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IN THE MATTER OF THE *HUMAN RIGHTS CODE,*
RSBC 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before
the British Columbia Human Rights Tribunal

BETWEEN:

Employee

COMPLAINANT

AND:

Company, President, and Supervisor

RESPONDENTS

REASONS FOR DECISION
APPLICATION TO ADMIT SETTLEMENT COMMUNICATIONS AS EVIDENCE

Tribunal Member:	Jessica Derynck
Counsel for the Complainant:	Aleem Bharmal, KC
On his own behalf and agent for Company:	President
Dates of hearing:	January 5 and 6, 2023
Location of hearing:	Video Conference

I INTRODUCTION

[1] A hearing of Employee's complaint of discrimination against Company, President, and Supervisor, and of Employee's complaint of retaliation against Company, commenced on May 30, 2022. Employee sought to enter certain documents into evidence that Employee asserted were relevant to an application for costs against Company and President:

[2] A letter from President to Employee's former representative, Daniel Sze, dated November 15, 2019 [**November 15 Letter**]; and

[3] A letter from Mr. Sze to President dated November 25, 2019 [**November 25 Response**].

[4] The November 15 Letter is labelled "Without Prejudice". The November 25 Response is labelled "Confidential & Without Prejudice". Employee raised the issue of the letters at the start of the hearing and took the position that if settlement privilege would ordinarily apply to the letters, they ought to be admissible under an exception.

[5] When Employee produced the letters for the purposes of his application to admit them as evidence in the hearing, President asserted that he did not write or send the November 15 Letter. President acknowledged receipt of the November 25 Response, but said he understood it to be a response to a letter that he wrote and sent directly to Employee on November 9, 2019 [**November 9 Letter**]. Employee said he did not receive the November 9 Letter from President and had never seen it before.

[6] To decide Employee's application to admit the November 15 and November 25 Letters it was necessary to hear evidence and make findings of fact about which letters the parties sent and received. Employee, Mr. Sze, and President all testified.

[7] In his written submissions on this application, Employee asserted that the November 15 Letter, November 29 Response, and November 9 Letter are not subject to settlement privilege, and are admissible along with emails that witnesses testified were sent between the parties for the purposes of an application against Company and President for costs.

[8] In response, President maintained that he did not send the November 15 Letter and did send the November 9 Letter, and that none of the letters are admissible.

[9] The outcome of this application depends on my credibility assessment of Employee's, President's, and Mr. Sze's evidence. For the following reasons, I accept Employee's and Mr. Sze's evidence. I find that President's evidence is not credible, and I do not accept it. I find that President wrote and sent the November 15 Letter in November 2019, and did not send the November 9 Letter at that time.

[10] I find that no settlement privilege attaches to any of the documents before me on this application. The letters and emails are admissible. Employee may rely on them for the purposes of an application for costs against Company and President.

II BACKGROUND

A. Application process

[11] Employee filed his complaint of discrimination on November 29, 2018. He filed his complaint of retaliation against Company on March 15, 2019. The Tribunal joined the complaints on September 29, 2020, in a decision denying the Company's application to dismiss the retaliation complaint: *Employee v. Company*, 2020 BCHRT 178 [**Retaliation ATD Decision**].

[12] When President responded to the discrimination complaint on January 14, 2019, he responded on Supervisor's behalf as well as Company's and his own. President also made an application to dismiss the discrimination complaint against all three respondents on October 4, 2019. At some point before the hearing, Supervisor ceased working for the Company, and President stopped representing him. Supervisor is self-represented at the hearing.

[13] At the outset of the hearing Employee's counsel gave notice that Employee sought to introduce evidence of improper conduct by President in support of an application for costs. Employee's counsel advised that Employee sought to introduce communications between President and Mr. Sze that were marked as "without prejudice". He explained that he did not

include these communications in Employee's documents for use at the hearing so President and Company would have an opportunity to object to their admissibility.

[14] The hearing continued on dates in June, July and August 2022. Additional dates were scheduled for January 3 to 6, 2023. Following a case conference on December 2, 2022, in a letter dated December 5, 2022, I addressed the issue of the communications Employee sought to introduce, and I set out directions to the parties:

> **[Employee's] application to introduce communications from settlement discussions as evidence**
>
> Settlement privilege applies to settlement discussions between parties, so these discussions, as a general rule, are not admissible as evidence. This is so parties may communicate freely in settlement discussions without concern that what they say may be used against them in a hearing if their case does not settle.
>
> There are some exceptions to settlement privilege that allow settlement communications to be entered as evidence. The underlying question for the Tribunal when a party applies to enter settlement communications as evidence is whether the party has shown that a competing public interest outweighs the public interest in encouraging settlement: *Bradley v. Fire-Trol Company*, 2005 BCHRT 212 at para. 35.
>
> [Employee] seeks to introduce written communications from settlement discussions as evidence in support of an application for costs. I must decide whether to admit these communications as evidence under an exception to settlement privilege.
>
> This application involves [President] only – not [Supervisor]. If I allow the application and [Employee] enters the evidence, it will need to be put to [President] and he will need an opportunity to respond to it.
>
> We will address this as follows:
>
> 1. Mr. Bharmal will send [President] a copy of the communications that [Employee] seeks to introduce.
>
>   Mr. Bharmal should send [President] an unredacted copy of the communications, as well as a redacted copy that he will submit to the Tribunal. The redacted copy should only show parts of the communications that [Employee] says fall within an exception to settlement privilege.

