CITATION: William Williamson v. Brandt Tractor Inc., 2025 ONSC 2571
COURT FILE NO.: CV-21-00670346-0000
DATE: 20250501

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
WILLIAM WILLIAMSON	)	David Vaughan, for the Plaintiff
Plaintiff	)	
– and –	)	
BRANDT TRACTOR INC.	)	Seann McAleese, for the Defendant
Defendant	)	
	)	**HEARD:** March 19, 20, and 21, 2025

AKAZAKI J.

REASONS FOR JUDGMENT

OVERVIEW

[1] At the time of his dismissal as a salesperson at Brandt Tractor, William Williamson was 56 years old and had worked there for 18 years. He never made it easy for himself. His job covered a large territory, north of Toronto to Timmins, Owen Sound, and Sudbury. Several times during his career, members of the public complained about his driving. He crashed the company truck. He injured himself at least once, while demonstrating a tractor attachment to a client. Brandt kept him on, and he was successful enough as a sales producer.

[2] On September 1, 2021, Brandt terminated Mr. Williamson's employment, citing his discipline record and an August 30, 2021, incident, in which a customer expressed dissatisfaction with his handling of a sale of a piece of equipment.

[3] The parties agreed that just cause can only justify dismissal without compensating him for a reasonable notice period in cases of serious misconduct. The analogue under s. 55 of the

Employment Standards Act, 2000, S.O. 2000, c. 41, and O.Reg. 288/01, s. 2, is wilful misconduct, disobedience, or breach of duty, although the employee's breach must be more serious to be deprived of the statutory benefit. They also agreed the August incident, however described, could not on its own have justified dismissal.

[4] The defendant relied on the cumulative misconduct principle allowing the employer to place a final act of misconduct on the scales, already laden with other disciplinary events, as the basis for termination. This is the theory that the final event is sufficient to "break the camel's back": *McNaughton v. Sears Canada Inc.* (1997), 144 D.L.R. (4th) 47, 1997 CarswellNB 76 (C.A.), at para. 16; *Nossal v. Better Business Bureau of Metropolitan Toronto Inc*., 1985 CarswellOnt 861, at paras. 13-14.

[5] The issue of just cause for the termination therefore depends on the question whether the August incident was misconduct warranting discipline. This, in turn, depends on the probative value of the evidence on this point. My conclusion is that the evidence falls short of proving a disciplinary offence. Therefore, the termination without notice or payment in lieu amounted to wrongful dismissal. Because I have concluded that it did not warrant discipline and dismissal, I will assess the damages.

[6] The balance of these reasons details the following points needed to reach the above conclusion:

1. whether the August 30, 2021, incident warranted discipline
2. length of termination notice for assessing damages
3. mitigation
4. punitive damages

1. WHETHER THE AUGUST 30, 2021, INCIDENT WARRANTED DISCIPLINE

[7] Brandt terminated Mr. Williamson's employment in a September 1, 2021, letter. The letter stated the key justification for the dismissal in the following paragraphs:

> There has been a variety of incidents since your last warning letter dated March 4, 2021. The most recent incident was August 30th, 2021, when you mismanaged a potential deal with a customer. You tried to get the customer to sign a sales agreement for a piece of equipment we do not have and financing that hadn't been finalized yet. The customer followed up to say he would be calling another branch to make his purchase and expressed his dissatisfaction with your business practice and unprofessionalism. This is completely unacceptable and tarnishes the reputation of Brandt. We have given you the benefit of the doubt on multiple occasions and tried to work with you to correct your behaviour and performance; however we have now

> reached an unworkable situation. Our trust in you as an employee has completely diminished and the employment relationship has been irreparably broken.
>
> Based on all of the foregoing, and the lack of improvement (or the prospect thereof), this letter is to inform you that your employment with the company is terminated effective today, September 1, 2021.

[8] The defendant's evidence about the August 30 incident came from Mr. Williamson's manager, Dave Clark, who testified using an email of August 31 to refresh his memory. The email was to Mr. Clark's superior, Paul Gleason, and to the human resources representative Jaime Newton. Because it is a long paragraph, I will break it up for ease of review:

> On August 30th 2021, Bill called me to tell me "he screwed up" with a potential customer. Bill explained to me that he was trying to get the customer to sign a sales agreement (for a piece of equipment we do not have), and told him just to initial the second page of the sales agreement because no one reads it anyways, and when the customer challenged him on it, Bill said he could take it home to read it if he liked.
>
> The customer also questioned Bill regarding financing that it wasn't in place with Brandt Finance and had not had a call from them. Bill had forgotten about the customer wanting to know about financing and did not inform Brandt Finance on the lead. The customer asked Bill why would he sign a sales agreement when financing hasn't been finalized? Bill did not have on the sales agreement that the purchase was subject to finance approval. The customer told Bill that this is highly unprofessional and did not like his business practice and that the customer would be calling another branch to make his purchase.
>
> I called and left a message for the customer that evening. I then spoke to the customer at approximately 8:30am on August 31st which he stated Bill was extremely unprofessional, calling him 8 times a day and did not want him to read the second page of the agreement, only to initial it. I told the customer I would be taking over for Bill, if he decided to stay with our branch on the purchase to which he agreed. I also explained that I will work with Brandt Finance as well for him.

[9] Mr. Williamson testified that he did not call Mr. Clark. However, he did acknowledge dealing with the customer in the manner set out in the first segment above. He did not deny serving the customer in question and that he tried to persuade the customer to ink the paperwork for the sale of a unit that was still on the production line and that remained conditional on financing. He testified that all members of the sales staff did this, and that it was simply a favour to the customer to put them in a place in line for the product as soon as it was available.

[10] I accept Mr. Clark's email as a contemporaneous note of his telephone conversation with the customer, who was upset that Mr. Williamson tried to sell him equipment that was not yet available, for which financing was not yet confirmed. The customer also complained that Mr. Williamson tried to pressure him into initialling the second page of the sales agreement, which contained fine print that he had not reviewed, and tried to call him eight times that day to close the sale. As a result, the customer chose to go to another Brandt branch to complete the purchase. Mr. Williamson's testimony denying other points of work-related incidents throughout the trial suggested to me that he was not the type to pour his heart out to Mr. Clark about customer complaints. I suspect the second segment above was all related by the disgruntled customer. Even if Mr. Williamson told Mr. Clark these things, the customer's version of events would not have constituted an admission of wrong doing.

[11] Since Mr. Williamson disclaimed he called Mr. Clark, his evidence was not useful in clearing up whether Mr. Williamson had simply lost the sale or had been guilty of using unprofessional methods to pressure the customer into a purchase. My overall impression of Mr. Williamson's evidence was that he lacked credibility. There was a record of work-related incidents and discipline under three different managers. He declined to accept he needed additional training or that he really deserved to be disciplined. Thus, if Brandt established that Mr. Williamson's encounter with his final customer was worthy of discipline, the employer would have proven just cause.

[12] Nevertheless, the evidence regarding the customer's version and the grounds for being upset was entirely hearsay. The customer did not testify. Brandt could have summoned him. A negative credibility assessment of Mr. Williamson's evidence and version of events does not amount to proof that the encounter went precisely as the customer claimed it did. The court had no means of testing the credibility of the customer's account as related to Mr. Clark. Mr. Clark's note satisfied neither of the requirements of necessity and reliability for admissibility of hearsay for truth of serious allegations: *R. v. Khan*, [1990] 2 S.C.R. 531, at pp. 546-48. The defence could have summoned the customer but did not do so.

[13] What does the evidence of Mr. Clark's email as a contemporaneous record of his telephone call with the customer reveal? At most, it proved the customer was upset and took his business to another branch. The court does not know whether the customer in fact went to another branch. It would have been easy enough to prove. The attempt to sell a unit that was still in production is not in itself wrong. In commerce, it is called pre-ordering. It would also have been reasonable to secure the customer's signature on the purchase agreement, as a condition of holding his place in line. Sales personnel operate with varying degrees of pushiness. The customer may have found this annoying, but the employment status of a long-time employee cannot hang in the balance of a customer's subjective interpretation of his conduct.

[14] I did not believe much of Mr. Williamson's evidence. I can accept Mr. Clark's email for the purpose of establishing that Mr. Williamson had an encounter with the customer. He admitted that much. However, the court cannot rely on a record of an occurrence as proof that Mr. Williamson was in the wrong. The email and Mr. Clark's telephone call with the

customer do not rise to the *prima facie* proof of facts in the statement. Although Mr. Clark could have been under a duty to record what the customer said, the customer was under no duty to provide an objective account. This differentiates the evidence here from those of duty-bound record-keepers: *Ares v. Venner*, 1970 CanLII 5 (SCC), [1970] SCR 608, at p. 626.

[15] The defendant therefore did not prove termination for just cause. Consequently, Mr. Williamson is entitled to damages commensurate with reasonable notice at common law.

