COURT OF APPEAL FOR ONTARIO

CITATION: De Castro v. Arista Homes Limited, 2025 ONCA 260
DATE: 20250403
DOCKET: COA-24-CV-0369

Pepall, Monahan and Pomerance JJ.A.

BETWEEN

Ellen De Castro

Plaintiff
(Respondent)

and

Arista Homes Limited

Defendant
(Appellant)

Neil G. Wilson, for the appellant

Timothy Lee, for the respondent

Heard: March 21, 2025

On appeal from the order of Justice Markus Koehnen of the Superior Court of Justice, dated February 23, 2024, with reasons reported at 2024 ONSC 1035.

REASONS FOR DECISION

[1] The respondent, Ellen De Castro, was employed by the appellant, Arista Homes Limited (Arista), for four years and nine months. The appellant dismissed the respondent without cause. Relying on the provision in the employment contract for termination without cause, the appellant paid the respondent four weeks' salary

in lieu of notice under the *Employment Standards Act, 2000*, S.O. 2000 (the "ESA").

[2] The respondent objected, sued the appellant for damages for failure to provide reasonable notice, and brought a motion for summary judgment.

[3] Before the summary judgment judge, the respondent relied on the governing authority of *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391, 446 D.L.R. (4th) 725, leave to appeal refused, [2020] S.C.C.A. No. 292, to argue that the termination provisions in the employment contract were unenforceable and she was entitled to common law damages. The appellant conceded that if the termination for cause provision in the employment contract fell afoul of the ESA, the termination without cause provision must also be struck out, however, the appellant argued that the contract, properly construed, did comply with the ESA. The motion judge disagreed with the appellant and awarded damages reflecting eight months' salary in lieu of notice .

[4] On appeal, the appellant challenges the motion judge's interpretation of the for-cause termination clause.

[5] That clause provides as follows:

> If you are terminated for Cause or you have been guilty of wilful misconduct, disobedience, breach of Employment Agreement or wilful neglect of duty that is not trivial and has not been condoned by ARISTA, then ARISTA will be under no further obligation to provide you

> with pay in lieu of reasonable notice or severance pay whether under statute or common law.

[6] Immediately afterward, it provides the following definition of "cause":

> For the purposes of this Agreement "Cause" shall include your involvement in any act or omission which would in law permit ARISTA to, without notice or payment in lieu of notice, terminate your employment.

[7] The motion judge found that the contract defined "cause" more broadly than did the ESA, and so permitted termination without notice in circumstances where the ESA would prohibit it. He therefore concluded that it breached the ESA. We see no error in the motion judge's approach. It was rooted in the plain grammatical meaning of the words in the agreement and reflected the application of established principles governing employment contracts.

[8] The impugned clause contemplates being "terminated for Cause", or being terminated because "you have been guilty of wilful misconduct, disobedience, breach of Employment Agreement or wilful neglect of duty that is not trivial and has not been condoned by ARISTA". This disjunctive language signals that termination may be either for "Cause" as defined in the agreement, or for the reasons set out after the word "or".

[9] Those reasons contemplate termination for acts and omissions that would not justify termination under the ESA. For example, as the motion judge concluded, the contract contemplates termination for cause based on "a breach of [the]

Employment Agreement". But it does not require that any such breach be either wilful or serious. That contravenes the requirements set by the ESA.

[10] The motion judge further noted that the final sentence of the clause defines "Cause" by saying that it "shall include … involvement in any act or omission which would in law permit" termination without notice. The words "shall include" suggest that the definition is not exhaustive and that circumstances other than those specified could justify termination.

[11] The appellant says that the motion judge's interpretation is not reasonable. It argues that there is only one way to construe the clause, namely, that it is in compliance with the ESA. The appellant says that the word wilful must be seen to qualify the reference to breach of the employment contract and further, that breach of the employment contract must be qualified by the final words: "that is not trivial and has not been condoned by Arista". It argues that the words "shall include" do not necessarily signal a non-exhaustive definition. It contrasts the language in this case with that used in *Dufault v. Ignace (Township)*, 2024 ONCA 915, where the offending language was "shall include but is not limited to".

[12] We do not agree that the appellant's interpretation is the only reasonable interpretation of the clause, or even a viable interpretation of the language in the contract. On the appellant's approach, one must ignore the word "or" as it appears in the opening sentence, ignore the placement of qualifiers, and disregard the

usual meaning of the words “shall include”. The appellant’s interpretation is neither plain nor grammatical.

[13] The appellant says that the contract evinces a desire to comply with the law by defining “Cause” as acts and omissions that would, in law, permit termination. The appellant says that it therefore makes no sense to interpret the clause as deviating from the law. This, too, is unpersuasive. The issue is not whether the contract purports to comply with the law; it is whether the language in the contract actually does comply with the law. If the language of the agreement violates the law, it is no answer for the employer to say that it did not intend this result. Were it otherwise, it would be an easy matter for an employer, by asserting such intention, to inoculate a contract from judicial review.

[14] Finally, the motion judge’s approach reflects a careful application of established principles governing the interpretation of employment contracts. Courts have recognized that such contracts are generally interpreted differently than other commercial agreements to protect the interests of employees: see *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158, 412 D.L.R. (4th) 261, at paras. 26-28. Employees have less bargaining power than employers. Furthermore, employees are far less likely than employers to be familiar with the standards dictated by the ESA.

[15] Because the ESA is “remedial legislation, intended to protect the interests of employees”, courts are to adopt an interpretation that best achieves this objective: *Wood*, at para. 28. That means an interpretation that “encourages employers to comply with the minimum requirements of the Act” and “extends its protections to as many employees as possible”: *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 1003. The contract is to be read as a whole, with any ambiguity construed in favour of the employee.

[16] For all of these reasons, we see no error—let alone palpable and overriding error—in the motion judge’s reasons. The appeal is therefore dismissed. Pursuant to the agreement between the parties, costs in the amount of $5,000 are awarded to the respondent.

“S.E. Pepall J.A.”
“P.J. Monahan J.A.”
“R. Pomerance J.A.”