Mr. Bharmal will also explain to [President] why he says the communications fall within an exception to settlement privilege, send [President] copies of any cases he relies on in support of his client's position.

2. [President] will respond to Mr. Bharmal to say whether or not he agrees that the communications fall under an exception to settlement privilege and should be entered as evidence.

    a. If [President] agrees to enter the communications as evidence, Mr. Bharmal may send them to the Tribunal before the January 3, 2023 hearing date. Mr. Bharmal will only send redacted communications that [President] agrees should be entered as evidence.

    b. If [President] objects to the communications being entered as evidence, Mr. Bharmal will send the Tribunal a copy of the redacted communications, his explanation of why he says they fall within an exception to settlement privilege, and any cases he relies on in support of his client's position, by January 3, 2023.

    In this case, [President] will have an opportunity at the hearing on January 4, 2023, to make submissions in response to [Employee's] application, and Mr. Bharmal may make a brief reply. I will then decide whether or not to allow [Employee] to enter the communications under an exception to settlement privilege.

[15] Directly following the case conference on December 2, 2022, Employee's counsel emailed President copies of the November 15 Letter and the November 25 Response. President did not respond to Employee's counsel with his position. President says he did not see Employee's counsel's email when it was sent, but acknowledges that he received it.

[16] On January 3, 2023, Employee's counsel sent the Tribunal and President copies of the November 15 Letter and November 25 Response. Employee's counsel did not make any redactions. Employee's position was that both letters were admissible in their entirety and that the November 15 Letter was evidence of improper conduct.

[17] On the morning of January 4, 2023, President sent the Tribunal and Employee's counsel a submission objecting to the admissibility of the November 15 Letter and the November 25 Response. President said that settlement privilege attached to the letters and no exception applied, but in any case, he did not send the November 15 Letter. He attached a copy of the

November 9 Letter, which he said he sent directly to Employee. In the body of his email submission he pasted what appears to be a screenshot of an email from him to Employee's personal email address with the subject line "WITHOUT PREJUDICE", sent on November 9, 2019 at 10:46 p.m. [**November 9 Email**].

[18] At the hearing of the application on January 4, 2023, Employee denied receiving the November 9 Letter and maintained that he and Mr. Sze received the November 15 Letter from President. In response, President said he did not send the November 15 Letter, and that Employee had not proven that he had. He did not dispute that he received the November 25 Response, but claimed that it was covered by settlement privilege, as was the November 9 Letter. He referred me to his email sent that morning, in which he submitted that all three letters are covered by settlement privilege, and no exception applies.

[19] I explained to the parties that to decide Employee's application, I first needed to hear evidence and make findings of fact about whether or not the President sent the November 15 Letter and the November 9 Letter. Employee's counsel advised that Employee would call evidence from Mr. Sze and that he was available the following day. Accordingly, I advised the parties that I would hear evidence related to the sending and receiving of the letters on January 5, 2023.

[20] At the hearing on January 5, 2023, President raised an objection to the letters being entered as evidence for the purposes of the application. I denied this objection. I explain my reasons for this in the Decision section below.

[21] Employee and Mr. Sze testified on January 5, 2023. President commenced testifying on January 5, 2023. I then adjourned the hearing of the application to provide him with an opportunity to look for additional documentary evidence.

[22] On January 6, 2023, President finished giving his evidence on the application. He also briefly called Supervisor to testify. I then allowed Employee's counsel to briefly recall Employee to testify in response to evidence from President that President did not put to the Employee in cross examination.

[23] On January 18, 2023, the Tribunal set a schedule for Employee and President to file written submissions on what findings should be made about whether or not the letters at issue were sent, whether the correspondence Employee seeks to introduce is admissible, and any submissions President wished to make about procedural fairness. Both parties missed the Tribunal's deadline for their submissions.

[24] I held a case conference with the parties on February 27, 2023, to set additional hearing dates. President did not attend the case conference. The case conference proceeded after I was satisfied that the Tribunal gave President notice of the case conference and he had an opportunity to attend. At the case conference I advised that I would set a new schedule for submissions on this application to give Employee and President an opportunity to make submissions. In setting the new schedule, I considered that President had previously advised the Tribunal that he was available for matters related to the hearing in March and April. Employee's deadline for submissions was March 24, 2023, and President's deadline was April 14, 2013. Employee sought and received a brief extension, so Employee's deadline was extended to March 31, 2023, and President's deadline for response was extended to April 21, 2023.