2. LENGTH OF NOTICE

[16] The parties agreed that they will calculate the damages, including the value of the notice period and benefits. The only issue for the court was the length of notice. They also agreed that the "Bardal" factors in Chief Justice McRuer's decision in *Bardal v. Globe & Mail Ltd*. [1960] OWN 253, 24 DLR (2d) 140 (Ont. H.C.J.) prevail in Canadian employment law for determining reasonable notice in common-law:

1. Character of the employment.
2. Length of service.
3. Age.
4. Availability of similar employment, having regard to the experience, training, and qualifications of the employee.

[17] Mr. Williamson relied on numerous employment law cases of persons with similar tenure who were awarded damages based on 18 months of notice, with two outliers at 20 and 21 months. Subject to the mitigation issue, Brandt submitted that 15 months would have been a more reasonable notice period.

[18] Mr. Williamson relied on the fact that the dismissal occurred during the height of the Covid-19 Pandemic to assert a claim for 20 months of notice. This was the only evidence on the fourth point. The Pandemic has been held to be grounds for finding a shortage of positions, although some sectors had greater demand for labour: *Gracias v. Dr. David Walt Dentistry*, 2022 ONSC 2967, at para. 110. There was no evidence that the demand for Brandt's products subsided during the Pandemic.

[19] Hearing Mr. Williamson at trial, I got the impression that if Brandt had given him 12 to 15 months of pay in lieu of notice, he would have taken it. This is not, of course, a proper measure of his legal entitlement. However, it would have been the lower end of Mr. Williamson's reasonable expectations – the underlying principle of all contract law. Employment law, however, recognizes special role of employment in an individual's identity and life. Accordingly, I would award him damages based on a notice period of 17 months.

3. MITIGATION

[20] After the termination, Mr. Williamson took a job driving a parts vehicle a lower pay grade. He testified that he was content with this, because he wanted to get out of sales. The defendant argued that this constituted grounds to deny him damages in lieu of reasonable notice.

[21] A wrongfully dismissed employee has a duty to try to mitigate damages by making reasonable best efforts to obtain a comparable position. If successful, the earnings from the new position can be deducted. Similarly, if such a position is turned down, the wages that could have been earned can also be deducted. But if the employee can only find a lower-paying or ranking position, as in the case of Mr. Williamson, the earnings are not deductible: *Brake v. PJ-M2R Restaurant Inc.*, 2017 ONCA 402, at paras. 157-58.

[22] Mr. Williamson's evidence that he wanted to get out of sales supports the defence view that he was heading out the door into a less stressful position. His discipline record is indicative of an unhappy employee. However, the evidence was thin on the point, and it is the defendant's burden to establish. Accordingly, I decline to reduce his notice period on account of his having accepted another position.

4. PUNITIVE DAMAGES

[23] Mr. Williamson relies mainly on case law stating that failure to provide notice under the ESA or payment in lieu is an independent actionable wrong, for the purpose of awarding punitive damages: *Altman v. Steve's Music*, 2011 ONSC 1480, at para. 137; and *Chen v. MagIndustries Corp.*, 2021 ONSC 2377, at para. 32.

[24] The Supreme Court has refused to acknowledge a nominate tort of statutory breach: *The Queen (Can.) v. Saskatchewan Wheat Pool*, 1983 CanLII 21 (SCC), [1983] 1 SCR 205, at p. 225. However, an actionable wrong does not need to rise to a separate tort, to become the basis for punitive damages: *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 SCR 595, at para. 82:

> … the requirement of an independent tort would unnecessarily complicate the pleadings, without in most cases adding anything of substance. … An independent actionable wrong is required, but it can be found in breach of a distinct and separate contractual provision or other duty such as a fiduciary obligation.

[25] I am prepared to accept that breach of the ESA is an actionable wrong, in the sense that the statute allows the dismissed employee to claim a remedy. However, I am reluctant to consider the breach to become a springboard for an automatic award of punitive damages beyond tolling the commencement of the notice period to the end of the statutory notice

period. There must be more, such as the egregious conduct requirement described in the case law, to justify punitive damages beyond the remedy enacted by the legislature.

CONCLUSION

[26] I therefore award damages to be calculated based on a 17-month notice period. The claim for punitive damages is dismissed. Per the joint submission of counsel, I will entrust them with the task of quantifying the damage award. Since I have been relieved of the task of calculating the damages, I will also leave it to counsel to calculate the prejudgment interest.

[27] If the parties are unable to agree on costs, counsel for the plaintiff may contact my judicial assistant to establish a timetable for exchange of submissions.

Akazaki, J.

Released: May 1, 2025

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