Employment Standards TRIBUNAL

Appeals

- by -

Canadian Carpet and Tile – BC Inc.
("Canadian Carpet")
– and –
Morteza Malek Mohammadi
("Mohammadi")

- 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 Nos.: 2016A/105 and 2016A/106

DATE OF DECISION: October 28, 2016

DECISION

SUBMISSIONS

Mohammad Sadegh Haghnegahdar	on behalf of Canadian Carpet and Tile – BC Inc.
Morteza Malek Mohammadi	on his own behalf

INTRODUCTION

1. On June 29, 2016, and following an investigation into an unpaid wage complaint filed by Morteza Malek Mohammadi ("Mohammadi") against his former employer, Canadian Carpet and Tile – BC Inc. ("Canadian Carpet"), a delegate of the Director of Employment Standards (the "delegate") issued a Determination under section 79 of the *Employment Standards Act* (the "*Act*"). The delegate also issued his written "Reasons for the Determination" (the "delegate's reasons") concurrently with the Determination.

2. By way of the Determination, Canadian Carpet was ordered to pay Mr. Mohammadi the total sum of $15,677.35 on account of unpaid wages (including $8,761.63 on account of compensation for length of service) and section 88 interest. In addition, and also by way of the Determination, Canadian Carpet was ordered to pay $2,500 on account of five separate $500 monetary penalties (see section 98). Thus, the total amount payable under the Determination is $18,177.35.

3. Canadian Carpet filed an appeal of the Determination on August 4, 2016 (File No. 2016A/105) based on all three statutory grounds set out in subsection 112(1) of the *Act* (the delegate erred in law; the delegate 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 made).

4. On August 8, 2016, Mr. Mohammadi also filed an appeal of the Determination based on the ground that the delegate failed to observe the principles of natural justice in making the Determination and on the ground that evidence has become available that was not available at the time the Determination was made.

5. I have reviewed the parties' submissions as well as the complete subsection 112(5) record that was before the delegate. I am now issuing a single decision that addresses both parties' various grounds of appeal.

THE DETERMINATION

6. As detailed in the delegate's reasons, Canadian Carpet sells and installs various flooring products and Mr. Mohammadi worked for the firm as a "project manager". His compensation was a combination of base salary plus sales commissions. Mr. Mohammadi was originally employed by a predecessor firm, Canadian Carpet and Tile Inc., as and from August 1, 2003. Canadian Carpet "assumed control" of this latter firm in January 2013 (delegate's reasons, page R2). The B.C. Registrar of Companies dissolved Canadian Carpet and Tile Inc. on August 3, 2015 for failing to file annual reports (the last having been filed on September 11, 2012). I shall henceforth refer to Canadian Carpet and Tile Inc. as the "dissolved corporation". Mr. Mohammad Sadegh Haghnegahdar ("Haghnegahdar"), who represents Canadian Carpet in these proceedings, was one of the dissolved corporation's two directors and also one of its two officers (he was its president). Mr. Haghnegahdar is Canadian Carpet's sole director and officer.

7. Although the delegate did not make a specific section 97 declaration, he nonetheless concluded that Mr. Mohammadi was continuously employed as and from his original date of hire with the dissolved corporation for purposes of determining his section 63 entitlement to compensation for length of service. Canadian Carpet was incorporated on February 1, 2012, but according to Mr. Haghnegahdar, the firm "only commenced ownership and operation [of the dissolved corporation's business] in January, 2013" (delegate's reasons, page R31).

8. The delegate applied section 66 of the *Act* ("If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated") and determined that Canadian Carpet's attempt to unilaterally transfer Mr. Mohammadi from its North Vancouver store to its Coquitlam store amounted to a deemed dismissal. The delegate awarded Mr. Mohammadi 8 weeks' wages as compensation for length of service.

9. The delegate also awarded Mr. Mohammadi unpaid commissions and an unpaid $500 bonus in the total amount of $4,075.00. The delegate determined that Mr. Mohammadi earned $5,123.74 in vacation pay during the section 80 wage recovery period but had only been paid $3,084.50 thus leaving a balance owing of $2,039.24. Finally, the delegate ordered Canadian Carpet to pay Mr. Mohammadi $230.00 on account of improper deductions of Canadian Carpet's business costs from Mr. Mohammadi's wages (see subsection 21(2)) and $189.75 on account of an unauthorized wage deduction for health insurance premiums (see section 22).