[25] Employee filed his submissions on March 31, 2023. the application. President did not file submissions by his deadline.

[26] On May 26, 2023, President advised the Tribunal and parties by email that he had sent emails to the Tribunal that the Tribunal did not receive from him. At a hearing day on May 29, 2023, President advised that he did not receive numerous emails that the Tribunal sent to his email address of record, and that he did not receive Employee's submissions on this application.

[27] I did not hear sworn evidence from President about his issue with email communications with the Tribunal and Employee's counsel. I did not make any findings regarding his claim that he did not receive numerous emails from the Tribunal or Employee's counsel between February and May 2023. To ensure that President had an opportunity to make

submissions on this application I directed Employee's counsel to re-send Employee's submission, and gave President a new deadline to respond. President met this deadline and filed his response submission on June 9, 2023. Employee's counsel filed Employee's reply submission on June 16, 2023.

B. Overview of November 2019 correspondence

[28] In November 2019 Employee was represented by Mr. Sze who, at the time, was a law student at the Law Students' Legal Advice Program [**LSLAP**].

[29] President's evidence is that he sent the November 9 Letter directly to Employee on November 9, 2019. At the hearing he introduced his screenshot depicting an email from his email address to Employee's on November 9, 2019, at 10:46 p.m., with the subject line "WITHOUT PREJUDICE", which depicts a PDF file attached with the file name "WITHOUT PREJUDICE.pdf". He also introduced a PDF copy of the November 9 Letter. President did not introduce an electronic email message file of the November 9 Email. He says he no longer has emails from 2019 because the Company has since changed service providers. He says he captured a screenshot of the email because he knew that the email server and provider were going to change, and he was thinking in advance.

[30] President says he sent the November 9 Letter following a sequence of events that started with an application Employee filed on June 25, 2019, for anonymization in the discrimination complaint. President says he received anonymous text messages on August 28, 2019, which he perceived as threatening messages related to the complaint [**Text Messages**]. He introduced a screenshot of two text messages dated August 28, 2019, which say "You can't hide" and "Soon everyone will know".

[31] I heard evidence on this application solely for the purpose of determining which letter or letters President sent in November 2019. I make no findings about whether President received the Text Messages or who may have sent them to President if he did receive them. I only refer to the Text Messages because President says they explain why he sent the November 9 Letter.

[32] President says he perceived the Text Messages as being about Employee's application for anonymization in the discrimination complaint, which was outstanding in August 2019. President says the Text Messages concerned him and he wanted to conclude the matter and move on, so he wrote the November 9 Letter. He says he knew that Mr. Sze was Employee's representative, but he sent the November 9 Letter to Employee directly because he had concerns about Mr. Sze and did not trust him.

[33] Employee testified that he never received the November 9 Letter. Mr. Sze testified that he never saw the November 9 Letter before the hearing of the application.

[34] Mr. Sze's evidence is that he emailed President on November 13, 2019, to ask for his position on an application to completely anonymize Employee in the retaliation complaint. Mr. Sze says President replied to this email on November 15, 2019, attaching the November 15 Letter.

[35] Mr. Sze identified an electronic email message file of his November 13, 2019, email to President. President says he may have received this email, but he no longer has his emails from 2019, so he cannot confirm this.

[36] Mr. Sze's evidence is that President replied to his November 13, 2019, email on November 15, 2019, attaching the November 15 Letter. Mr. Sze identified an electronic email message file of an email dated November 15, 2019, at 1:23 p.m., from President's email address to Mr. Sze's and Employee's email addresses, with a PDF copy of the November 15 Letter attached [**November 15 Email**]. The text of the November 15 Email says, "Please find attached Respondent's response to your proposal." President's email signature is below the text. Mr. Sze's November 13, 2019, email is below President's signature.

[37] Employee's evidence is that he received the November 15 Email and Letter directly from President, and that Mr. Sze also sent him a copy for his records.

[38] President's evidence is that he did not send the November 15 Email. He suggested that someone may have hacked his email to send it. I say more about his evidence on this point below.

[39] The November 15 Letter is four pages long. It includes reference to the Text Messages, reference to an email from the Tribunal regarding a conference call, and many details about the discrimination complaint. It also contains a reference to Employee's outstanding request for full anonymization in the discrimination complaint.

[40] President briefly called Supervisor as a witness to ask whether he was familiar with the November 15 Letter. Supervisor's evidence is that he never saw the November 15 Letter before it was shown to him at the hearing of the application.

[41] Mr. Sze's evidence is that he replied to the November 15 Email on November 18, 2019. He identified an electronic email message file of an email sent from his LSLAP email address to President's email address on November 18, 2019, at 1:48 p.m. Mr. Sze says he sent this email because it appeared to him, based on the November 15 Letter, that President misunderstood his November 13, 2019, email. Mr. Sze says the November 15 Letter appeared to be about the discrimination complaint, and he tried to reorient President back to Employee's application for anonymization in the retaliation complaint. In his email Mr. Sze said that the application was about the retaliation complaint, and again asked President for his position. He also asked President to direct all communications to him and not to Employee.

