the verbal agreement with Mr. McConachie entitled him to a salary of \$1,500 per month plus a commission of 60% on revenues earned through private golf lessons taught by Mr. McConachie. In addition, like all employees, he was entitled to purchase food from the restaurant at a 50% discount. Furthermore, during the Summer of 1997 he agreed to provide Mr. McConachie with a "travel allowance" of \$525.00 in recognition of the time and costs associated with his commute. This amount was paid to Mr. McConachie and is not in dispute. Mr. Francis also testified that he, rather than Mr. Fitzgerald, had final authority to employ or dismiss Bogey's employees. Mr. Francis also testified that Mr. McConachie never discussed sales commissions with him at any time during or after his employment at Cheam despite accepting employment (in October, 1997) at Nevada Bob's, a retail golf equipment store in which Mr. Francis was also a major shareholder.

The Director's delegate, Mr. Bull, made the following observations in the Determination to explain the basis on which he concluded that Mr. McConachie was entitled to receive commissions in addition to his base monthly salary:

... the principals or directors are in disagreement and the partnership is in the process of dissolving. There are three directors listed, Mr. Earl Francis, his wife Barbara and Ed Fitzgerald. The dispute is between Mr. Francis and Mr. Fitzgerald, and the result was that I received two conflicting opinions by two directors as to what the employment contract was in regard to commission. Mr. Fitzgerald was the General Manager at the Golf Centre and the one that (Mr. McConachie) had day to day contact with ....

In addition, he noted that Mr. McConachie's view was supported by Mr. Ed Fitzgerald (former shareholder/partner and general manager) who confirmed that Mr. McConachie was to receive a 3% commission. But, he also noted:

The other director and principal shareholder, Mr. Earl Francis, has advised that this was not the agreement. McConachie as the assistant was not to receive any commission ..."

The Determination also contains the following reasons for finding that Mr. McConachie was entitled to receive a commission:

This commitment was made ... by the General Manager, who also is a principal of the company. He does not deny that this was the agreement, as a principal he made a commitment. Unless it can be proven otherwise, I feel that the commission promised is owed. Mr. Fitzgerald had supplied documentation on the sales of the pro shop and from them the following commissions have been calculated.

Mr. Bull testified that upon being assigned responsibility to investigate Mr. McConachie's complaint, he wrote to the Employer and, subsequently, met the with Mr. Francis to discuss

the matter. After that meeting, he spoke to Mr. McConachie who suggested that Mr. Fitzgerald could provide supporting evidence. Mr. Bull met with Mr. Fitzgerald in early August, 1998 and he confirmed that Mr. McConachie was entitled to receive 3% commission. At the same meeting, Mr. Fitzgerald acknowledged that as a director of Bogey he could be personally liable for unpaid wages by way of Section 96 of the *Act*. Mr. Fitzgerald also provided Mr. Bull with two schedules of monthly sales revenues for the purpose of calculating commissions payable. Mr. Bull wrote to Mr. Francis on September 2, 1998 to provide an update on the results of his investigation.

In early October, 1998 Ron Perrick (Counsel for Bogey) contacted Mr. Bull to discuss Mr. McConachie's complaint and an in-depth discussion took place. Mr. Bull did not receive any further comments or submissions from either Mr. Perrick or Mr. Francis prior to issuing the Determination on November 30, 1998.

Effective April 9, 1998 Mr. Francis decided that Hugh MacDonald (superintendent) should report directly to him rather than to Mr. Fitzgerald. That "operational change" caused Mr. Fitzgerald to write to Bogey's suppliers in April 20, 1998 to put them on notice that, *inter alia*, "... all debts incurred after today by Bogey ... will not carry the personal obligation for repayment by the undersigned ...." On April 28, 1998 Mr. Francis sent a memo to Mr. Fitzgerald in which he identified 14 operational and financial matters which required immediate attention. Mr. Fitzgerald took a leave of absence, without notifying Mr. Francis, effective May 1, 1998. Mr. Francis sent another memo to Mr. Fitzgerald on May 28, 1998 in which he identified an additional 11 issues of concern as a result of a preliminary review of the 1997 financial records. During the Fall of 1998 Mr. Fitzgerald and Mr. Francis concluded a settlement by which Mr. Fitzgerald ceased to have any involvement in or to act in any capacity with Bogey and/or Cheam Golf Centre.

