

An appeal

- by -

Premium Weatherstripping Inc.
(“Premium Weatherstripping”)

- 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: Kenneth Wm. Thornicroft

FILE No.: 2016A/80

DATE OF DECISION: August 5, 2016

DECISION

SUBMISSIONS

Andrew Spence

counsel for Premium Weatherstripping Inc.

OVERVIEW

1. Premium Weatherstripping Inc. (“Premium Weatherstripping”) appeals a Determination issued against it by a delegate of the Director of Employment Standards (the “delegate”) on May 20, 2016, pursuant to which it was ordered to pay its former employee, Golam Hossein Ghassemi Ghassemvand (known as Hossein Ghassemi; “Mr. Ghassemi”), the total sum of \$15,085.41 on account of vacation pay and interest. By way of the Determination, the delegate also levied two separate \$500 monetary penalties against Premium Weatherstripping and thus the total amount of the Determination is \$16,085.41.
2. The appeal is filed under subsection 112(1)(a) of the *Employment Standards Act* (the “*Act*”) on the ground that the Determination should be varied because the delegate erred in law.
3. In my view, this appeal has no reasonable prospect of succeeding (see subsection 114(1)(f) of the *Act*) and, accordingly, must be summarily dismissed.
4. In adjudicating this appeal, I have reviewed Premium Weatherstripping’s submissions as well as the record that was before the delegate when he issued the Determination.
5. My reasons for summarily dismissing the appeal are set out in greater detail, below.

THE DETERMINATION

6. Premium Weatherstripping operates a manufacturing plant in Coquitlam where it produces weatherstripping, door sill, and threshold products for residential and commercial applications. Mr. Ghassemi was the firm’s General Manager from January 16, 2012, to October 7, 2014, and was involved in the initial formation of the company.
7. On December 16, 2014, Mr. Ghassemi filed a complaint under section 74 of the *Act* in which he claimed he was “fired” from his employment. He sought approximately \$4,300 in regular wages and a further \$13,700 in unpaid vacation pay. This complaint was the subject of an oral complaint hearing before the delegate on May 21, 2015, and, almost exactly one year later (May 20, 2016), the delegate issued the Determination and his accompanying “Reasons for the Determination” (the “delegate’s reasons”).
8. In my view, the delay from the filing of the complaint to the date of the complaint hearing (about 5 months) is within an acceptable range. However, there is no explanation in either the delegate’s reasons, or in the record, for the further *1-year* delay from hearing to decision. This was not a complicated case and the delegate had the benefit of careful submissions from competent legal counsel for both parties. Subsection 2(d) of the *Act* states that one of the purposes of the *Act* is to ensure “fair and efficient procedures for resolving disputes” arising under the *Act*. In the circumstances, I consider a wholly unexplained 1-year delay in rendering a decision to be wholly unacceptable. I have no idea why there was such a delay; I can only express my concern about it. No one is well served when relatively simple and straightforward matters are not resolved in a timely manner.