[42] President says he received the November 18, 2019, email, but at the time, he did not see that it appeared to be a reply to the November 15 Email because the email service he was using at the time, Thunderbird, did not display email chains.

[43] There is no evidence that President responded to the November 18 email.

[44] Mr. Sze says he sent President the November 25 Letter in reply to the November 15 Letter. President does not dispute that he received the November 25 Letter. There is no evidence that President responded to the November 25 Letter.

III DECISION

A. President's objection to introduction of documents for the purposes of this application

[45] President objected to Employee introducing the letters as evidence for the purposes of the application. I denied President's objection at the hearing.

[46] President submitted that his objection was based on procedural fairness. He said that it was not possible to address the issue of which letter Mr. Sze received without "going into" the contents of the letters, and once the letters were entered for the purposes of the application, this would bypass his objection to their admissibility in his January 4, 2023, submission. He submitted that admissibility should be dealt with first.

[47] In response, Employee submitted that the issue of the authenticity of the letters goes directly to their admissibility. Employee's counsel said he intended to ask Mr. Sze questions about which letter or letters he received, which was necessary in light of the President's position that he did not send the November 15 Letter.

[48] I considered that President is self-represented and that he must have fair access and equal treatment in the Tribunal's process: *Ferri v. Society of Saint Vincent de Paul and another (No. 2)*, 2017 BCHRT 263 at para. 20. President advised at the hearing that he sought legal advice to respond to Employee's application. I reminded President that his communications with legal counsel are subject to solicitor-client privilege, and that he should not divulge any communications related to seeking or obtaining legal advice. Regardless of whether he received legal advice he is self-represented at the Tribunal, including for the purposes of this application. I do not give President's submissions any less weight because they did not come from legal counsel, and I ensured that I gave him an opportunity to introduce evidence and make submissions in response to Employee's application, including about his objection to my review of the letters for the purposes of deciding the application.

[49] President submitted that I would "bypass" his submission of January 4, 2023, if the letters were introduced as evidence on the application. In this submission President said that the letters should not be admitted as evidence because: (1) he denies that he sent the November 15 Letter; (2) if Employee had an issue with the November 9 Letter that he did send, Employee should have raised that with him at the time; and (3) both letters are protected by settlement privilege and there are no compelling reasons to invoke an exception.

[50] In denying President's objection, I explained that I needed to hear evidence so I could determine whether President sent the November 15 Letter in order to decide Employee's application to admit it as evidence. I explained that if I were to find that the November 15 Letter and November 25 Letter were exchanged, I would then decide whether the letters are admissible for the purposes of hearing Employee's application for costs. I explained that I needed to see the letters to decide whether they are admissible. This does not bypass President's January 2, 2023, submission, because I considered this submission when deciding whether the letters are admissible.

[51] I explained that any documents the parties wanted to enter as evidence on the application would be marked as exhibits for the purposes of deciding the application only, marked as A1, A2, and so on. I explained that the documents would not be admitted as evidence for the purposes of the hearing unless I were to decide that they are admissible for the purposes of Employee's costs application.

[52] President also objected to the introduction of the letters for the purposes of the application because I directed Employee's counsel to send only redacted copies of the documents to the Tribunal, and he sent the complete documents. President submitted that Employee's counsel failed to follow my direction.

[53] I explained that my direction to Employee's counsel was to redact any parts of the communications that Employee said were not subject to an exception to settlement privilege. Employee took the position that each letter was admissible in its entirety and explained this when submitting the letters. This was not a failure to follow my direction.

[54] Finally, President submitted that admitting the communications to decide the application raised an issue of bias.

[55] I explained that it is my job to decide whether all, some, or no part of the communications should be admitted as evidence. I explained that I would consider all of President's submissions on why the letters should not be admitted. I explained that part of an adjudicator's job is to decide whether proposed evidence is admissible, and that if I decide that the documents are not admissible, I will not consider them.

B. Estoppel

[56] President raised an issue of estoppel in his January 4, 2023, submission. His submission on estoppel also relates to fairness. President submitted that Employee did not raise any issue of potential improper conduct in November 2019 when the communications at issue arose, so he is estopped from raising the issue now. President further submits that the Retaliation ATD Decision precludes the Tribunal's consideration of this application.

[57] President did not elaborate on his submission that Employee is estopped from seeking to introduce the letters. In the absence of any submissions on the principles of estoppel and how they apply to these circumstances, I find that it would not be appropriate to apply them.

[58] I consider President's estoppel submission to be essentially a submission about fairness. The gist of President's argument is if Employee thought that a communication he sent in November 2019 constituted improper conduct, but Employee did not raise this as an issue at that time, it is not fair to raise it now. I disagree.