## **ANALYSIS**

### *Opportunity to Respond*

One of the grounds of Bogey's appeal is that "... there was no due process" before the Determination was issued on November 30, 1998. The relevant provision in the *Act* is Section 77, which states:

#### **Opportunity to respond**

If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

On the evidence before me, which was not challenged or refuted by Mr. Francis, I cannot find any contravention of Section 77. The Director's delegate wrote to Bogey, met with Mr. Francis and had a lengthy telephone conversation with Mr. Perrick, Bogey's legal

counsel, before he issued the Determination. Accordingly, I would dismiss this ground of Bogey's appeal.

*Entitlement to commissions*

Bogey submits that the Director erred by determining that Mr. McConachie is entitled to be paid commissions on "pro shop" revenues. That error arises, Bogey submits, from a lack of evidence to support the findings of fact made by the Director. Bogey's appeal also questions the "timing" of Mr. McConachie's complaint in May, 1998.

It also submits that the Director erred by relying on information which was given to the Director's delegate by Mr. Fitzgerald who, in Mr. Francis' opinion, was "a disgruntled, vengeful minority shareholder."

Further, Bogey submits, it is not logical for a business with financial problems to pay 6% of gross revenues in the form of commissions to its employees. Mr. Francis concludes his appeal on behalf of Bogey, as follows:

I respectfully submit that the facts presented by complaints (sic) and Mr. Fitzgerald have been fabricated and that there is no documented evidence to support the claims. The evidence and documents submitted by us demonstrate that the agreements alleged did not exist. Accordingly, I further submit that it is improper for the delegate to construct agreements where no evidence of the same exists.

That is a strongly-worded submission which, on my review of the evidence, is not warranted.

The date (or, as Bogey's submissions refer to it, the "timing") of Mr. McConachie's complaint is not, in my view, suspicious. His testimony on that point was clear and was not challenged by Mr. Francis. I find Mr. McConachie's evidence to be entirely credible. He believed he would be paid commissions based on the pro-shop's revenues by November 1, 1997 (when BCPGA membership dues were payable). That date was changed, by Mr. Fitzgerald, to February 1, 1998 (Bogey's financial year-end) and then to April 30, 1998.

I do not agree with Bogey's submissions that there was a lack of evidence on which the Director could find that Mr. McConachie is entitled to receive commissions. On the contrary, I find there is ample evidence to support the findings of fact contained in the Determination. The findings made by the Director are supported fully by the evidence given by both Mr. McConachie and Mr. Griffiths. Mr. McConachie would be paid on the same commission structure as Mr. Griffiths (i.e. 2% of merchandise sales in the "pro-shop" if revenues were less than \$100,00 and 3% if revenues exceed \$100,00).

If, as Mr. Francis testified, he was unaware of Mr. McConachie's entitlement to receive commissions until he made his complaint in May, 1998 that may well be due to a lack of

effective communication between Mr. Fitzgerald and Mr. Francis. However, that lack of communication should not serve to disentitle Mr. McConachie. I note that Mr. Francis did not cross examine Mr. McConachie on his testimony that he was told during his employment interview with Mr. Francis that he would receive the same commission structure as Mr. Griffiths. The weight given by the Director's delegate to the information provided by Mr. Fitzgerald is not unreasonable in all the circumstances of this appeal. Mr. Fitzgerald was, at that time, the general manager, a director and a shareholder of Bogey. He provided financial information which allowed the Director's delegate to calculate commissions payable. Under those circumstances, it was quite reasonable for the Director's delegate to conclude that "the principles or directors are in disagreement ..." while also concluding that Mr. McConachie was to receive commissions based on 3% of "pro-shop" revenues. There is no dispute that "pro-shop" revenue exceeded \$100,000 during the period of Mr. McConachie's employment and Bogey's appeal does not challenge the gross revenue figures which formed the basis of the calculations in the Determination.

Bogey's submissions encourage me to rely on correspondence between Mr. Fitzgerald and Mr. Francis in early 1998 as evidence of Mr. Fitzgerald's lack of authority to make employment decisions on behalf of Bogey. While I acknowledge there is some logic to that line of argument, I am unable to find that it should be the basis for overturning the Director's findings of fact. It must be remembered that Mr. McConachie was employed from April 3, 1997 to October 16, 1997 and that the relationship/partnership between Mr. Francis and Mr. Fitzgerald in early 1998 may not have been as professional as it had been one year earlier.

For all of these reasons I find that Bogey's appeal should be dismissed.

**ORDER**

I order, under Section 115 of the *Act*, that the Determination be varied to acknowledge the settlement of Mr. Griffith's complaint and to reflect Mr. McConachie's entitlement to receive commissions and vacation pay in the amount of \$3,377.93 plus accrued interest according to Section 88 of the *Act*.

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**Geoffrey Crampton**  
**Chair**  
Employment Standards Tribunal