10. As noted above, the delegate ordered Canadian Carpet to pay Mr. Mohammadi the total sum of $15,677.35 including section 88 interest and levied $2,500 against Canadian Carpet on account of five $500 monetary penalties for having contravened sections 18, 21, 22, 58 and 63 of the *Act*.

REASONS FOR APPEAL – CANADIAN CARPET

11. Canadian Carpet attached separate 3-page and 25-page memoranda to its Appeal Form (as well as nearly 40 pages of additional documents) in which it set out its reasons for appealing the Determination. However, Canadian Carpet did not organize its submission by its separate grounds of appeal and thus it is rather difficult to discern what particular evidence and argument relates to each separate ground of appeal.

12. Nevertheless, after having reviewed Canadian Carpet's submission it would appear that its "error of law" ground of appeal seemingly has two components.

13. First, Canadian Carpet asserts that the delegate "has not considered most of the evidence the company has provided when assessing for the Determination" (*sic*) and that "in the letter of Determination, most of the decisions and judgments are based on what the claimant has said without any actual evidence" (underlining in original text).

14. Second, Canadian Carpet says that the delegate erred in law in finding that Mr. Mohammadi was continuously employed with the dissolved corporation and then by Canadian Carpet as and from August 1, 2003. Canadian Carpet claims that "all employees [of the dissolved corporation] were terminated and compensated accordingly". Canada Carpet also asserts that it "announced closure to all employees" and that since Mr. Mohammadi "was on WCB leave, the owner met with him, announced the closure and offered him the same position with better compensation at another location in Coquitlam". Canadian Carpet then asserts that Mr. Mohammadi "insisted on being terminated, which was not accepted by the employer".

15. As for the natural justice ground, aside from the allegations noted above regarding the delegate's failure to consider all of the relevant evidence or, alternatively, making findings without evidence, Canadian Carpet says: "On the hearing date which started around 9:00 am and ended around 4:00 pm, the delegate used the whole hearing time listening to the complainant [and] the appellant got only five minutes to talk and never got a chance to cross-examine the claimant" (underlining in original text). Canadian Carpet asserts that during this hearing, "the Director of Employment Standards even wasted a lot of time waiting for the claimant to send some new documents during the hearing time". With respect to this alleged "hearing", it should be noted that the delegate's reasons clearly indicate that the Determination was issued following an *investigation* rather than an oral complaint hearing. So far as I can determine, there never was an oral complaint hearing. I believe Canadian Carpet is referring to some sort of fact finding or mediation session (these are commonly held during the course of an investigation) but there is nothing in the record, nor should there necessarily be, showing that such a meeting occurred. In fact, at a later point in its appeal submissions, Canadian Carpet referred to this meeting – apparently held on "October 3rd" (2015, presumably) and lasting from "9am-3PM" (rather than 4:00 PM as initially asserted) – as "the settlement and hearing".

16. Further and with respect (possibly) to the natural justice ground, Canadian Carpet also says: "The appellant provided the name and contact information of witnesses [but] the witnesses were never contacted during the eight-month period of investigation".

17. The "new evidence", so far as I can determine since there is nothing in Canadian Carpet's submissions specifically identifying the new evidence it now wishes to submit on appeal, is apparently to be found in the 37 pages of additional documents, included in Tabs C through K under the heading "Outline of Documents", that Canadian Carpet initially submitted in support of its appeal (Tab A is the Appeal Form and Tab B includes Canadian Carpet's arguments in support of its appeal).

CANDADIAN CARPET'S APPEAL – FINDINGS AND ANALYSIS

18. I shall address each of Canadian Carpet's reasons for appeal in turn commencing with the "new evidence" ground of appeal.

"New Evidence"

19. "New evidence" is admissible in accordance with the criteria set out in *Davies et al.* (BC EST # D171/03) and these criteria include the following:

- the evidence could not, with the exercise of due diligence, have been discovered and submitted during the investigation of the complaint and prior to the Determination being made;
- the evidence must be relevant to an important issue arising from the complaint;
- the evidence must be credible; and
- the evidence must have significant probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led to a different conclusion on a central issue.

20. Having reviewed the documents apparently tendered as "new evidence" I note, firstly, that many of these documents are only marginally relevant, if relevant at all, to the issues raised by Canadian Carpet in its appeal. Secondly, and much more importantly, most of the remaining documents (almost entirely consisting of Canadian Carpet's internal records of one kind or another) predate the Determination (which was issued on June 29, 2016) and thus could have been provided to the delegate before the Determination was issued (in

fact, some of these documents are contained in the record and thus obviously *were* before the delegate when he issued the Determination).