[59] I find that Employee is not precluded from making this application to introduce the November 15 and November 25 Letters into evidence based on the timing. I appreciate that the Tribunal's process is long and that the passage of time may make it more difficult for a party, especially a self-represented party, to respond to this application to introduce an email into evidence that President allegedly sent years earlier. However, I find that addressing this issue at this time does not create unfairness to President so significant that Employee should be

precluded from making his application. Employee has a right as part of the Tribunal's process to apply for costs for improper conduct, and to apply to introduce the letters as evidence of alleged improper conduct. It would not be fair to Employee to prevent him from making his application. Instead I consider the timing of the application and the passage of time as relevant factors when I assess the evidence.

[60] I find that the Retaliation ATD Decision does not preclude Employee from seeking to introduce the letters in support of an application for costs.

[61] In his submission on the application to dismiss the retaliation complaint, Employee alleged that President threatened him to try to push him into withdrawing his complaints. The Tribunal did not consider this allegation in the ATD process. President now submits that the Retaliation ATD Decision precludes Employee from seeking to introduce the letters and apply for costs based on President's alleged communication.

[62] In the Retaliation ATD Decision, at para. 37, the Tribunal said that it would not consider submissions Employee made in response to the ATD alleging that the respondents to the complaint had threatened him:

> In addition to the above, I note that in his response to this application, the Employee raises for the first time an allegation that the Respondents threatened to file a police report against the Employee for sending threatening texts, to sue for defamation, and to file a claim for bad faith unless the Employee withdrew his existing human rights complaints. Not only does this allegation not form a part of the retaliation complaint, but no evidence has been submitted to support the allegation. I have therefore not considered it.

[63] Employee made it clear at the outset of the hearing that he seeks to enter the letters as evidence in support of an application for costs, not to make additional allegations of retaliation or discrimination. The Retaliation ATD Decision did not address the issue of whether Employee may make an application for costs and may introduce evidence of President's alleged communications for that purpose.

[64] I now turn to my assessment of the parties' evidence and my findings about letters sent and received in November 2019.

C. Findings related to November 2019 Letters

[65] I find that President sent the November 15 Email attaching the November 15 Letter to Mr. Sze and Employee. I find that President did not send the November 9 Letter to Employee in November 2019. Employee submits that President fabricated the November 9 Letter in an attempt to avoid an order for costs based on the November 15 Letter. I find that President created the November 9 Letter in response to this application.

[66] My findings are based on my assessment of the witnesses' evidence and findings of credibility. Credibility "involves an assessment of the trustworthiness of a witness' testimony based on the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides": *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, leave to appeal refused, [2012] S.C.C.A. No. 392 (QL) at para. 186. In some cases, a witness' evidence may not be trustworthy because they have "made a conscious decision not to tell the truth": *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.,* 2019 BCSC 739 at para. 89. In other cases, a witness may testify honestly but their evidence may not be reliable because of their inability to accurately observe, recall, or recount the event: *R. v. H.C.,* 2009 ONCA 56 at para. 42; *Youyi* at paras. 89-90. In that case, the decision maker may not safely rely on their testimony where it conflicts with others' who are better positioned to give accurate testimony.

[67] Mr. Sze's evidence was sincere and reliable, and I accept it. He identified electronic email files and used them to clearly explain his correspondence back and forth with President in November 2019. Based on Mr. Sze's evidence, I find that Mr. Sze received the November 15 Email with the November 15 Letter attached, on November 15, 2019, from the President.

[68] I also accept Employee's evidence that he received the November 15 Letter from President and from Mr. Sze in November 2019, and that he did not receive the November 9 Email and Letter.

[69] While Employee was testifying about correspondence exchanged more than three years earlier, it was clear that the issues related to these communications are important to him. His evidence is that he regularly checked his spam folder in November 2019 because he knew that he might receive emails about his matters at the Tribunal. He testified that if he received an email and letter directly from President that was not copied to Mr. Sze, it would have stood out to him, he would not have deleted it, and he would have sent it to the Tribunal right away. President asked Employee in cross examination whether it was possible that he received the November 9 Email and Letter and deleted them by mistake. Employee maintained that he did not receive the November 9 Email and delete it. He said he uses Gmail, which asks him to confirm whether he wants to delete a message before a message is deleted, and he would have noticed an email from his former boss about his human rights complaints before deleting it. He also said that his spam emails are automatically deleted after 30 days, but he was checking his spam folder much more frequently than that. I find his evidence to be sincere and reliable.

[70] I accept Supervisor's evidence that he had never seen the November 15 Letter before President showed it to him for the purposes of giving evidence at the hearing of this application. Supervisor's evidence was sincere. No party submitted that his evidence lacked credibility, or that he had anything to do with the sending of the November 15 Letter at the time. I have no reason to treat his evidence with any level of caution.

[71] I do not accept President's evidence that he did not send the November 15 Email and Letter. I find that he did send them to Mr. Sze and Employee, and denied doing so in response to Employee's application in a deliberate effort to mislead the Tribunal.

