An appeal

- by -

Tim McKay
("Mr. McKay")

- 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 (as amended)

TRIBUNAL MEMBER: Shafik Bhalloo

FILE No.: 2016A/76

DATE OF DECISION: August 26, 2016

DECISION

SUBMISSIONS

Tim McKay — on his own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the *"Act"*), Tim McKay ("Mr. McKay") has filed an appeal of the Determination issued by a delegate of the Director of Employment Standards (the "Director") on May 13, 2016. The Director's delegate determined that it was appropriate to exercise her discretion under section 76(3)(i) to decline to investigate or adjudicate Mr. McKay's complaint in light of a settlement agreement between Mr. McKay and his former employer, Double H. Holdings Ltd. ("DHH").

2. Based on his Appeal Form, Mr. McKay grounds his appeal in the assertions that the Director erred in law and breached the principles of natural justice in making the Determination and evidence has become available that was not available at the time the Determination was made.

3. The appeal was received by the Tribunal on June 20, 2016, the final day for filing the appeal of the Determination.

4. On June 22, 2016, the Tribunal acknowledged receipt of the appeal, requested the Director to produce the section 112(5) "record" (the "Record") and notified the other parties, *inter alia*, that no submissions were being sought from them pending review of the appeal by the Tribunal and following such review all or part of the appeal might be dismissed.

5. On July 7, 2016, the Director provided the Record to the Tribunal. A copy of the Record was delivered to Mr. McKay on July 8, 2016 and the latter was given an opportunity to object to its completeness.

6. On July 11 and July 14, 2016, the Tribunal received Mr. McKay's written objections to the completeness of the Record, which the Tribunal subsequently disclosed to the Director. On July 26, 2016, the delegate of the Director submitted her written submissions in response to Mr. McKay's objections which the Tribunal forwarded to Mr. McKay. I have reviewed both, Mr. McKay's submissions objecting to the completeness of the Record and the delegate's response, and find myself persuaded with the latter's submissions that Mr. McKay's submissions are not in the nature of objections to the completeness of the Record but submissions on the merits of his original complaint against DHH (the "Complaint") or the appeal. In the circumstances, I do not find any merit in Mr. McKay's objections to the completeness of the Record and accept the Record as complete.

7. On August 5, 2016, the Tribunal notified the parties that the appeal had been assigned to a Tribunal Member, it would be reviewed and that following the review, all or part of the appeal may be dismissed. I have reviewed the appeal, the appeal submissions of Mr. McKay and the Record and conclude that this appeal is appropriate for consideration under section 114 of the *Act*. Therefore, at this stage, I will assess the appeal based solely on the Determination, the reasons for the Determination (the "Reasons"), the Appeal Form, the written submissions of Mr. McKay, and the Record that was before the Director when the Determination was being made. Under section 114(1) of the *Act*, the Tribunal has the discretion to dismiss all or part of an appeal, without a hearing of any kind, for any of the reasons listed in section 114(1) of the *Act*. If satisfied the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114(1), the

Tribunal may request submissions on the merits of the appeal from the Director and DHH. Mr. McKay will then be given an opportunity to make a final reply to those submissions, if any.

ISSUE

8. The issue at this stage is whether this appeal should be dismissed under section 114(1) of the *Act*.

FACTS

9. DHH operates a golf course in Nanaimo, British Columbia. It employed Mr. McKay as a greens keeper and night watchman from July 20, 2013, to October 4, 2015, at a starting wage of $15.00 per hour and increasing to $17.50 per hour.

10. On November 12, 2015, Mr. McKay filed a complaint under section 74 of the *Act* against DHH alleging that the latter contravened the *Act* by failing to pay him wages and compensation for length of service for termination of his employment (the "Complaint"). The hearing of the Complaint was scheduled on February 1, 2016 (the "Hearing"). At the Hearing, Harvey and Priscilla Hurd (the "Hurds"), who are both directors and officers of DHH, made submissions on behalf of DHH and Mr. McKay made submissions on his own behalf.

11. In the Reasons, the delegate of the Director indicates that, at the commencement of the Hearing, she advised the parties if they wished to attempt to resolve the Complaint they could request the services of another Industrial Relations Officer who could act as a mediator. After she heard the evidence of DHH, and prior to hearing Mr. McKay's evidence, the delegate states that Mr. McKay indicated that he wished to speak to a mediator. As a result, the delegate adjourned the Hearing to give the parties an opportunity to engage in settlement discussions but she advised the parties that there was limited time for settlement discussions and if a settlement was not reached, the Hearing would resume.

12. The parties met with a mediator (the "Branch Mediator") and on February 3, 2016, DHH provided the Employment Standards Branch (the "Branch") with a copy of the signed settlement agreement and a cheque for $1,450.00 made out to Mr. McKay. On the following day, on February 4, 2016, Mr. McKay contacted the Branch Mediator and advised him that settlement had not been reached with DHH and that he would not sign the settlement agreement. He also indicated his desire to have the Complaint rescheduled for adjudication.

13. The delegate notes in the Reasons that the question she was tasked with determining was whether the Complaint of Mr. McKay was settled resulting in no further need for investigation. She invited submissions from both parties, which submissions she summarizes at page 5 of the Reasons as follows:

> In this case, the Employer asserts that a mutual settlement agreement was reached in the February 1, 2016 mediation requested by the Complainant. In support of its assertion, it relies on the settlement agreement produced by the Branch Mediator which was signed by its principal and returned to the Branch for execution by Complainant on February 3, 2016, along with a cheque made out to the Complainant in the amount set out in the settlement agreement.
>
> The Complainant agrees that he requested the mediation, which was facilitated by a Branch Mediator; however, he denies that agreement was reached with the Employer. He also suggests that the mediator did not have sufficient time to mediate.

14. In concluding that DHH discharged its burden to establish that a settlement agreement was made between the parties, the delegate reasons as follows at pages 5 and 6 of the Reasons:

> On the basis that the signed settlement agreement drafted by the Branch Mediator was executed and returned to the Branch by the employer along with the cheque in the amount of the settlement amount, I find that the employer has met its threshold onus of showing sufficient evidence of a settlement. The fact that the settlement cheque was provided along with the executed settlement agreement drafted by the Branch Mediator indicates that the Employer acted under reasonably held belief that the complaint had been settled. The Complainant has not provided evidence that the terms set out in the settlement agreement were not what was agreed to in the mediation or that the Employer failed to complete a term of the agreement. Rather, his submission indicates that he had second thoughts and refused to sign the settlement agreement. As a result, I find that the public interest in applying an exception to settlement privilege in this case outweighs the potential inherent in maintaining it.

15. In light of the delegate's conclusion above, the delegate then embarks on the task of determining "whether a binding settlement agreement took place between [the parties] on February 1, 2016 [based] not only [on] the written submissions of the parties, but also any evidence of settlement related communications occurring during the February 1, 2016, mediation." In this regard, the delegate observes that a settlement agreement is a form of a contract and for it to be binding there must be evidence of a settlement offer, its acceptance and consideration for the settlement. She also notes that, even where all of these terms are satisfied, one must consider whether the settlement agreement is "contrary to the law on the basis of bad faith or some other voidable action". Where a settlement is made in good faith, and it is lawful, the delegate states the parties are bound by it and cannot unilaterally withdraw from it.

16. The delegate next goes on to consider the correspondence of the Branch Mediator to Mr. McKay dated March 2, 2016. In this correspondence, the Branch Mediator states that during the February 1, 2016, mediation, Mr. McKay made a counteroffer to DHH which was accepted by the latter. During the course of the mediation, the Branch Mediator states, he made it clear to both parties that if a settlement was reached, it would be binding on the parties and the parties responded that they understood. The correspondence also notes that at the conclusion of the mediation, the Branch Mediator went over the terms of the settlement agreement with the parties and made arrangements for the parties to sign the agreement. Mr. McKay advised the Branch Mediator that he did not have email access but lived close to the Branch Office and preferred to come into the Branch Office to sign the agreement and pick up the settlement cheque.

17. The delegate also notes that the Branch Manager's correspondence states that on February 3, 2016, DHH's representative dropped off the originally signed settlement agreement with the settlement cheque. The Branch Mediator then telephoned Mr. McKay and left a message for him that the cheque for the settlement funds was ready for him to pick up. Mr. McKay returned the Branch Manager's telephone call on February 4, 2016, advising the Branch Mediator that he no longer wished to sign the settlement agreement and wanted his Complaint to be rescheduled for adjudication. The Branch Mediator then advised Mr. McKay that a binding settlement agreement had been reached between the parties. In response to this, Mr. McKay stated that the agreement was "not legal" because he had not signed it.

18. The delegate indicates that the correspondence also indicates that in a later telephone conversation with the Branch Manager, Mr. McKay informed the Branch Mediator that "it was not just about the money, but that there were other issues that were of concern [to him] relating to the Employer's business practices". However, Mr. McKay refused DHH's offer to discuss Mr. McKay's other concerns.