21. There are a couple of documents that are post-dated relative to the Determination. Canadian Carpet submitted a 1-paragraph letter dated July 29, 2016, from one of its store managers. This letter concerns the $500 "bonus" that is addressed at page R26 of the delegate's reasons. Although this employee's letter was written after the date of the Determination, the evidence contained within it could have been provided to the delegate during the course of the investigation (and it would appear, in any event, that it *was* – see page R13 of the delegate's reasons). Simply for the sake of completeness, I would also note that I entirely agree with the delegate's comment regarding section 20 of the *Act* as it relates to this "bonus" issue (see page R26).

22. Canadian Carpet's submission also includes another 1 ½-page letter from a former employee. This letter concerns the $200 wage deduction relating to an "interpreter's fee" that is addressed at page R30 of the delegate's reasons. Again, while this letter was apparently written after the date of the Determination (it is dated July 26, 2016), the evidence contained within it could have been presented to the delegate during the course of his investigation.

23. In sum, there is absolutely no merit whatsoever to Canadian Carpet's appeal as it relates to the "new evidence" ground of appeal (subsection 112(1)(c) of the *Act*). Accordingly, this ground of appeal is summarily dismissed pursuant to subsection 114(1)(f) of the *Act*.

Alleged Natural Justice Breaches

24. Although Canadian Carpet did not specifically identify how or why the delegate apparently failed to observe the principles of natural justice in making the Determination, it would appear that this ground of appeal has three components: i) the delegate failed to consider all relevant evidence or, alternatively, made certain findings without a proper evidentiary foundation; ii) "On the hearing date which started around 9:00 am and ended around 4:00 pm, the delegate used the whole hearing time listening to the complainant [and] the appellant got only five minutes to talk and never got a chance to cross-examine the claimant" (underlining in original text); and iii) "The appellant provided the name and contact information of witnesses [but these] witnesses were never contacted during the eight-month period of investigation".

25. In my view, the first of these three issues more properly raises an alleged "error of law" and I address this particular assertion as such later on in these reasons. However, as will be seen, I am not persuaded that the delegate failed to consider relevant evidence or otherwise made findings of fact without there being any evidence to support those findings. Thus, even if I were to consider this assertion as a "natural justice" issue, I would nonetheless reject this ground of appeal as meritless.

26. As noted above, the Determination was issued following an investigation conducted by the delegate – there never was an oral complaint hearing in this matter. It would appear that the "hearing" Canadian Carpet referenced in its appeal documents was a fact finding or mediation session. If it were the latter, the entire process is confidential and protected by privilege and should not be referenced in these appeal proceedings. If the former, the fact finding hearing was simply an opportunity for the delegate to hear the parties' positions on the various issues in dispute. Since it was not a formal hearing, there was no requirement that parties be allowed to cross-examine each other. Further, Canadian Carpet's assertion that it was only afforded "five minutes to talk" – during the course of a 6- or 7-hour hearing (Canadian Carpet at one point in its submission stated the hearing ran from 9:00 AM to 4 PM but in another submission stated it ended at 3:00 PM) – strikes me as patently absurd. I consider that statement to be pure hyperbole inasmuch as I find it impossible to believe that Canadian Carpet was only given five minutes to present its position and/or to answer the

delegate's inquiries during the course of a process that lasted six or seven hours. While it may have been that one party spoke for a longer period than the other, there is no natural justice requirement that the time available be evenly divided between the parties. Finally, my review of the record clearly shows that the delegate made every reasonable effort during the course of his investigation to obtain Canadian Carpet's evidence and position with respect to the issues in dispute. I am satisfied that the delegate wholly satisfied the dictates of section 77 of the *Act*: "If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond."

27. Canadian Carpet's third "natural justice" argument is based on its assertion that it provided the names of some unnamed witnesses that the delegate, during the course of his investigation, failed to interview. There are several points to be addressed with respect to this particular ground of appeal. First, Canadian Carpet has not identified who these potential witnesses might have been or the nature of the evidence they might have provided. Second, having reviewed the record, I am unable to identify any formal communication from Canadian Carpet to the delegate in which it specifically provided the names of witnesses that it requested the delegate to interview. Third, there is no credible explanation before me as to why Canadian Carpet did not, of its own volition, provide these supposed witnesses' evidence to the delegate. Fourth, I note that the delegate wrote to Canadian Carpet on April 13, 2016, setting out, in great detail, a summary of the evidence and a "preliminary assessment" of that evidence. The delegate specifically offered Canadian Carpet "an opportunity to provide additional evidence prior to my writing of a decision" (the Determination was issued on June 29, 2016) and, in addition, stated: "If you have any questions with respect to this assessment, or if there is any additional information which you would like me to consider, I would ask that you provide it to me by **4:00 pm, April 20, 2016**. A determination may be issued based on the evidence that I have if I do not receive a response from you by this date." (**emphasis** in original text). So far as I can determine, Canadian Carpet never provided any further information or even replied to the delegate's April 13, 2016, letter.

28. In my view, there is no merit whatsoever to any of Canadian Carpet's "natural justice" grounds of appeal and, as such, this aspect of its appeal must be summarily dismissed pursuant to subsection 114(1)(f) of the *Act*.

29. I now turn to Canadian Carpet's "error of law" submissions.

Alleged Errors of Law

30. As noted above, Canadian Carpet appears to suggest that the delegate erred in law in two broad respects. First, Canadian Carpet alleges that the delegate did not consider "most of the evidence the company has provided when assessing for the Determination" (*sic*) and that "in the letter of Determination, most of the decisions and judgments are based on what the claimant has said without any actual evidence" (underlining in original text). Second, Canadian Carpet appears to take issue with the delegate's finding that Mr. Mohammadi was continuously employed as and from August 1, 2003, and with the delegate's finding that he was entitled to any compensation for length of service or, alternatively, to 8 weeks' compensation for length of service.

31. With respect to the first alleged legal error, it should be noted that the delegate issued detailed reasons, consisting of 40 single-spaced pages. The delegate summarized the parties' evidence with respect to the issues in dispute and then set out his analysis and findings in the following 23 pages. While a finding of fact can amount to an error of law, that is only so if the impugned finding is not based on any evidence or is wholly unreasonable given the evidence before the fact-finder. In my view, there was ample evidence before the delegate that supported his findings of fact and it is a gross misrepresentation to suggest that any of his findings of fact was made "without any actual evidence". While it is clear that Canadian Carpet disagrees with some of the delegate's findings, mere disagreement does not constitute an error of law on the delegate's part. I should also add that, for the most part, the delegate did not simply take Mr. Mohammadi's evidence at face

value; rather, the delegate consistently based his findings of fact on both *viva voce* testimony and corroborating documentary evidence. It should also be noted that the delegate rejected Mr. Mohammadi's position with respect to several matters including many of his unpaid commission claims.

32. There are several elements to Canadian Carpet's second alleged error law. I shall first address section 97 of the *Act*: "If all or part of a business or a substantial part of the entire assets of a business is disposed of, the employment of an employee of the business is deemed, for the purposes of this *Act*, to be continuous and uninterrupted by the disposition." Although the delegate did not make a specific section 97 declaration, there is nothing in that provision requiring the delegate to do so. Rather, there must be a finding that there was a sale or "disposition" while the individual was still employed by the predecessor firm. The phrase "disposed of" must be interpreted broadly, consistent with the definition of "dispose" contained in section 29 of the *Interpretation Act* (see, for example, *Spirit Ridge Resort Holdings Ltd. v. British Columbia (Employment Standards Tribunal)*, 2014 BCSC 2059).

33. The delegate noted, at page R31 of his reasons, that Mr. Mohammadi commenced his employment with the dissolved corporation in 2003. Canadian Carpet maintained that this latter firm terminated Mr. Mohammadi's employment in 2013 and paid him some severance pay but its evidence on this point was inconsistent and contrary to its own documentation. First, Canadian Carpet stated that Mr. Mohammadi received $8,000 as severance pay in 2013 (even though its own documentary evidence clearly showed this to be on account of vacation pay). Canadian Carpet alternatively argued that a December 2012 $8,394.20 payment was on account of severance pay (even though the cheque in question itemized the payment as a sales commission).

34. The delegate held (page R32) that "Canadian Carpet did not provide any documentary evidence that Mr. Mohammadi was terminated by [the dissolved corporation] prior to the disposition, and the documentary evidence that was provided in support of its claim that Mr. Mohammadi was paid compensation for length of service does not support its position". Having reviewed the record, I am unable to disagree with the delegate's conclusion on this point. There is simply nothing in the record demonstrating that the dissolved corporation formally terminated Mr. Mohammadi's employment in December 2012, January 2013, or at any other time. The only Records of Employment (required, by federal law, to be issued on termination of employment) contained in the record are two separate ROEs issued by Canadian Carpet to Mr. Mohammadi sometime in July or August 2015 (neither document is dated).

35. In my view, the delegate did not err in law or fact when he concluded that Mr. Mohammadi's employment was, in the language of section 97, "continuous and uninterrupted" throughout the disposition of assets from the dissolved corporation to Canadian Carpet. Accordingly, and for purposes of determining his section 63 entitlement to compensation for length of service, he must be considered to have had in excess of eight years of consecutive employment.

36. However, a person is not entitled to any compensation for length of service if the person voluntarily resigned their employment or was dismissed for just cause (see subsection 63(3)(c) of the *Act*). The delegate did not conclude that Canadian Carpet formally terminated Mr. Mohammadi's employment. Rather, applying section 66 of the *Act*, the delegate determined that Canadian Carpet "substantially altered" a condition of Mr. Mohammadi's employment and, as such, this alteration constituted a deemed termination (delegate's reasons, page R19). Specifically, the delegate concluded that in late July 2015, Canadian Carpet made a unilateral decision to transfer Mr. Mohammadi from its North Vancouver to its Coquitlam store.

37. The distance from one store to the other is approximately 31 kilometers and the distance from Mr. Mohammadi's North Vancouver residence to the Coquitlam store is approximately 28 kilometers. The distance from Mr. Mohammadi's North Vancouver residence to the North Vancouver store is about 1

kilometer. The delegate noted (and he erred in this respect) that this transfer would have required Mr. Mohammadi to drive "an extra 70 to 80 km every work day and would have added significant travel time, of approximately one hour, to Mr. Mohammadi's commute" (page R18).

38. The delegate also noted that this additional travel time would have caused Mr. Mohammadi to incur additional travel costs (gas and wear and tear on his vehicle) and reduce his availability to spend time with his son. The delegate noted that Mr. Mohammadi had worked in the North Vancouver store for about 12 years prior to the transfer and that "there is no evidence that the terms and conditions of his employment stated that he could be transferred to a different location of Canadian Carpet" (page R18). The delegate held (page R19): "I have determined that the requirement that Mr. Mohammadi transfer to the Coquitlam Canadian Carpet location constituted a substantial, unilateral change in the nature of his employment, and that he was therefore terminated under section 66 of the Act [and] accordingly, I have determined that [Mr. Mohammadi's] employment was terminated effective July 30, 2015, his last day of employment at the North Vancouver store".

39. The delegate also seemingly concluded that Mr. Haghnegahdar (the person who ordered the transfer) did not have the corporate authority to make that decision (page R18): "I find that his authority to order the transfer of Mr. Mohammadi's employment to this other store was limited".

40. A geographic transfer, even one involving the need to relocate one's residence does not necessarily constitute a constructive dismissal (see, for example, *Brown v. Pronghorn Controls Ltd.*, 2011 ABCA 328 – a transfer that would have involved an additional daily two-hour commute each way). In *Morris v. International Harvester Canada Ltd.* (1984), 7 C.C.E.L. 300 (Ont. H.C.J., Justice McKinlay observed (at p. 305):

> The law appropriately permits employers some flexibility in deciding location of employment. When an employee is requested by his company to make a geographic move, and when moving expenses are to be paid, and he is promised a position of similar or higher status in the firm with similar fringe benefits, he must normally accept the move, or he will not be heard to say that he has been wrongfully dismissed. His leaving will be considered voluntary.

41. In *Smith v. Viking Helicopter Ltd.*, 1989 CanLII 4368 (Ont. C.A.), a case involving a geographic transfer from Ottawa to Montreal, Justice Finlayson, for the court, stated:

> As I understand counsel for the respondent in this court, he was of the view that the company could not relocate its business to the financial detriment of the respondent without creating a fundamental breach of its contract of employment. Consequently, the move itself was the fundamental breach. Counsel seemed to equate the terms of employment with the personal situation of the respondent, a life-long resident of Ottawa, who had a family and a home with a mortgage. It has never been my understanding that an employee is entitled to a job for life in a place of his choosing. If he wishes to remain an employee of a given company, he must expect reasonable dislocations in that employment including the place where it is to be performed.

42. In other cases, however, the refusal to accept a geographic transfer was held to constitute a wrongful repudiation of the employment contract (see, for example, *Wilson v. UBS Securities Canada Inc. et al.*, 2005 BCSC 563 – refusal of a transfer from Vancouver to San Francisco; and *Reynolds v. Innopac Inc.*, 1998 CanLII 3558 (Ont. C.A.) – refusal of a transfer from Toronto to Vancouver).