[72] President did not question Mr. Sze's evidence that he received the November 15 Email and Letter. President's evidence is that alternative explanations are possible for Mr. Sze receiving them from President's email address even if President did not send them.

[73] President was still representing the Supervisor in response to the discrimination complaint in November 2019. Typed at the end of the November 15 Letter is "Respondents: Video Game Company, [AB], [CD]4", with "AB" representing President's initials, and "CD"

representing Supervisor's initials. President says he does not know why the number 4 is there, and that he has never signed a letter this way, but would always end a letter with his actual signature. He says he would not have sent this form of letter to Employee without his signature. He also says he would not have used the tone of the November 15 Letter because he does not think it would have been productive. He says it would have taken a tremendous amount of time to write the November 15 Letter, and he would not have wasted his time this way.

[74] President says he has no explanation for how Mr. Sze and Employee received the November 15 Email and Letter, but theorizes that his email may have been hacked, so someone else may have sent the email and letter to appear as if he had sent them. He introduced an email that he referred to as a "spoof email", dated December 14, 2022, into evidence. This email appears to be sent from President's email address to his email address. It says a professional hacker has hacked President's operating system and threatens to publicize his information if he does not transfer the Bitcoin equivalent of $1350 USD.

[75] President introduced a similar "spoof" email dated October 20, 2019, into evidence. This email also appears to be to and from President's email address and says that a hacker will publicize President's information if he does not transfer $1450 of USD bitcoin.

[76] I find that President made a conscious decision not to tell the truth about sending the November 15 Email and Letter. His evidence is simply not plausible in the context of evidence that I accept. Someone sent the November 15 Email and Letter from President's email address. The November 15 Letter is four pages long and contains detailed information about Employee's complaints, and about the Text Messages that President says he received. Only someone familiar with Employee's complaints, the Tribunal's process, and the Text Messages issue could have written the letter.

[77] President does not suggest that Supervisor wrote and sent the letter, and I accept Supervisor's evidence that he was not familiar with it.

[78] President does not directly allege that Employee wrote the November 15 Letter, then hacked President's email to make it appear as though President sent the letter. However,

President testified that a software engineer with knowledge of this case could have done this. Employee is a software engineer. President submits that he has refrained from pointing fingers at Employee to accuse him of sending the letter. However, he did not submit any evidence or explanation that any other person had enough knowledge of the complaints and Text Messages to have written the November 15 Letter. I find that President is insinuating that Employee wrote the November 15 Letter and sent it to himself and Mr. Sze from President's email address, without directly accusing Employee of having done this.

[79] Employee's evidence is that he never hacked President's email and would not know how to do so. I accept this evidence. I also find it improbable that any other employee would have accessed detailed information about Employee's complaints, written the November 15 Letter, and hacked President's email to send the letter.

[80] President testified that he never saw the November 15 Letter until January 3, 2023, and this is why he did not dispute that he wrote the letter until that time. I do not accept this evidence. I find that it is improbable in the context of the communications between President and Mr. Sze.

[81] The November 9 Letter contains a settlement offer of a payment in exchange for Employee withdrawing his complaints and releasing any potential future claims. In this letter, President suggests that Employee may have sent the Text Messages, and that it would benefit all parties to resolve the complaints. The language and tone of this letter is not particularly inflammatory or threatening.

[82] The November 15 Letter, on the other hand, does not contain a settlement offer. It states that it is obvious that Employee sent the Text Messages, and that President could easily obtain a subpoena in court for Employee to submit his credit card details and electronic devices, and that a police report against Employee is warranted. This letter accuses Employee of making personal threats against President through the Text Messages, and says that the Respondents will file a police report against Employee if he does not drop his complaints, will file a claim for defamation in court, and will claim at the Tribunal that Employee is acting in bad

faith. The language and tone of this letter is inflammatory and threatening in comparison to the November 9 Letter.

[83] Mr. Sze responded to President with the November 25 Letter. Mr. Sze said he was responding to President's letter of November 15, 2019, and summarized the November 15 Letter:

> You demanded us to withdraw all existing human rights complaints and promised not to file any future claims regarding this issue, threatening to file a police report regarding alleged threatening texts sent by our client. You also threatened to file a claim for defamation at the BC Supreme Court, a human rights complaint for bad faith, and a subpoena for client's credit card information.

[84] President did not respond to the November 25 Letter. President's evidence is that he noticed the reference to a letter of November 15, and thought this was odd, but he did not respond to raise this issue with Mr. Sze, or to ask Mr. Sze about his references to threats, because he was busy with Company and his family and he did not have a lot of time.

[85] It is improbable that President, on learning that Employee's representative claimed to have a letter from him dated November 15, 2019, containing threats that he did not write, would simply let this go without asking to see the letter, saying that he did not write a letter on November 15, or saying that he did not write a letter containing those threats.

[86] When Employee raised his concern about the letter in his submissions on the application to dismiss the retaliation complaint, President again did not ask questions about why Employee was accusing him of making threats.

[87] I find that President did not respond to Mr. Sze to deny writing the November 15 Letter because he wrote and sent this letter.

[88] I also find that President did not write or send the November 9 Letter in November 2019, but created this letter and the November 9 Email to make it appear as though he had. I find that President did this as an attempt to avoid acknowledging that he wrote and sent the November 15 Letter. This is a deliberate attempt to mislead the Tribunal.

[89] President introduced the November 9 Email into evidence as a screenshot pasted into an email he sent to the Tribunal on January 4, 2023. He testified that he did not have an electronic email file to produce because he switched email providers and no longer had access to emails from 2019. He said he took a screenshot of this email because he had made an offer, perhaps at some point the parties would discuss other offers, and he was thinking in advance. However, there is no offer shown in the screenshot of the November 9 Email; the offer is only set out in the November 9 Letter. President did not explain why he would save a screenshot of the email sending the letter, but would not have saved the email file itself, although he says he has five terabytes of data saved from years ago. He did not produce an electronic file to show when the screenshot was first created. He did not produce an electronic file to show when the November 9 Letter was first created.

[90] I considered that President had to respond to Employee's application more than three years after November 2019 when the communications at issue were sent. I considered that the passage of time may have impacted President's ability to respond to the application with documentary evidence. I also considered that he is self-represented and that without the benefit of legal representation, it may be difficult for a self-represented respondent to know which documents to save over time, and in what format.

[91] I find that none of this explains why President did not produce any electronic files to show when the November 9 Letter or the screenshot of the November 9 Email were created.

[92] During President's direct evidence, Employee's counsel asked President if he could produce an electronic email file for the November 9 Email. President said that he did not have it because he sent the email four years ago. Employee's counsel also addressed this issue in cross examination. President said he kept screen captures related to the complaints that he thought were important because he knew he was switching email providers, and he kept the screen capture of the November 9 Email in case the parties were to discuss other settlement offers in the future. I do not accept President's evidence. If President had written and sent the November 9 Letter in November 2019, I find it is improbable that he would have saved a screenshot of the November 9 Email and produced it by pasting it into a new email, with no

evidence of an electronic file to show when he saved the screenshot itself, or the letter. In the context of all of the evidence on this application, the most probable explanation is that President created the November 9 Letter and the screenshot of the November 9 Email to respond to Employee's application and support his denial that he wrote the November 15 Letter.

[93] I considered President's evidence of why he says he wrote the November 9 Letter. He says he felt threatened by the Text Messages, and felt that his family was at risk, so he wanted to conclude the complaints and get them over with. He says he sent the November 9 Letter directly to Employee because he had concerns that Mr. Sze was not forwarding communications to Employee; he did not explain his basis for such a concern. He says he believed the Text Messages were related to Employee's requests to be anonymized in the complaints, but did not explain how text messages that said "you can't hide" and "soon everyone will know" might be related to, or were even consistent with, Employee's requests for anonymization. President became emotional when he testified that he felt that his child was at risk, and that he could not bear it if something happened to him because of how that would impact his child.

[94] I do not accept President's evidence. Even if he had reasons to be concerned for his and his family's safety at the time, this does not explain why he would have sent the November 9 Letter directly to Employee and not Mr. Sze, then ignored a response that clearly stated Mr. Sze had received a letter from him dated November 15 containing threats.

[95] In summary, I accept Employee's and Mr. Sze's evidence that they received the November 15 Letter on November 15, 2019, and that Employee did not receive the November 9 Letter or Email. President's evidence is inconsistent with Employee's and Mr. Sze's documentary evidence, including electronic evidence, as well as their clear recollections, and is not plausible. President's evidence is not credible and I cannot rely on it. I find that President wrote and sent the November 15 Letter to Employee and Mr. Sze on that date. I find that President did not write and send the November 9 Letter in November 2019, but created it and the screenshot of the November 9 Email in a deliberate attempt to mislead the Tribunal.

[96] I now turn to my decision on whether the letters are admissible as evidence in the hearing of the complaints.

D. Admissibility

[97] Employee initially sought to enter the November 15 and November 25 Letters into evidence in support of an application for costs against President based on his position that the November 15 Letter is evidence of improper conduct. Employee wanted to ask President questions about the letters in cross examination. Employee gave notice of his intention to do this at the outset of the hearing instead of simply providing the letters to the Tribunal so President would have an opportunity to object to the letters' admissibility, because the letters were exchanged between President and Mr. Sze in the course of the complaint process and labelled as "without prejudice".

[98] In the course of this application process, Employee submitted that President's denial that he wrote the November 15 Letter and his claim that he wrote the November 9 Letter instead, was an attempt to egregiously mislead the Tribunal. Employee argued that all of the communications the parties exchanged, as well as the November 9 Letter and Email, are admissible for the purposes of a costs application against President for this conduct.

[99] President maintained that he did not send the November 15 Letter, but submits that in any case, it is the type of communication that is protected by settlement privilege and should not be admissible. He also submits that settlement privilege clearly applies to the November 9 Letter.