9. For the most part, there was no factual dispute between the parties. At the outset of the hearing, Premium Weatherstripping tendered two cheques on account of Mr. Ghassemi's unpaid regular wage claim. Accordingly, there were only two related issues before the delegate: 1. Should Mr. Ghassemi's vacation pay be calculated at an 8% or 4% rate?; 2. Did Mr. Ghassemi's unpaid vacation pay accumulate over the course of his employment such that he was entitled to recover vacation pay earned during the entire period of his employment with Premium Weatherstripping?
10. Premium Weatherstripping does not contest the delegate's calculation of Mr. Ghassemi's vacation pay entitlement, assuming the appropriate rate was 8% rather than 4%. Of course, Premium Weatherstripping does say that the delegate erred in awarding vacation pay at 8% rather than 4%.
11. The delegate found in Mr. Ghassemi's favour on both "vacation pay" issues. Premium Weatherstripping's appeal concerns only the first issue and it seeks the following remedy: "The Delegate erred when he concluded that it was a term of the employee's contract of employment that he was entitled to 8% vacation pay rather than 4%. It is submitted that the Delegate's determination should be varied to reflect Mr. Ghassemi's entitlement to 4% vacation pay."
12. The delegate found that it was Premium Weatherstripping's responsibility to ensure that Mr. Ghassemi actually took his annual vacation leave – in fact, Mr. Ghassemi only took a few days of vacation leave during his entire tenure. He did receive some vacation pay (about \$2,300) but not all of the vacation pay to which he was entitled. Premium Weatherstripping conceded at the hearing that even at a 4% rate, Mr. Ghassemi did not receive all of his earned vacation pay (see delegate's reasons, page R9).
13. Premium Weatherstripping did not have a written vacation leave policy and, so far as I can discern, Mr. Ghassemi did not have a written employment contract that detailed his vacation pay entitlement.
14. Mr. Ghassemi's testimony was that he negotiated his employment terms and conditions with Premium Weatherstripping's president, Mr. Panahandeh (who also testified at the hearing). Mr. Ghassemi secured an agreement that his pay and benefits would more or less mirror (save for an employer-funded R.R.S.P.) what he was then receiving with another firm. With respect to vacation, "Mr. Ghassemi stated that he had received four weeks of vacation leave per year and 8% vacation pay at [his former employer]" (delegate's reasons, page R3). Mr. Ghassemi brought with him three other employees from his former firm and they, too, were to receive 8% vacation pay.
15. Premium Weatherstripping called three witnesses at the complaint hearing. Mr. Valad was hired in January 2012 to be responsible for Premium Weatherstripping's accounting functions. Mr. Valad was not involved in any way in the negotiation of Mr. Ghassemi's terms and conditions of employment. He did raise the issue of vacation pay with Mr. Ghassemi directly and was told by the latter that his vacation pay entitlement was 8%. Mr. Valad also testified that the other three employees were also accruing vacation pay at the 8% rate (delegate's reasons, page R6). Mr. Valad testified that he raised the vacation pay issue with Mr. Panahandeh and Mr. Ghassemi on several occasions in 2012, 2013 and 2014 but "[e]ach time he raised the issue no decision or direction was provided" (delegate's reasons, page R6). Most critically, he testified that "[w]hen Mr. Ghassemi was terminated on October 7, 2014, Mr. Valad received instructions from Mr. Panahandeh to calculate the owed vacation pay at 8% of Mr. Ghassemi's earnings for 2014" (delegate's reasons, page R7).
16. Ms. Tyre was responsible for Premium Weatherstripping's accounting and monthly reporting but she was not hired until March 2014 and thus was not in any position to comment on the terms and conditions of Mr. Ghassemi's original employment agreement. Ms. Tyre confirmed that she authored a March 14, 2014, e-mail in which she confirmed Mr. Ghassemi's vacation pay entitlement at 8% and in which she suggested

that rather than accruing unpaid vacation pay on an indefinite ongoing basis, perhaps it could be paid out annually at year-end or paid as a “bonus” (delegate’s reasons, page R7).

17. Finally, Mr. Panahandeh testified that Mr. Ghassemi reported to the “board of directors” and not to himself directly (delegate’s reasons, page R8). Mr. Panahandeh also testified that he was not directly involved in negotiating Mr. Ghassemi’s terms of employment – indeed, he testified that he thought Mr. Ghassemi was to be paid a \$70,000 annual salary and was surprised to learn that Mr. Ghassemi’s salary was actually fixed at \$75,000 per annum (delegate’s reasons, page R8). The following excerpts from the delegate’s reasons (at pages R8 – R9) seem to be central to the current appeal:

Mr. Panahandeh requested that Mr. Ghassemi provide him with documentation verifying his compensation package from [Mr. Ghassemi’s former employer] but he never received the requested information...

In January 2012 when Mr. Valad spoke to Mr. Panahandeh about Mr. Ghassemi and three other employees receiving 8% vacation pay Mr. Panahandeh called a meeting with Mr. Ghassemi to discuss the matter. Mr. Panahandeh suggested that the percentage of vacation pay for all four employees be lowered to 4% to remain in line with the Act. Mr. Ghassemi maintained that 8% was the rate of vacation pay he had received at [his former employer] and it was the same compensation he had promised the three other employees who had come over from [the former employer]. Mr. Panahandeh requested proof of the previous compensation package but never received any information from Mr. Ghassemi...