43. The Tribunal has addressed the scope of section 66 in the case of a geographic transfer in a number of decisions including *Stordoor Investments Ltd. and Helliker*, BC EST # D357/96 (reconsideration refused: BC EST # D338/97) – a transfer from Abbotsford to Burnaby; *Columbia Dodge (1967) Ltd.*, BC EST # D678/01

and BC EST # D158/03 – transfer from New Westminster to Richmond; and *Short*, BC EST # D061/04 – transfer from Vancouver to Burnaby).

44. The Tribunal's jurisprudence on this issue outlines the criteria that must be satisfied before there can be a section 66 "deemed termination". First, the deemed termination must concern a "condition of employment" – "conditions of employment" are defined in subsection 1(1) of the *Act* as follows: "**conditions of employment** means all matters and circumstances that in any way affect the employment relationship of employers and employees". Second, the employer must have "substantially altered" a condition of employment. With respect to this latter criterion, Tribunal Member Stevenson observed in *Stordoor and Helliker*, *supra* (at page 5):

> …the alteration must be of significance or importance to the employment relationship: an insignificant alteration of even a very significant "matter and circumstance" will not satisfy the requisites of the section. The alteration must also substantially affect the employment relationship. In other words, it must be sufficiently material that it could be described as being a fundamental change in the employment relationship…
>
> …an employment relationship can be affected not only by a unilateral alteration in the terms of employment but also by a change in the job situation, exemplified by conduct inconsistent with an intention to continue the employment relationship, such as threats of dismissal or demotion, harassment or badgering an employee to quit…
>
> …Where the parties to the employment relationship have expressly stated certain matters are part of the employment relationship that would be important to a consideration of whether a deemed termination has occurred…
>
> …the question of whether a condition of employment has been substantially altered is essentially a question of fact. The test is an objective, not subjective, one. The issue is not whether the particular employee feels their employment has been substantially altered, but whether on a reasoned objective analysis a substantial alteration has occurred. Such an analysis would include, but is not necessarily limited to, the nature of the employment relationship, the conditions of employment, including their significance to the particular employment relationship, the alterations which have been made, the legitimate expectations of the parties (which may arise as a matter of custom or common practice in the employment relationship under consideration) and whether there are any express or implied agreements or understandings.

45. Third, as discussed in *Irvine*, BC EST # D005/01, an employer can make substantial changes in an employee's conditions of employment – even substantial changes – provided adequate notice is given to the employee (see also *Oriental Interiors Ltd.*, BC EST # D281/02; *Gordon*, BC EST # D399/02; *Tollasepp*, BC EST # D490/02; and *Comet Transport Ltd.*, BC EST # RD192/03).

46. The common law appears to give the employer a measure of flexibility in terms of moving an employee from one of the employer's work sites to another, especially where the transfer does not require the employee to physically relocate from their current place of residence. On the other hand, an employee is not required to accept any and all geographic transfers. In particular, an employer cannot lawfully require an employee to accept a geographic transfer that would involve a loss of pay or position, or where the obligation to relocate could not be reasonably characterized as an implied term of the employee's contract. Of course, the employer's right to unilaterally transfer the employee's work location (and the employee's correlative obligation to accept the transfer) may be more precisely defined by the parties' employment contract.

47. In the case at hand, the delegate did not make an affirmative finding of fact that Mr. Mohammadi's employment contract included a specific provision regarding geographic transfers, and the evidence before the delegate suggests that the matter was never discussed. The delegate only stated that there was "no

evidence" before him on this point. Thus, the issue would have to be determined based on the implied terms of the parties' employment contract. As noted above, the common law (and the Tribunal's jurisprudence) oblige employees to accept geographic transfers that are not unduly burdensome (and to even accept some transfers that may be burdensome). The delegate noted that the decision to transfer Mr. Mohammadi was a "unilateral" decision made by Canadian Carpet, but that does not speak to the question of whether Canadian Carpet had the implied contractual right to require Mr. Mohammadi to change work locations from North Vancouver to Coquitlam. The delegate concluded that the transfer was a "substantial change" in Mr. Mohammadi's "nature of employment" (page R18) and, at least in part, relied on an erroneous calculation of the extra commuting distance that the transfer would entail. The delegate appears to have primarily focused on the effects of the transfer on Mr. Mohammadi's personal life without first addressing whether the right to transfer was an express or implied term of the parties' employment contract.

48. The delegate also questioned whether Mr. Haghnegahdar had the corporate authority to order the transfer. However, I do not consider this concern to be legitimate. Mr. Haghnegahdar was both a Canadian Carpet director and officer and, as such, the "indoor management rule" applies. Accordingly, Canadian Carpet is bound by Mr. Haghnegahdar's decision and the ensuing legal consequences of that decision.

49. I am far from satisfied that the delegate correctly determined that a section 66 "deemed termination" occurred in this case. Further, even if it could be said that there was a deemed termination, the delegate did not address whether the proposed relocation constituted an offer of "reasonable alternative employment" within subsection 65(1)(f) of the *Act* (see *Stordoor Investments Ltd. and Helliker*, *supra*). In this latter regard, I note that Canadian Carpet specifically raised this issue with the delegate during the course of the investigation (see record, page 73) and thus the delegate had express notice of the issue. One could characterize the delegate's failure to address this issue as a breach of the principles of natural justice.

50. However, while I do not necessarily accept the delegate's analysis of the section 66 issue (and I am also of the view that the delegate should have alternatively turned his mind to subsection 65(1)(f) of the *Act*), I nonetheless find that the delegate correctly determined that Mr. Mohammadi was entitled to 8 weeks' wages as compensation for length of service. My decision in this latter regard flows from the very essence of the employer's proposal regarding Mr. Mohammadi's relocation from the North Vancouver to the Coquitlam store.

51. As recounted in the delegate's reasons (page R2), in late May 2015 Mr. Mohammadi was away from work on an approved medical leave. Concurrent with this leave, it would appear that there were ongoing negotiations involving one or more of the principal shareholders of Canadian Carpet who were planning to sell their shares. On July 30, 2015, Mr. Haghnegahdar met with Mr. Mohammadi and advised him that he would no longer be working at the North Vancouver store and was being transferred to the Coquitlam store. At this meeting, Mr. Mohammadi was given a letter, the relevant portions of which read as follows:

> …[Canadian Carpet] informs you that on account of downsizing we would no longer require your services [at the North Vancouver store]. This letter serves as your official transferring either to [the Coquitlam store] or Terminating based on Ministry of Labour, Government of B.C. [sic] with effect from 30th July, 2015.
>
> In order to cut costs, we are forced to focus on one location and shift our business to the Coquitlam Branch. As you may know, due to the sudden downturn of economy, cost cutting has become a necessity. We regret doing this terribly but we do not have any other option.
>
> We appreciate your valuable contributions to the organization. The transferring is in no manner related to any inefficiency or misconduct from your side. We are certain that your efficiency and hardworking nature will help us to grow our business in Coquitlam.

> We have updated your contact details in our records in Coquitlam with store manager [name omitted]. The inconvenience is highly regretted and we assure you a good future after cure of your injury to make up for it. The HR team will assist you whenever you decide to start your job at this location…
>
> If you refuse to work at [the Coquitlam store], then we will act based on "Ministry of Labour Government of B.C.", which might be maximum 8 weeks of your average salary from the last eight weeks before you go on medical leave (WCB)…
>
> …I will wait to receive your written answer within 2 weeks from today, otherwise I will choose any of these offers based on our policy…
>
> (my underlining)

52. Mr. Mohammadi's evidence is that he rejected Canadian Carpet's relocation offer, in part because he did not believe it to be a *bona fide* offer, and because of the additional travel time that the relocation would entail (delegate's reasons, page R3). For its part, Canadian Carpet maintains that "employees were informed that it was the company policy to work in other locations as needed" and that when presented with the relocation offer, Mr. Mohammadi "insisted" on being terminated.

53. In my view, the above narrative clearly demonstrates the following: i) Canadian Carpet made a unilateral decision to transfer Mr. Mohammadi from its North Vancouver to its Coquitlam store; ii) this decision was not negotiable; iii) if Mr. Mohammadi did not accept the geographic reassignment, his employment would be terminated and he would be paid severance in accordance with "Ministry of Labour" rules which I infer to mean the minimum standard provided for in the *Act* (in this regard, I note the reassignment letter specifically referred to "8 weeks of your average salary" – the very standard provided for in the *Act*); iv) Mr. Mohammadi had 2 weeks to communicate his decision; v) Mr. Mohammadi opted for termination with compensation within the 2-week period.

54. The evidentiary record shows that Canadian Carpet made an offer to Mr. Mohammadi containing two options – relocation or termination. Mr. Mohammadi opted for the latter thereby triggering Canadian Carpet's obligation to pay compensation for length of service as per its written offer and in accordance with section 63 of the *Act*.

55. Although Canadian Carpet does not agree with the delegate's calculation of Mr. Mohammadi's section 63 entitlement, I have reviewed the delegate's calculations in this regard (at pages R32 – R33) and I am not persuaded that the delegate erred in fact or principle with respect to the calculation of the section 63 award.

56. To summarize my findings on this point, while I do not necessarily agree with the delegate's analysis of the section 66 issue, and I am of the further view that he should have turned his mind to the possible application of subsection 65(1)(f) of the *Act*, I am nonetheless of the view that, in the facts of this case, Mr. Mohammadi was entitled to 8 weeks' wages for compensation for length of service and that the delegate did not err in law or fact in determining the amount of Mr. Mohammadi's entitlement on this account. Accordingly, I am satisfied that Canadian Carpet's appeal, as it relates to the section 63 award, has no reasonable prospect of succeeding and thus must be summarily dismissed under subsection 114(1)(f) of the *Act*.

57. Having dismissed of all of Canadian Carpet's appeal arguments, I now turn to Mr. Mohammadi's reasons for appealing the Determination.

REASONS FOR APPEAL – MR. MOHAMMADI

58. Mr. Mohammadi appeals the Determination on the ground that the delegate failed to observe the principles of natural justice in making the Determination and on the basis that evidence has now become available that was not available when the Determination was being made (see subsections 112(1)(b) and (c) of the *Act*).

59. I will address each ground of appeal, separately, below.

MR. MOHAMMADI'S APPEAL – FINDINGS AND ANALYSIS

60. Mr. Mohammadi's appeal submissions are rather cursory consisting of a 3-page memorandum appended to his appeal form and a series of e-mails sent to the Tribunal on August 24, 2016. Mr. Mohammadi's submissions, almost entirely, relate to the calculation of his unpaid commissions. There is no obvious assertion or argument to be found anywhere in Mr. Mohammadi's submissions with respect to the "natural justice" ground of appeal.

61. The only submission that might have been intended to concern "natural justice" is in regard to the wage recovery period (see subsection 80(1) of the *Act*). Mr. Mohammadi states that he would like "Employment Standards Tribunal [to] give me a consent letter that allows me to proceed in one of the BC Court of Law for those claims that was not falling into the allowable period" [*sic*]. I presume this assertion concerns section 82 of the *Act* and, if that is the case, the requisite consent, even if such consent were required, can only be given by the Director of Employment Standards.

62. I outlined the governing legal criteria with respect to the admissibility of "new evidence" on appeal, above. Mr. Mohammadi attached a number of documents, such as e-mails/text messages, invoices, job quotations and other internal Canadian Carpet documents, to his various submissions and, presumably, these documents constitute the "new evidence" Mr. Mohammadi wishes to rely on in his appeal. However, none of these documents is admissible on appeal simply because they all pre-date the issuance of the Determination and could have been provided to the delegate during the course of his investigation.

63. Mr. Mohammadi also questions the delegate's calculation of several of his unpaid commissions. There was a great deal of evidence before the delegate regarding the various commission claims, almost all of it conflicting. The delegate carefully reviewed the evidence relating to each separate claim at pages R19 – R27 of his reasons. I am not persuaded that the delegate failed to consider all relevant evidence relating to the various commission claims or that his decision with respect to any particular claim could be said to amount to an error of law. I am satisfied, having reviewed the delegate's reasons and the record, that there was a proper evidentiary foundation for each and every one of the delegate's findings regarding the various commission payments in dispute.

64. Mr. Mohammadi also questioned the delegate's calculation of his vacation pay entitlement (he was awarded $2,039.24 on this account). The delegate's findings on this issue are set out at pages R33 – R40 of his reasons and, as with the commission claims, I am not persuaded that the delegate failed to consider relevant evidence or that his findings on this aspect of Mr. Mohammadi's claim were wholly unsupported by any evidence.

65. Mr. Mohammadi also raised, by way of reply to Canadian Carpet's appeal, arguments with respect to his section 63 compensation for length of service award. As noted above, I am confirming this award and, as such, there is no need to address Mr. Mohammadi's arguments on this issue.

66. To summarize, I am of the view that Mr. Mohammadi's appeal has no reasonable prospect of succeeding and thus must be summarily dismissed pursuant to subsection 114(1)(f) of the *Act*.

ORDERS

67. Pursuant to subsection 114(1)(f) of the *Act*, the appeals filed by Canadian Carpet and Mr. Mohammadi are both summarily dismissed. Pursuant to subsection 115(1)(a) of the *Act*, the Determination is confirmed as issued in the total amount of $18,177.35 together with additional interest that has accrued, under section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal