

COURT OF APPEAL FOR ONTARIO

CITATION: Bertsch v. Datastealth Inc., 2025 ONCA 379

DATE: 20250516

DOCKET: COA-24-CV-1227

van Rensburg, Sossin and Gomery JJ.A.

BETWEEN

Gavin Bertsch

Plaintiff (Appellant)

and

Datastealth Inc.

Defendant (Respondent)

Philip R. White and Jason K. Wong, for the appellant

Gabriel Latner and Martyn Siek, for the respondent

Heard: May 14, 2025

On appeal from the order of Justice Colin P. Stevenson of the Superior Court of Justice, dated October 8, 2024, with reasons reported at 2024 ONSC 5593.

REASONS FOR DECISION

[1] This is an appeal from the dismissal of the appellant's wrongful dismissal action. At the oral hearing we dismissed the appeal with reasons to follow. These are our reasons.

[2] The appellant's employment with the respondent was terminated after 8.5 months of service. He had been hired as a vice-president, earning a base salary of \$300,000 per year. On the termination of his employment without cause the appellant received four weeks' pay in lieu of notice. He commenced an action seeking common law damages for wrongful dismissal.

[3] The respondent brought a motion under r. 21.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, for the interpretation of the termination provision in the appellant's employment agreement, and to strike or dismiss the appellant's claim as disclosing no tenable cause of action. On appeal there is no issue that the matter could appropriately be determined on a r. 21 motion.

[4] The termination provision of the employment agreement provided as follows:

Termination of Employment by the Company: If your employment is terminated with or without cause, you will be provided with only the minimum payments and entitlements, if any, owed to you under the Ontario Employment Standards Act, 2000 and its Regulations, as may be amended from time to time (the "ESA"), including but not limited to outstanding wages, vacation pay, and any minimum entitlement to notice of termination (or termination pay), severance pay (if applicable) and benefit continuation. You understand and agree that, in accordance with the ESA, there are circumstances in which you would have no entitlement to notice of termination, termination pay, severance pay or benefit continuation.

You understand and agree that compliance with the minimum requirements of the ESA satisfies any common law or contractual entitlement you may have to notice of termination of your employment, or pay in lieu thereof.

You further understand and agree that this provision shall apply to you throughout your employment with the Company, regardless of its duration or any changes to your position or compensation.

[5] Section 11(a), contained in the “General” provisions of the employment agreement, also provided:

If any of your entitlements under this Agreement are, or could be, less than your minimum entitlements owing under the Ontario Employment Standards Act, 2000, as amended from time to time, you shall instead receive your minimum entitlements owing under the Ontario Employment Standards Act, 2000, as amended from time to time.

[6] The appellant asserted that he was entitled to common law damages for wrongful dismissal because the termination provision of the employment agreement was void and unenforceable, as violating the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (the “ESA”). The ESA provides, among other things, that an employee is entitled to statutory notice or termination pay and severance pay (where applicable) unless they fall under various exceptions set out in the regulations to the ESA. One such exception (under O. Reg. 288/01) is for employees who have “been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer.”

[7] The motion judge rejected the appellant’s argument that the termination provision in the employment agreement would permit the employer to terminate employment for cause short of “wilful misconduct, disobedience or wilful neglect of

duty”, without payment. He concluded that the termination provision effectively excluded any claim for common law wrongful dismissal damages beyond what was provided under the ESA. The motion judge stated that there was “no reasonable interpretation [of the relevant provisions] which would be contrary to the minimum requirements of the ESA and regulations.” While clause 11(a) also provided for a “failsafe”, in that it expressly provided for an employee to receive their minimum entitlements under the ESA on termination, this provision was not needed because the termination clause was clear and unambiguous. In sum, the exclusion of common law notice under the appellant’s employment agreement was enforceable.

[8] The appellant submitted that the motion judge erred when he refused to find that the termination clause was ambiguous. He asserted that, while a person trained in the law might find the clause unambiguous, an ordinary person might understand, incorrectly, that they could be terminated from their employment without notice for conduct such as negligence.

[9] We see no error in the motion judge’s disposition of the r. 21 motion. In *Amberber v. IBM Canada Ltd.*, 2018 ONCA 571, 424 D.L.R. (4th) 169, this court observed, at para. 43, that “[w]here a termination clause can reasonably be interpreted in more than one way, the interpretation that favours the employee should be preferred”. A finding of ambiguity, however, means “something more than the mere existence of competing interpretations”: *Amberber*, at para. 45.

[10] Contrary to the appellant's submissions, this is not a case where the agreement uses legal terms or language that might be confusing to a person not versed in the law. The appellant's counsel suggests that because the average employee may believe that a person can be terminated for cause without notice, they could read the termination agreement to provide for termination for cause for any reason without payment. Such a reading would require the employee to ignore the words "with or without cause".

[11] In any event, the issue is not whether an ordinary person might arrive at an incorrect interpretation of the termination provisions of the employment agreement, but how the agreement can be reasonably interpreted. The termination provision specifically states that an employee who is terminated "with or without cause" will receive the minimum payments and entitlements under the ESA and its regulations. We see no error in the motion judge's conclusion that the termination provision in the employment agreement is unambiguous, and that, when reasonably interpreted, it does not depart from the minimum standards guaranteed by the ESA. As such, the termination provision is enforceable and precludes the appellant's claim for common law damages for wrongful dismissal.

[12] For these reasons we dismissed the appeal. Costs of \$10,000 inclusive of disbursements and HST are payable by the appellant to the respondent.

"K. van Rensburg J.A."

"L. Sossin J.A."

"S. Gomery J.A."