[100] Settlement privilege protects communications that parties exchange as they attempt to resolve a complaint. Whether or not communications are labelled as "without prejudice", any discussions between parties with the intent of trying to settle a complaint are not admissible as evidence, subject to exceptions. This allows parties to have frank discussions without concern that information they disclose might be used against them if the complaint is not resolved: *Bombardier Inc. v. Union Carbide Canada Inc.,* 2014 SCC 35 pat paras. 31 and 34.

[101] Deciding whether an exception applies in a particular case involves assessing whether a competing public interest outweighs the public interest in encouraging settlement: *Bradley v. Fire-Trol Canada Co.*, 2005 BCHRT 212 at para. 35. The Court of Appeal has said that the burden of establishing an exception should not be set too low, that the public policy behind settlement privilege is so compelling that even threats arising in the context of settlement negotiations may not justify an exception, and that an exception should only be found where necessary to achieve either the agreement of the parties to the settlement, or another compelling or overriding interest of justice: *Dos Santos (Committee of) v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4 at paras. 19-20.

[102] The circumstances of this case are unique. If President had acknowledged that he wrote the November 15 Letter, my task would have been to decide whether the letter was protected by settlement privilege, and if so, whether any exception applied. President's claim that he did not write the letter changed the course of the application. His position that the letter is protected by settlement privilege is not consistent with his claim that he did not write the letter in the first place. However, having made the finding that he did write and send the letter, I must decide whether it is admissible.

[103] For the purposes of this application, I assume that settlement privilege would have applied to the November 15 Letter if President had acknowledged writing it. However, I find that this letter cannot be protected by settlement privilege in these circumstances. President's denial that he wrote the letter is inconsistent with a claim of settlement privilege. President submitted that this is the type of letter that is normally protected by settlement privilege, but he cannot both deny writing the letter and claim that it is privileged. He effectively waived the privilege by denying that he wrote the letter in the first place.

[104] Even if I found that the November 15 Letter could be protected by settlement privilege in the circumstances, I would find that there is a compelling interest of justice that necessitates an exception. My finding that President intended to mislead the Tribunal is a serious matter. There is a compelling interest of justice in admitting the letter so I may seek submissions from

the parties about whether President's conduct is improper conduct, and if so, warrants an award of costs against him.

[105] I also find that the November 25 Letter is admissible. The basis for President to claim settlement privilege over this letter is the references and descriptions in it of the November 15 Letter. Having found that the November 15 Letter is admissible, there is no basis to find that settlement privilege protects the November 25 Letter.

[106] I find that the November 9 Letter is not protected by settlement privilege. I have found that President did not send this letter as an attempt to resolve the complaint. Rather, he created it in an attempt to mislead the Tribunal. No settlement privilege applies.

[107] Employee submits that the emails introduced in the hearing of this application are also admissible as evidence. He submits that he will seek costs against President for purposely trying to mislead the Tribunal.

[108] President did not make submissions on whether the emails are admissible. Given my findings about the November 15 and November 9 Letters, and my decision that they are admissible, I find that there is no basis for excluding the emails introduced at the hearing of this application.

[109] In summary, I find that the following documents introduced at the hearing of this application are admissible as evidence in the hearing for the purposes of Employee's application against President for costs:

a. Exhibit A1 – November 15, 2019 letter
b. Exhibit A2 – Email chain Nov 13-25, 2019
c. Exhibit A3 – Email from Sze to Tribunal – January 4, 2023 – electronic file (attaches electronic file of November 25 Email)
d. Exhibit A4 – Email from Sze to [President] – November 25, 2019 – electronic file
e. Exhibit A5 – November 25, 2019 letter from Sze to [President]
f. Exhibit A6 – Email from [President] to Sze – November 15, 2019 – electronic file
g. Exhibit A7 – November 9, 2019 letter from [President] to [Employee]

h. Exhibit A8 – Email from [President] to Tribunal – January 4, 2023 – containing November 9, 2019 email from [President] to [Employee] – electronic file
i. Exhibit A14 – Email Sze to [President] – November 18, 2019 – electronic file

IV CONCLUSION

[110] Employee's application is allowed.

[111] Employee initially applied to introduce the November 15 and November 25 Letters for use in his cross examination of President. The hearing of the evidence has now concluded. Given my findings that President sent the November 15 Letter and not the November 9 Letter in November 2019, I find it is not necessary to schedule additional hearing time for Employee to put the letters to President in cross examination. Employee submitted that the issue of whether President wrote and sent the November 15 Letter overtook the issue of whether the letter was protected by settlement privilege. I agree. Any party may rely on Exhibits A1 to A8 and A14, and my findings in this decision, to make submissions about whether President has engaged in improper conduct, and if so, whether an award of costs is warranted.

[112] The next step in this hearing process is for the parties to make closing submissions. The parties have agreed to do this in writing. The case manager will contact the parties to provide a schedule for closing submissions.

Jessica Derynck
Tribunal Member