19. Having considered both parties' evidence including the Branch Manager's correspondence, the delegate concluded that a binding settlement agreement had been reached between the parties for the following reasons set out at page 7 of the Reasons:

> I find that a binding settlement took place between the Complainant and the Employer during the course of the February 1, 2016 mediation. The Employer unconditionally accepted the Complainant's counter-offer. The parties were made aware by the Branch Mediator during the course of the mediation that any settlement would be binding on the parties once agreed to. The parties indicated their understanding of the binding nature of any agreement. The terms of the verbal settlement were put into a written settlement agreement by the Branch Mediator. The Complainant did not dispute the terms set out in the settlement agreement. The Employer relied on the terms reached in the February 1, 2016 mediation as evidenced by the provision of the signed settlement agreement and by payment of the settlement funds on February 3, 2016, two days after the mediation. As a result, all of the necessary elements of a binding settlement agreement were met. The Complainant's subsequent refusal to sign the settlement agreement does not negate the fact that a settlement was entered into and that the terms of the agreement were met.

20. Having said this, the delegate noted that although the contractual elements of the settlement agreement have been met, a settlement agreement may yet be set aside if there is evidence that it "resulted from inequitable or unethical grounds including undue influence or duress". In this case, the delegate noted, Mr. McKay alleged that the Branch Mediator was under a time restraint at the mediation and, therefore, did not have sufficient time to address a number of his issues. This assertion of Mr. McKay, according to the delegate, "implies that the settlement agreement should be void due to duress". However, according to the delegate, there was no evidence of duress or other unfairness for voiding the settlement agreement. She states the mediation was conducted by the Branch Mediator at the request of Mr. McKay and he was aware that the purpose of entering into settlement discussions was to resolve his complaint. She further states that he was aware that any settlement reached would conclude his Complaint. Therefore, when Mr. McKay chose to make a counter offer to DHH's settlement offer and the latter unconditionally accepted it and paid consideration in the form of the settlement amount, a binding settlement agreement was reached between the parties and Mr. McKay's complaint was settled. In the circumstances, the delegate chose not to proceed with Mr. McKay's Complaint.

SUBMISSIONS OF MR. MCKAY

21. Mr. McKay has submitted eighteen (18) pages of written submissions in his appeal together with another about sixty (60) pages of documents, most of which are contained in the Record.

22. In his Appeal Form, as previously noted, Mr. McKay has checked of all three grounds of appeal allowed under section 112(1) of the *Act*. However, his written submissions in support are not very clear and interspersed over the eighteen (18) pages. These written submissions include, to a significant extent, a reiteration of his submissions to the delegate on May 27, 2016, after the Determination was made. While I do not find it necessary to reiterate verbatim Mr. McKay's submissions, but having reviewed them very carefully, I will summarize the gist of his submissions below.

23. One aspect of Mr. McKay's submissions is his mental health. More particularly, he repeatedly mentions in his extensive submissions that his mental state was compromised at the time of the mediation on February 1, 2016, because he was taking two types of anti-depressive and anti-anxiety medication because of DHH's treatment of him and the termination of his employment. Essentially, he suggests that he was not in the right frame of mind to participate in the mediation.

24. Another significant aspect of his appeal submissions is his argument on the merits of his original Complaint. In these submissions he sets out his original issues in his Complaint against DHH, some evidence in support

of those issues and the remedies he feels the Director should have ordered, including reinstatement of his employment with DHH.

25. As an extension of the former submissions, Mr. McKay also explains how he was allegedly harassed by the Hurds and how the latter hired their friend to replace him after he returned from his sick leave.

26. In terms of the natural justice ground of appeal, Mr. Mckay states that the mediation of February 1, 2016, failed because the Branch Mediator had no interest in what he wanted to discuss with the employer. He submits that the Branch Mediator cut him off because the Branch Mediator was only interested in discussing termination pay and getting him to accept money to settle while he was interested in "sav[ing] his employment".

27. He also submits, as part of the natural justice ground of appeal, the Branch Mediator "was supposed to be neutral in the mediation discussions" but "ran the mediation more like he was the employer's defence lawyer". He states the Branch Mediator was "unethical in trying to influence settlement aggressively under false pretences" and placed him under "a lot of duress during the conversation".

28. He also argues that he was not allowed to bring anyone in the room during the complaint Hearing or the mediation. He also states that he had "no means of affording a lawyer" during the mediation or the Hearing.

29. As in his submissions to the director before the Determination was made, he states he never signed the settlement agreement and, therefore, the agreement is not binding. He further argues that his claim in the original Complaint involved a "significant amount of owed wages" and that it "does not make any sense" for him to agree to settle "at basically two weeks' termination pay". Therefore, he states, no settlement was reached between the parties and the matter should have been returned to the Director for adjudication.

ANALYSIS

30. In an appeal under the *Act*, the appellant, Mr. McKay in this case, bears the burden of establishing that there is an error in the Determination such that the Tribunal should vary or cancel the Determination. I am not persuaded that Mr. McKay has discharged this burden, for the reasons I set out below.

31. Under section 76(3)(i) of the *Act*, the Director has a discretion to refuse to investigate a complaint or may cease investigating a complaint if the dispute that caused the complaint is resolved.

32. In the Reasons, the delegate notes that during the Hearing of the Complaint, she afforded the parties an opportunity to mediate the complaint and Mr. McKay expressed an interest in mediating. As a result, she adjourned the Hearing to allow the parties to mediate. The Branch Mediator was called in to assist the parties and the complaint was resolved as evidenced by the written settlement agreement that DHH signed and returned to the Branch together with a money payment, two days later, on February 3, 2016. In the circumstances, the delegate decided to exercise her discretion to cease investigating the Complaint pursuant to section 76(3)(i) of the *Act*.

33. Mr. McKay challenges the delegate's decision, in the Determination, to not investigate his Complaint. He states that no settlement was reached between the parties at the mediation.

34. The test for the review of an exercise of discretion is set out in *Jody L. Goudreau and another*, BC EST # D066/98:

> The Tribunal will not interfere with the exercise of discretion unless it can be shown that the exercise was an abuse of power, the Director made a mistake in construing the limits of her authority, there was a procedural irregularity or the decision was unreasonable. Unreasonable, in this context, has been described as being:
>
> > … a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. *Associated Picture Houses v. Wednesbury Corp.* [1948] 1 K.B. 223 at p. 229
>
> Absent any of those considerations, the director even has the right to be wrong.

35. In *Takarabe, and others*, BC EST # D160/98, the Tribunal added the following comment:

> In *Boulis v. Minister of Manpower and Immigration* (1972), 26 D.L.R. (3rd) 216 (S.C.C.), the Supreme Court of Canada decided that statutory discretion must be exercised within 'well established legal principles'. In other words, the Director must exercise her discretion for *bona fide* reasons, must not be arbitrary and must not base her decision on irrelevant considerations.

36. The essence of Mr. McKay's argument is that the delegate erred in exercising her discretion to not investigate the Complaint. For Mr. McKay to succeed in this case, he must show that the exercise of discretion by the delegate was "unreasonable" because, in reviewing the exercise of the delegate's discretion, the proper test is a test of "unreasonableness", not "correctness". Therefore, if the delegate had a *reasonable* basis to conclude that the parties settled the Complaint at the mediation on February 1, 2016, then I should not interfere with that discretion.

37. Having said this, in reviewing the discretion exercised by the delegate in this case, I have considered the Determination, the Record including the Branch Manager's correspondence of March 2, 2016, and the purported settlement agreement. I have also considered the written submissions of Mr. McKay which are somewhat helpful in setting out background facts and argument, but are unhelpful when it comes to setting out the parties' intentions. Based on my review of the above materials, I do not find any evidence of the delegate abusing her power, misconstruing the limits of her discretion or exercising her discretion unreasonably in deciding to not investigate Mr. McKay's Complaint. To the contrary, I find her decision to not investigate Mr. McKay's Complaint amply supported in her reasons at pages 5 to 7 inclusive in the Reasons. Therefore, I have no basis to interfere with the delegate's exercise of her discretion here.

38. I also agree with the delegate that there is no evidence of duress or collusion that would raise questions of the *bona fides* of the settlement agreement. Having said this, settlement of unpaid wage claims is an integral aspect of the *Act* and the entire scheme of the *Act* would be undermined if *bona fide* settlement agreements can be overridden simply because one party, with the benefit of hindsight, subsequently concludes that they made a bad bargain or not an optimal bargain (see *Heather Workman,* BC EST # D642/01; *Alnor Services Ltd.,* BC EST # D199/99). I find that this is such a case; that is, the appellant, Mr. McKay, after reaching a settlement at the mediation, had second thoughts later and decided not to sign the settlement agreement and pursue adjudication. I am satisfied that Mr. McKay's complaint was the subject of a valid and subsisting settlement agreement reached on February 1, 2016, and there is not any evidence of error of law committed by the delegate in making the Determination.

39. With respect to Mr. McKay's complaint that the Branch Mediator failed to consider his mental state because he was on some anti-depressive and anti-anxiety medication, Mr. McKay has not produced sufficient evidence to persuade me that he did not have the capacity to make the settlement agreement he did at

mediation. I find it curious also that Mr. McKay's mental state was not an issue for him in terms of his decision to proceed with the Hearing on the same day as the mediation. I find that the issue of his mental state is an afterthought in this appeal and I find it unmeritorious.

40. As concerns Mr. McKay's submissions on the merits of his original Complaint, I do not find any of these submissions relevant in this appeal. The Determination he appeals from did not decide the merits of the original Complaint but only the questions of whether his complaint was settled and the delegate exercised her discretion not to investigate the Complaint reasonably.

41. With respect to those allegations of Mr. McKay that come under the natural justice ground of appeal, I note that the Tribunal in *Re 607730 B.C. Ltd. (c.o.b. English Inn and Resort)*, BC EST # D055/05, noted that the principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to learn the case against them, the right to present their evidence and the right to be heard by an independent decision-maker. Any party alleging denial of a fair hearing has the onus to provide some evidence in support of that allegation (see *Re Healey*, BC EST # D207/04).

42. In this case, Mr. McKay makes allegations of bias, unfairness and lack of neutrality on the part of the Branch Mediator stating that the latter "ran the mediation more like he was employer's defence lawyer". Mr. McKay also accuses the Branch Mediator for being "unethical and trying to influence settlement aggressively under false pretenses".

43. In *R. v. S. (R.D.), [1997] 3 S.C.R. 484,*, the Supreme Court of Canada reiterated that the test to be applied when it is alleged that a judge is not impartial is "whether the particular conduct gives rise to a reasonable apprehension of bias". At paragraph 111 of the Judgment, Cory, J. cited:

> … the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information ….
>
> The test is 'what would an informed person, upon review of the matter, realistically and practically – and having thought the matter through – conclude'.

44. Having reviewed the Record and the Determination, I find that "an informed person, viewing the matter realistically and practically" would conclude that Mr. McKay has not demonstrated bias, prejudice or unfairness on the part of the Branch Mediator or the delegate. I also find that the same hypothetically reasonable person would conclude that Mr. McKay's allegations of bias and prejudice on the part of the Branch Mediator are but mere suspicions or impressions unsupported with any real evidence. In the result, I find Mr. McKay's allegations of bias, lack of neutrality and/or unethical conduct on the part of the Branch Mediator are without any foundation and dismiss them.

45. With respect to Mr. McKay's allegation that he was not allowed to bring anyone to the mediation or the Hearing and that he had no means of affording a lawyer during either proceeding, I find these allegations are also without any merit. The principles of natural justice do not require that each party appearing before an administrative tribunal must have or should be provided legal representative. The principles of natural justice are simply procedural rights ensuring that parties have an opportunity to learn the case against them, the right to present their evidence and the right to be heard by an independent decision maker. In the case at hand, there is no evidence that Mr. McKay was denied these procedural rights at any time. There is also no evidence that he was prevented from bringing anybody at either of these proceedings. Therefore, I do not find that there has been any breach of Mr. McKay's natural justice rights in this case.

46. With respect to Mr. McKay's new evidence ground of appeal, I note that the Tribunal in *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.* (BC EST # D171/03) set out four conjunctive requirements which must be met before new evidence will found to be "new evidence" and considered on appeal. These requirements are as follows:

- 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;
- The evidence must be relevant to material issue arising from the complaint;
- The evidence must be credible in the sense that it is reasonably capable of belief; and
- 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.

47. The Tribunal will not consider evidence, in the context of an appeal, which could have been provided at the investigation stage or before the Determination is made (see *607470 B.C. Ltd. carrying on business as Michael Allen Painting,* BC EST # D096/07; *Kaiser Stables Ltd.,* BC EST # D058/97).

48. In this case, I find that there is nothing in the extensive written submissions of Mr. McKay that would qualify as new evidence under the four-fold test for admitting new evidence delineated in the Tribunal's decision in *Re Bruce Davies, supra.* In the circumstances, I reject Mr. McKay's appeal on the new evidence ground of appeal as well.

49. In conclusion, I find that Mr. McKay has not shown, on a balance of probabilities, any reviewable error in the Determination. Pursuant to section 114(1)(f) of the *Act*, I dismiss Mr. McKay's appeal of the Determination.

ORDER

50. Pursuant to section 115 of the *Act*, I confirm the Determination made on May 13, 2016.

Shafik Bhalloo
Member
Employment Standards Tribunal