Following Mr. Ghassemi’s termination Mr. Panahandeh directed Mr. Valad to calculate only the owed vacation pay for 2014 and to pay it based on 8% of Mr. Ghassemi’s gross wages for that year. Although two cheques were produced for Mr. Ghassemi, one for his vacation pay and one for his final two weeks of work, the cheques were not cashed as the amounts were in dispute.

Mr. Panahandeh stated that the other three employees who had been receiving 8% vacation pay have been told they are required to use their vacation leave each year. Mr. Panahandeh acknowledged that PWS did not attempt to change the terms of employment for these employees as it was his understanding that once a term or condition is provided to an employee it cannot easily be taken back.

18. In addition to the above *viva voce* evidence, the delegate also had before him Mr. Ghassemi’s wage statements, issued by Premium Weatherstripping, that unequivocally showed that: 1) his vacation pay was being paid at an 8% rate; and 2) his earned vacation pay was being carried forward and held in an “available” account.
19. Premium Weatherstripping’s central argument before the delegate is essentially identical to that advanced in this appeal, namely, that there was no agreement regarding the payment of vacation pay at the 8% rate and, as such, Mr. Ghassemi should have only been awarded vacation pay based on the statutory minimum which, for Mr. Ghassemi, given his length of service, was 4%. The delegate, at page R11 of his reasons, determined that Mr. Ghassemi should be awarded vacation pay based on an 8%, rather than a 4%, rate. In reaching this conclusion, the delegate noted (page R12), among other things, that Mr. Ghassemi testified he was hired on the understanding that he (and the three other employees he recruited to join him) would receive vacation pay at an 8% rate (I should add that Mr. Ghassemi’s testimony was wholly uncontroverted on this point – Premium Weatherstripping could have called one or more members of the board of directors to contradict Mr. Ghassemi’s evidence but it did not do so); Mr. Ghassemi was paid and he accrued vacation pay at an 8% rate as consistently shown on his wage statements issued by Premium Weatherstripping; on termination, Mr. Panahandeh directed that Premium Weatherstripping pay out Mr. Ghassemi’s vacation pay for the current year based on an 8% rate; and, finally, throughout Mr. Ghassemi’s employment, he maintained that his entitlement was 8%, and although Mr. Panahandeh was well aware that Mr. Ghassemi was being paid at 8%, he never took any steps to renegotiate or cancel the 8% arrangement.

REASONS FOR APPEAL

20. Premium Weatherstripping says that the delegate erred in law in fixing Mr. Ghassemi's vacation pay entitlement based on an 8% rate and that the "[D]etermination should be varied to reflect Mr. Ghassemi's entitlement to 4% vacation pay". I have extracted what I consider to be the central assertions made by Premium Weatherstripping's legal counsel in support of the appeal:

- "The Delegate erred in law when the Delegate concluded that it was a term of the employee's contract of employment that he was entitled to 8% vacation pay."
- "There were numerous meetings between Mr. Ghassemi and other management of PWS wherein the issue of his entitlement to 8% was raised and proof of his vacation pay at his former employer was requested but not produced."
- "In looking at the relationship between the parties, the Delegate concluded that by showing 8% on Mr. Ghassemi's wage statements the 8% vacation pay became a term of Mr. Ghassemi's employment contract."
- "It can be reasonably inferred from the Delegate's reasoning that he applied that evidence regarding other employees [to the effect they were entitled, as a condition of employment, to 8% vacation pay] to Mr. Ghassemi's circumstances. However, the evidence at the hearing was clear in that there was no issue between PWS and the other employee's [*sic*] entitlement to 8% vacation pay thus it was accepted by PWS that 8% vacation pay was a term of those employees' terms of employment. The Delegate erred in applying that evidence to Mr. Ghassemi's circumstances in order to ascertain the terms of his employment contract with PWS."
- "Mr. Panahandeh's evidence was that PWS required proof from Mr. Ghassemi as to his vacation entitlement at his previous employment and such proof was never provided."
- "It was open to Mr. Ghassemi while employed at PWS to provide the requested information from his previous employment as to his vacation pay. Likewise, it was open to Mr. Ghassemi at the hearing before the Delegate to provide information of his vacation pay at his previous employment as to his vacation pay; he did not. The obvious inference that arises it [*sic*] that the reason Mr. Ghassemi did not provide any proof of his vacation pay entitlement at his previous employment is that no such proof exists and he did not receive 8% vacation pay from his previous employer."
- "The evidence of continued meetings regarding Mr. Ghassemi's vacation pay entitlement was not denied by Mr. Ghassemi. In the factual circumstances, PWS and Mr. Ghassemi were not *ad idem* with respect to his vacation pay entitlement. Absence [*sic*] an agreement, the minimum vacation pay entitlement prescribed by the Act should be applicable."
- "The Delegate erred when he concluded that it was a term of the employee's contract of employment that he was entitled to 8% vacation pay rather than 4%."

FINDINGS AND ANALYSIS

21. Although Premium Weatherstripping's counsel did not use the term, I conceive his argument regarding the vacation pay rate issue to be predicated, at least in part, on the common law doctrine of misrepresentation. In effect, counsel appears to be asserting that Mr. Ghassemi knowingly misrepresented his vacation pay entitlement under his former employment contract and that Premium Weatherstripping was induced to pay

an 8% rate on the basis of that misrepresentation. However, Premium Weatherstripping's agreement to 8% vacation pay was not subject to some sort of condition precedent that obliged Mr. Ghassemi to provide corroborative proof of the fact that his former employer was paying him vacation pay at an 8% rate. Alternatively, and perhaps additionally, counsel says that there never was any agreement between the parties regarding the payment of vacation pay at the 8% rate and, accordingly, the minimum standard set out in the *Act* (4%) should have been applied to determine Mr. Ghassemi's unpaid vacation pay entitlement.

22. In my view, either alternative argument is wholly without merit. I will address each point in turn.

Misrepresentation

23. A contract induced by a fraudulent misrepresentation is a voidable contract (see, for example, *Re City of Ottawa and Ottawa Professional Firefighters' Association, Local 162, International Association of Firefighters et al.*, 1985 CanLII 2153 (Ont. S.C.); *Sable Mary Seismic Inc. v. Geophysical Services Inc.*, 2012 NSCA 33; and *Jer v. Royal Bank of Canada*, 2014 BCCA 116). However, in order for this plea to succeed, there must be evidence confirming the misrepresentation, and that the misrepresentee took affirmative steps to avoid the contract upon discovering the misrepresentation. In this case, there was no evidence whatsoever of a misrepresentation by Mr. Ghassemi. Mr. Ghassemi's uncontroverted testimony was that his previous employer paid him vacation pay at an 8% rate and while Premium Weatherstripping may have sought some further clarification from Mr. Ghassemi, it certainly did not pursue the matter with any vigour. I have to question why Premium Weatherstripping did not simply contact the former employer directly – there is no evidence that it did so. Premium Weatherstripping could have demanded that Mr. Ghassemi produce wage statements from his former employer to confirm the 8% rate prior to agreeing to pay vacation pay at that rate. It did not do so. Further, Premium Weatherstripping's counsel says that Mr. Ghassemi could have provided such confirmation at the hearing – but it can be equally observed that Premium Weatherstripping could have taken steps to have Mr. Ghassemi's former employer attend the hearing and provide evidence with respect to this issue (see sections 84 and 85 of the *Act*) but it failed to do so. The *only* evidence before the delegate was to the effect that Mr. Ghassemi received 8% vacation pay under the terms of his former employment contract – while Premium Weatherstripping may have questioned whether this was actually the case, Premium Weatherstripping appears to have ultimately been content to simply accept Mr. Ghassemi's assertion with respect to this matter.
24. Quite apart from the evidentiary problem, there is no evidence that Premium Weatherstripping ever avoided the contract. Indeed, *following Mr. Ghassemi's termination*, Mr. Panahandeh specifically directed “Mr. Valad to calculate only the owed vacation pay for 2014 and to pay it based on 8% of Mr. Ghassemi's gross wages for that year” (delegate's reasons, page R9).
25. Further, there was no evidence before the delegate that the parties ever negotiated an express condition precedent to the effect that vacation pay would only be paid at 8% if Mr. Ghassemi provided confirmation that this rate was included in his former employment contract and that, failing such confirmation, vacation pay would only accrue at the statutory 4% rate. I might also add, simply for the sake of completeness, that while the *Act* provides a remedy for *employer* misrepresentations (section 8), there is no similar provision with respect to *employee* misrepresentations.

Consensus ad idem

26. Premium Weatherstripping's claim that there was no *consensus ad idem* regarding a contractual agreement to pay 8% vacation pay is, in my view, similarly wholly devoid of merit. Section 58 of the *Act* states that an employer must pay “at least” 4% vacation pay, and “at least” 6% vacation pay after the employee has five

years' service. However, in the same way that an employer must pay "at least" the minimum wage (section 16) but can be held liable under the *Act* to pay the actual contract wage, the Director can enforce the parties' agreement to pay vacation pay at a rate above the statutory minimum (see, for example, *IBM Canada Limited*, BC EST # RD012/15).

27. In my view, the delegate did not err in finding that there was an agreement to pay vacation pay at 8%. First, Mr. Ghassemi testified that this was the agreement. Two of Premium Weatherstripping's three witnesses called at the hearing were not in a position to refute that testimony. The third witness, Mr. Panahandeh testified that while he questioned the 8% rate during the course of Mr. Ghassemi's employment, he nonetheless accepted (or at least acquiesced) that Mr. Ghassemi would be paid at the 8% rate. Recall that it was Mr. Panahandeh who specifically directed that Mr. Ghassemi be paid out his vacation pay for 2014 at the 8% rate. Second, Mr. Ghassemi's wage statements unequivocally show that his vacation pay was accruing at an 8% rate throughout his tenure with Premium Weatherstripping.
28. Mr. Ghassemi also testified that the other three employees who joined Premium Weatherstripping at the same time he did, were also paid vacation pay at 8% under their former employment contracts and Premium Weatherstripping apparently accepts that these employees are contractually entitled to vacation pay at 8%. I am unable to accept that the delegate misinterpreted or misapplied this evidence. Mr. Ghassemi presented this evidence as corroboration of his own contractual terms. The delegate, as I read his reasons, found that this evidence simply corroborated Mr. Ghassemi's testimony that all four employees had a contractual agreement to accrue vacation pay at an 8% rate. Mr. Ghassemi's position in this regard was also confirmed by the wages statements issued to him by Premium Weatherstripping, which indicated that his vacation pay was paid, and accrued, at an 8% rate.
29. There is no evidence that Premium Weatherstripping ever negotiated a condition precedent such that Mr. Ghassemi's entitlement to 8% vacation pay would only stand if he provided formal confirmation that this was the rate he received under his former employment contract. Mr. Ghassemi asserted that he was receiving 8% vacation pay under his former employment contract. He demanded that Premium Weatherstripping agree to pay vacation pay at the same rate. The only credible evidence before the delegate was that Premium Weatherstripping agreed to pay vacation pay at 8% as shown on Mr. Ghassemi's wage statements. Premium Weatherstripping could have brought to the hearing the person or persons who actually negotiated Mr. Ghassemi's employment contract to demonstrate that: a) there never was an agreement to pay 8%; or b) that such an agreement was subject to a condition precedent that it never waived. No such evidence was brought to the hearing and, in the end result, there was absolutely no evidence before the delegate that undermined Mr. Ghassemi's position that he had been formerly paid at 8%, and that Premium Weatherstripping similarly agreed to pay vacation pay at the 8% rate.
30. In my view, the delegate came to both a reasonable and a correct conclusion regarding the vacation pay issue in light of the evidence before him. There is simply no proper legal or factual basis for setting aside the delegate's determination on this score.

ORDER

31. Pursuant to subsection 114(1)(f) of the *Act*, this appeal is dismissed. In accordance with the provisions of subsection 115(1)(a) of the *Act*, the Determination is confirmed as issued in the amount of \$16,085.41 together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal