Employment Standards TRIBUNAL

An appeal

- by -

George Dumitrache

- 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: Carol L. Roberts

FILE No.: 2017A/106

DATE OF DECISION: December 18, 2017

DECISION

SUBMISSIONS

George Dumitrache	on his own behalf
Kim Holmes	on behalf of Glenlyon Norfolk School Society
Shelley Chrest	on behalf of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), George Dumitrache has filed an appeal of a Determination issued by Shelley Chrest, a delegate (the "Delegate") of the Director of Employment Standards (the "Director"), on July 18, 2017. In that Determination, the Director concluded that there had been no breach of the *ESA*.

2. Mr. Dumitrache appeals the Determination on the grounds that the Director's delegate erred in law and failed to observe the principles of natural justice in making the Determination. Mr. Dumitrache also says that evidence has become available that was not available at the time the Determination was made.

3. After the appeal was filed, the Tribunal requested that the Director produce the section 112(5) record (the "Record") that was before the Director at the time the Determination was being made. A copy of the Record was provided to Mr. Dumitrache and Glenlyon Norfolk School Society and both parties were invited to respond to its completeness.

4. Mr. Dumitrache alleged that the Record was incomplete because it did not contain some of the evidence he submitted to the Branch; did not include all documents requested by the Delegate in the Demand for Employer Records; and did not include evidence the Employer referred to at the hearing.

5. In her response to Mr. Dumitrache's objections about the Record, the Delegate says that several emails between Branch staff and Mr. Dumitrache did not form part of the adjudication record because the correspondence was in regard to the scheduling of a mediation session. The Delegate also says that in a June 12, 2017, letter to Mr. Dumitrache, the Branch identified and included copies of all documents it had received to that date. Mr. Dumitrache was given the opportunity to identify any missing documents. He did not do so.

6. The Delegate says that the issuance of a Demand for Records, which was not included in the section 112(5) record, is a standard Branch process and is unrelated to the completeness of the Record.

7. Finally, the Delegate says that although the Employer offered to provide additional documents during the hearing, she did not seek or receive any additional documentation either at or following the hearing. The Delegate submits that the record is complete.

8. Documents relating to the mediation process do not form part of the Record. Mediation is a confidential process. Consequently, I do not find that the Record is incomplete due to the absence of documents relating to the mediation process.

9. I accept that the Branch's Demand for Employer Records to the Employer was not included in the copy of the Record submitted to the Tribunal by the Delegate on September 13, 2017. The Demand for Employer Records should have been included with the Record submitted to the Tribunal on September 13, 2017, as it was clearly before the delegate at the time the Determination was made. However, nothing in this appeal turns on its absence as I find that all relevant records submitted in response to that Demand formed part of the Record that was disclosed both in advance of the hearing and in response to Mr. Dumitrache's appeal.

10. Finally, I also accept that, at the hearing, the Employer offered to submit certain additional documents to the Delegate, but that the Delegate did not seek, receive or consider any additional documents. As such, I find that the record is complete.

11. After reviewing Mr. Dumitrache's appeal submissions, I sought a response from the Delegate and the Employer on the issue of whether or not Mr. Dumitrache was denied natural justice. This decision is based on the submissions of the parties, the section 112(5) record and the Reasons for the Determination.

FACTS AND ARGUMENT

Background

12. Mr. Dumitrache was employed as a custodian by Glenlyon Norfolk School Society ("GNSS") from May 10, 2013, until December 19, 2016, when his employment was terminated. On January 13, 2017, Mr. Dumitrache signed a settlement agreement and release drafted by GNSS in exchange for a payment of $8,900 less statutory deductions.

13. On March 20, 2017, Mr. Dumitrache filed a complaint with the Director alleging that GNSS contravened the *ESA* by failing to pay him vacation pay, statutory holiday pay and compensation for length of service, and for making an unauthorized deduction from his wages.

14. The parties appeared at a hearing before the Delegate on June 23, 2017. Mr. Dumitrache appeared with a support person.

15. Kim Holmes, the Human Resource Manager for GNSS, testified that on December 19, 2016, GNSS's Headmaster informed Mr. Dumitrache that his employment was being terminated without cause. GNSS gave Mr. Dumitrache a termination letter that offered him his statutory entitlement of three weeks compensation for length of service on termination, as well as the payment of an additional amount of $7,000, which GNSS indicated represented a gratuitous payment of severance contingent upon signing an "Acknowledgement and Release" by January 3, 2017. The intent of the document was to release GNSS from all claims, including claims under the *ESA*. The letter of termination also indicated that any vacation taken by Mr. Dumitrache to the date of termination that exceeded his accrued entitlement would be deducted from the $7,000 payment.

16. Mr. Dumitrache was encouraged to seek independent legal advice prior to signing the release. On December 23, 2016, Mr. Dumitrache asked for an extension of time to respond to GNSS's settlement offer and Ms. Holmes agreed to extend the deadline to January 11, 2017.

17. On January 5, 2017, Mr. Dumitrache informed Ms. Holmes that he had obtained legal advice and sought to increase the settlement amount. Ms. Holmes informed Mr. Dumitrache that she would pass on his request to GNSS's Chief Financial Officer.

18. On January 9, 2017, GNSS presented Mr. Dumitrache with a Final Settlement Letter, offering Mr. Dumitrache an amount of $8,900 gross, contingent on Mr. Dumitrache signing the release. Mr. Dumitrache signed the release on January 13, 2017.

Evidence and submissions at the hearing before the delegate

19. GNSS contended that Mr. Dumitrache was bound by the settlement agreement that provided for compensation over and above the *ESA*, that Mr. Dumitrache had signed the agreement after obtaining legal advice, and that Mr. Dumitrache had been paid all his statutory entitlements.

20. Mr. Dumitrache said that although he spoke with a non-profit group about the release, he was told it was unable to provide him with any legal advice and that he should contact a lawyer. On January 5, 2017, Mr. Dumitrache attempted, without success, to speak to a legal aid lawyer. He said that he did not pursue getting legal advice after that date because he was psychologically unwell. Mr. Dumitrache denied informing Ms. Holmes that he had received legal advice, contending that he has difficulty with English. Mr. Dumitrache also denied negotiating an increased settlement amount.

21. Mr. Dumitrache further asserted that he requested that the release be amended to exclude any references to his rights under the *ESA*, and believed that the release was going to be amended to reflect that request. Although he noticed that the release had not been amended when he went to GNSS's office on January 13, 2017, he asserts that Ms. Holmes told him that if he did not sign the release he would not get the money and that he felt pressured to sign the release.

22. Mr. Dumitrache contended that the release was of no effect and that he was entitled to his full vacation entitlement. He also argued that he did not authorize GNSS to deduct his vacation days from his settlement agreement and that he was owed statutory holiday pay for July 1, 2016. Finally, Mr. Dumitrache contended that his employment was terminated during the school holidays when he was on leave, and is therefore of no force and effect as it was contrary to the *ESA*.

23. The Delegate determined that Mr. Dumitrache was entitled to 7.9 vacation days in 2016 and that he took 11 days, or 3.1 days over and above his 2016 vacation entitlement. The Delegate noted that GNSS had deducted the value of these vacation days, or $423.37, from the settlement amount.

24. The Delegate considered the purposes of the *ESA* as well as the intention behind settlement agreements. The Delegate further noted that the Tribunal has upheld lawful settlement agreements made in good faith as consistent with the purposes of the *ESA*.

25. The Delegate concluded that the parties had entered into a valid and binding settlement agreement. She noted that the agreement was both lawful and made in good faith, and determined that Mr. Dumitrache had failed to prove that he had been coerced into signing the release. She also accepted GNSS's evidence that Mr. Dumitrache had been provided with every opportunity to obtain independent legal advice.

26. The Delegate determined that GNSS's deduction of an amount representing vacation pay from the settlement amount, which both parties referred to as severance, was not a deduction from wages and therefore did not constitute a breach under section 21 of the *ESA*. The Delegate found no evidence that Mr. Dumitrache was owed vacation pay or statutory holiday pay.

27. Finally, the Delegate found that GNSS's payment of three weeks' wages to Mr. Dumitrache fulfilled the Employer's statutory obligation to pay compensation for length of service under section 63 of the *ESA*.

Argument

28. The thrust of Mr. Dumitrache's argument appears to be that GNSS acted unfairly towards him and that, although he signed the Settlement Agreement and Release, he was coerced or intimidated into doing so.

29. Mr. Dumitrache makes the following arguments:

- GNSS acted maliciously in terminating his employment during the holiday season;
- GNSS' letter of termination indicated that it had lost trust in him but that it was terminating his employment on a without cause basis and provided no further information;
- That Ms. Holmes and the GNSS Headmaster were "very aggressive" towards him;
- Although GNSS offered to provide him with a letter of reference, none was provided upon termination;
- The severance package was not the result of any negotiation, that it was grossly unfair given that it was without cause and at the end of his working career;
- That termination pay and statutory entitlements should not be the subject of a settlement agreement and are payable irrespective of any allegations of cause;
- The Delegate misconstrued or erred in her calculations of his vacation and statutory holiday pay entitlements. He believes he is entitled to an additional day of vacation pay.

30. Mr. Dumitrache also contends that the Delegate denied him the opportunity to cross-examine the Employer's representative at the hearing and failed to consider relevant evidence in making her Determination.

31. Both GNSS and the Delegate say that Mr. Dumitrache was given full opportunity to cross-examine Ms. Holmes. Ms. Holmes and the Delegate submit that, at the commencement of the hearing, the Delegate directed that all questions and comments be submitted through her, and that both parties agreed to this process. Ms. Holmes says that, at the end of the hearing after both parties had presented their cases, Mr. Dumitrache attempted to bring up issues that had already been canvassed, and that the Delegate advised

him that he was only to present information that had not already been canvassed. Ms. Holmes submitted that if Mr. Dumitrache was denied any opportunity to ask additional questions, it was because the subject had already been covered.

32. The Delegate submits that not only was Mr. Dumitrache given an opportunity to ask Ms. Holmes questions following the presentation of her evidence, he exercised that opportunity, asking her several questions particularly around the signing of the release, about various e-mail correspondence as well as his vacation entitlement. While the Delegate acknowledges that she interjected during Mr. Dumitrache's questioning of Ms. Homes, she said that she did so when his questions became statements regarding his views about his case or became overly forceful or animated, in order to ensure the process was fair, respectful and relevant. In his reply submission, Mr. Dumitrache further asserted that the Delegate was biased against him in refusing to allow him to ask questions directly, based on her working relationship with the previous delegate (who I infer was the delegate assigned to mediate the complaint).

33. Mr. Dumitrache further suggests he was intimidated by Branch personnel into withdrawing his complaint.

34. The Delegate says that a mediator contacted Mr. Dumitrache prior to the adjudication, but that the matter did not settle. In preparing her response to Mr. Dumitrache's appeal, the Delegate spoke with the mediator who informed her that Mr. Dumitrache initially expressed an intention to withdraw his complaint, but that after sending Mr. Dumitrache a "Withdrawal of Complaint" form, Mr. Dumitrache contacted the Branch to advise he no longer wished to withdraw the complaint.

ANALYSIS

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

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

36. Mr. Dumitrache has grounded his appeal on all three grounds.

37. Acknowledging that most appellants do not have any formal legal training and, in essence, act as their own counsel, the Tribunal has taken a liberal view of the grounds of appeal. As the Tribunal held in *Triple S Transmission*, (BC EST # D141/03), while

> most lawyers generally understand the fundamental principles underlying the "rules of natural justice" or what sort of error amounts to an "error of law", these latter terms are often an opaque mystery to someone who is untrained in the law. In my view, the Tribunal must not mechanically adjudicate an appeal based solely on the particular "box" that an appellant has--often without a full, or even any, understanding--simply checked off.
>
> The purposes of the *Act* remain untouched, including the establishment of fair and efficient dispute resolution procedures and, more generally, to ensure that all parties receive "fair treatment" [see

> subsections 2(b) and (d)]. When adjudicating an appeal, I believe it is appropriate for the adjudicator to first inquire into the nature of the challenge to the determination (or the process that led to it being issued) and then determine whether that challenge, *prima facie,* invokes one of the statutory grounds. In making that assessment, I also believe that adjudicators should take a large and liberal view of the appellant's explanation as to why the determination ought to be varied or cancelled or why the matter should be returned to the Director.

38. I have considered each of the grounds of appeal and whether there is any basis for the Tribunal to interfere with the decision and have concluded that there is not.

Failure to observe the principles of natural justice

39. Natural justice is a procedural right which includes the right to know the case being made, the right to respond and the right to be heard by an unbiased decision maker.

40. Although Mr. Dumitrache suggests he was intimidated into withdrawing his complaint, the information submitted indicates that he was provided with a complaint withdrawal form as part of the mediation process. I do not find this to be either unusual or an intimidation tactic. In any event, it is clear from Mr. Dumitrache's submission that he was not intimidated. While it may be that Mr. Dumitrache felt pressured by the conduct of one of the delegates (who was acting as a mediator in this matter), that delegate did not conduct the hearing.

41. Allegations of bias cannot be made speculatively. The onus of demonstrating bias or reasonable apprehension of bias lies with the person who is alleging its existence. Furthermore, a "real likelihood" or probability of bias or reasonable apprehension of bias must be demonstrated. Mere suspicions, or impressions, are not enough.

42. The test for determining bias, either actual bias or a reasonable apprehension of bias, is an objective one and the evidence presented should allow for objective findings of fact. Furthermore,

> …because allegations of bias are serious allegations, they should not be found except on the clearest of evidence: (*A.B. Lumber Co. Ltd. and North Coast Forest Products Ltd. v. B. C. Labour Relations Board and another*, B.C.J. No. 1858, August 7, 1998, Vancouver Registry No. A980541.)

43. In *R. v. S. (R.D.), [1997] 3 S.C.R. 484*, the Supreme Court added the following to the concern expressed above:

> Regardless of the precise words used to describe the test (of bias or apprehension of bias) the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed, an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice.

44. Allegations of bias against a delegate must be considered in light of the fundamental nature of the statutory process within which a delegate functions. (see *Milan Holdings*, BC EST # D559/97; Reconsideration Refused, BC EST # RD313/98)

45. The thrust of Mr. Dumitrache's argument is that because the delegates work together, there was bias. I find no evidence to support Mr. Dumitrache's allegation that the decision maker was biased or unfair to him. The information indicates that the Delegate and the mediator work out of different offices that are not geographically proximate to each other. The fact that the mediator and decision maker both work at the Employment Standards Branch does not, in and of itself, constitute bias. Even if they were not geographically separate, I would not find bias without more evidence in support of the allegations.

46. Mr. Dumitrache also argued that he was denied the opportunity to cross-examine the Employer's witnesses. This allegation is denied by both the representative of GNSS as well as the Delegate. The Delegate submits that while she interrupted Mr. Dumitrache's questioning when it was becoming too repetitive or aggressive, he was given wide latitude to ask questions.

47. There is a presumption of regularity in the delegate's conduct of a hearing. The Branch website sets out the procedures the Branch follows at all hearings, and parties are provided with information on what to expect at hearings. Parties are advised:

> *The Adjudicator will ask the complainant and the employer to present evidence or call any witnesses. Both parties will be given an opportunity to ask questions of each other's witnesses, and respond to evidence or statements made by the other party.*
>
> *The Adjudicator may also ask questions of the complainant, the employer and any witnesses.*

48. The Tribunal also notes that, in general, unrepresented parties may be instructed by a delegate to present only relevant evidence. This caution may be more frequent as the hearing continues. That does not, however, support an allegation of an apprehension of bias or unfairness.

49. In order to displace this presumption of regularity, Mr. Dumitrache must provide some evidence that the Delegate denied him an opportunity to ask relevant questions of Ms. Holmes. He has not done so.

50. In the absence of any evidence that the Delegate denied Mr. Dumitrache a fair hearing, I dismiss the appeal on this ground.

Error of law

51. The Tribunal has adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam),* [1998] B.C.J. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

52. Mr. Dumitrache alleges the Delegate erred in calculating his vacation entitlement and erred in giving effect to the settlement agreement.

53. However, Mr. Dumitrache's appeal submission does not set out any basis for his argument that the Delegate erred in law. Rather, he appears to be repeating arguments he made before the Delegate. Those arguments were considered and rejected by the Delegate.

54. I find no basis that the Delegate erred in law in calculating Mr. Dumitrache's vacation entitlement.

55. The purposes of the *ESA* are to encourage open communication between employers and employees and the provision of fair and efficient dispute resolution processes. The Tribunal held that:

> … The settlement of unpaid wage claims is an integral aspect of the *Act* … [and] the entire scheme of the *Act* is undermined if *bona fide* settlements can be overridden simply because one party - with the benefit of hindsight - subsequently concludes that they made a bad (or at least not an optimal) bargain. If *bona fide* settlement agreements can be reopened even in the absence of misrepresentation, fraud, undue influence, duress or noncompliance with the agreement, then one has to wonder why any party would want to settle any dispute. (*Alnor Services Ltd.* BC EST # D199/99)

56. I find no basis to conclude that the Delegate erred in law in giving effect to the settlement agreement. The Delegate noted that Mr. Dumitrache not only had the opportunity to seek legal advice, he indicated to the Employer that he had done so. The Delegate also noted that Mr. Dumitrache sought an increase to the settlement amount, which suggested that he was not intimidated or coerced into signing it. Finally, in the settlement agreement itself, Mr. Dumitrache acknowledged that he "had the opportunity to seek independent tax, financial and legal advice" with respect to the Release and that he was signing the Release "voluntarily and in full and final settlement of his affairs with GNSS."

57. There is no evidence of misrepresentation, fraud, undue influence or that the settlement agreement was not *bona fide*. Rather, I conclude that this is simply a situation where Mr. Dumitrache had second thoughts about the settlement.

58. The fact that Mr. Dumitrache did not, in fact, obtain independent legal advice does not amount to an unfair settlement. The Delegate considered whether the payments made in the settlement agreement complied with the minimum standards of the *ESA* and concluded they did. I find no basis to find that she erred in law in this conclusion. I understand from Mr. Dumitrache's submissions that he feels that he was treated unfairly, first by GNSS, then by the Delegate. However, an objective analysis of all of the facts does not support his view.

New Evidence

59. In *Re Merilus Technologies* (BC EST # D171/03) the Tribunal established the following four-part test for admitting new evidence on appeal:

(a) 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;

(b) the evidence must be relevant to a material issue arising from the complaint;

(c) the evidence must be credible in the sense that it is reasonably capable of belief; and

(d) 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.

60. It is unclear from Mr. Dumitrache's submissions what "new evidence" he seeks to submit. I have reviewed the appeal submission and the documents attached and I find there is nothing attached to the appeal submission that would meet the test for new evidence.

61. I find no basis to interfere with the Determination.

ORDER

62. Pursuant to section 115 of the *ESA*, finding no breach of the *ESA*, I Order that the Determination dated July 18, 2017, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal