CITATION: Baker v. Van Dolder's Home Team Inc., 2025 ONSC 952
COURT FILE NO.: CV-24-004 (Owen Sound)
DATE: 2025-02-11

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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
Frederick Baker	)	Christopher Achkar, Susana Cruz and Madison Chilvers, for the Plaintiff
Plaintiff	)	
– and –	)	
Van Dolder's Home Team Inc.	)	Erroll Treslan, for the Defendant
Defendant	)	
	)	**HEARD:** February 7, 2025

REASONS FOR JUDGMENT

SPROAT, J

INTRODUCTION

[1] The parties agreed that it was appropriate to decide this wrongful dismissal case on a summary judgment application brought by the defendant. Liability was to be determined on the basis of affidavit evidence and written submissions. I, however, asked for oral submissions.

[2] Mr. Achkar filed the plaintiff's material and Ms. Cruz and Ms. Chilvers attended on February 7, 2025 to make oral submissions.

THE ISSUES AND EVIDENCE

[3] The plaintiff's employment contract provided in relevant part as follows:

1. Resignation: you may resign from your employment by providing us with at least 14 days' prior written notice, specifying the effective date of resignation. We may, at our sole discretion, waive in whole or in part such notice by paying you your base salary and benefits (and any entitlements under the *Employment Standards Act*, if applicable) until the effective date of your resignation.

2. Termination without cause: we may terminate your employment at any time, without just cause, upon providing you with only the minimum notice, or payment in lieu of notice and, if applicable, severance pay, required by the *Employment Standards Act*. If any additional payments or entitlements, including but not limited to making contributions to maintain your benefits plan, are prescribed by the minimum standards of the *Employment Standards Act* at the time of your termination, we will pay same. The provisions of this paragraph will apply in circumstances which would constitute constructive dismissal.

3. Termination with cause: we may terminate your employment at any time for just cause, without prior notice or compensation of any kind, except any minimum compensation or entitlements prescribed by the *Employment Standards Act*. Just cause includes the following conduct:

    a. Poor performance, after having been notified in writing of the required standard;

    b. Dishonesty relevant to your employment (such as misleading statements, falsifying documents and misrepresenting your qualifications for the position you were hired for);

    c. Theft, misappropriation or improper use of the company's property;

    d. Violent or harassing conduct towards other employees or customers;

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e. Intentional or grossly negligent disclosure of privileged or confidential information about the company;

f. Any conduct which would constitute just cause under the common law or statute.

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[4] The plaintiff was terminated "without cause" on May 24, 2023. The agreement between the parties stated that, "the issue to be determined on the motion will be whether the "with cause" provision of the Contract is enforceable or not".

[5] In *Waksdale v. Swegon North America*, 2020 ONCA 391, the court determined that if a portion of a termination provision is unenforceable, it renders the entire termination provision unenforceable. As such, to ascertain if the "with cause" provision is unenforceable, it is necessary to consider:

a) whether the "with cause" provision is unenforceable by reason of its wording; and

b) whether the "without cause" termination provision is unenforceable, thereby also rendering the "with cause" provision unenforceable.

[6] The agreement between the parties focused on the enforceability of the "with cause" provision. The plaintiff, the responding party to the motion, cited the *Default* decision, which I will come to, that addresses the enforceability of a "without cause" provision. I, therefore, asked for further oral submissions as the plaintiff's factum had understandably not addressed the "without cause" provision.

STARE DECISIS

[7] In *R. v. Scarlett*, 2013 ONSC 562, then Strathy J. stated:

> [43] The decisions of judges of coordinate jurisdiction, while not absolutely binding, should be followed in the absence of cogent reasons to depart from them: see *Re Hansard Spruce Mills Ltd.*, 1954 CanLII 253 (BC SC), [1954] 4 D.L.R. 590 (S.C.); *R. v. Northern*

> *Electric Co. Ltd.*, 1955 CanLII 392 (ON SC), [1955] O.R. 431, [1955] 3 D.L.R. 449 (H.C.) at para. 31. Reasons to depart from a decision, referred to in *Hansard Spruce Mills*, include (a) that the validity of the judgment has been affected by subsequent decisions; (b) that the judge overlooked some binding case law or a relevant statute; or (c) that the decision was otherwise made without full consideration. […]

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[8] In *R. v. Sullivan*, 2022 SCC 19, Kassirer J. for the court stated:

> [44] In the result, I agree with the conclusion reached by Paciocco J.A. that the ordinary principles of *stare decisis* govern the manner in which a declaration issued by a court under s. 52(1) affects how courts of coordinate jurisdiction in the province should decide future cases raising the same issue. I would however clarify the situations when a superior court may depart from a prior judgment of a court of coordinate jurisdiction. The standard is not that the prior decision was "plainly wrong". A superior court judge in first instance should follow prior decisions made by their own court on all questions of law, including questions of constitutional law, unless one or more of the exceptions in *Spruce Mills* are met.

IS THE "WITHOUT CAUSE" TERMINATION PROVISION ENFORCEABLE

[9] The plaintiff submits that this provision is unenforceable, as it states that the defendant is entitled to terminate employment "at any time". The plaintiff cites *Dufault v. The Corporation of the Township of Ignace*, 2024 ONSC 1029:

> [46] Thirdly, the plaintiff submits that Article 4.02 misstates the ESA when it gives the employer "sole discretion" to terminate the employee's employment at any time. I agree with this submission. The *Act* prohibits the employer from terminating an employee on the conclusion of an employee's leave (s. 53) or in reprisal for attempting to exercise a right under the *Act* (s. 74). Thus, the right of the employer to dismiss is not absolute.

[10] On the authority of *Dufault*, the plaintiff's "without cause" termination provision is unenforceable, as the *ESA* does not permit an employer to terminate employment "at any time". An incorrect statement as to the *ESA* is not saved by general language stating that the employer will comply with the *ESA*. (See *Campbell-Givons v. Humber River Hospital*, (2021) 74 C.C.E.L. (4th) 279 (Ont. S.C.J.) at paragraphs 33-40.)

[11] At the hearing, the defendant cited *Bertsch v. Datastealth Inc.*, 2024 ONSC 5593. That decision concluded that a "without cause" termination provision was enforceable. That case is, however, distinguishable in that there was no "with cause" provision that conflicted with the *ESA*. The contract simply stated, correctly, that under the *ESA*, "… there are circumstances in which you would have no entitlement to notice of termination, termination pay, severance pay or benefit continuation."

[12] I must apply *Dufault,* as none of the reasons to depart from a prior decision referenced in *Spruce Mills* are applicable. As such, the "without cause" termination provision is unenforceable.

IS THE "WITH CAUSE" TERMINATION PROVISION ENFORCEABLE

[13] For the sake of completeness, I will also address whether the "with cause" provision is itself unenforceable, such that it would also operate to render the "without cause" provision unenforceable. The plaintiff submits that the provision is unenforceable because it states that the plaintiff has no entitlement in the event of a "just cause" termination which is defined to be a less stringent standard than the "wilful misconduct" standard required to disentitle an employee to *ESA* entitlements.

[14] The plaintiff cites *Perretta v. Rand A Technology Corporation*, 2021 ONSC 2111:

> [43] The Termination With Cause Provision in the 2018 Employment Contract provides as follows:

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> **Termination With Cause** – We may terminate your employment for just cause at any time without notice, pay in lieu of notice, severance pay, or other liability, subject to the ESA. For the purposes of this Agreement, "just cause" means just cause as that term is understood under the common law and includes, but is not limited to: [list of Eleven Categories of Just Cause]

> [44] Three of the Eleven Categories of Just Cause are as follows: (i) "a material breach of this Agreement or our employment policies"; (ii) unacceptable performance standards"; (iii) "repeated, unwarranted lateness, absenteeism or failure to report for work". The Plaintiff submitted that these three Categories of Just Cause, and perhaps others, fall short of the statutory exemption set out in *Termination and Severance of Employment*, O. Reg. 288/01, passed under the *ESA*, which provides, in sections 2(1)3. and 9(1)6., that an employee is not entitled to notice of termination or termination pay or severance pay under the *ESA* where the employee "has been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer."

> [45] I find that the three categories of just cause emphasized by the Plaintiff, and quoted in the previous paragraph, fail to rise to the statutory threshold set out in O. Reg. 288/01 and thereby breach the *ESA*. Simply, they permit dismissal without notice of termination or termination or severance pay in circumstances where the employee is not "guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer." I will refer to these three categories as the "Offending Categories".

[15] The defendant submits that *Perretta* is distinguishable. In that case, the offending provision simply said, "subject to the *ESA*," while the defendant's "with cause" provision is more fulsome, stating that it applies, "except any minimum compensation or entitlements prescribed by the *Employment Standards Act*." I see this as a distinction without a meaningful difference.

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[16] In both cases, the contract at least alerts the employee to the fact that the *ESA* may provide for something other than what is provided for in the contract. If this was a commercial contract with lawyers involved, the parties would be taken to understand the difference between a contractual definition of just cause, the common law definition of just cause, and the *ESA* definition of wilful misconduct disentitling an employee to termination and severance pay. I think that the underlying premise of *Perretta* is that a regular employee cannot be expected to appreciate these differences.

[17] As discussed in *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158, employment contracts are, however, treated differently than commercial contracts, and "Many employees are likely unfamiliar with the employment standards in the *ESA* and the obligations the statute imposes on employers".

[18] In *Rossman v. Canadian Solar Inc.*, 2019 ONCA 992, MacPherson J.A. made the point that:

> [39] … Employees need to know the conditions, including entitlements, of their employment with certainty.

[19] The potential unfairness of a termination provision of the sort at issue is that the employer has described in detail the contractual standard of just cause but given no detail or explanation of the *ESA* wilful misconduct standard, and that it differs from the contractual standard. Given that many employees will not be familiar with the *ESA* provisions, many employees would assume that they had no entitlement if they breached the contractual standards.

[20] In my opinion on the authority of *Perretta*, which I am obliged to follow, the "with cause" termination provision is also unenforceable.

CONCLUSION

[21] As the termination provision is unenforceable, the defendant's motion for summary judgment must be dismissed.

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[22] In accordance with the agreement between the parties, there will be a one-hour virtual hearing to determine damages. Counsel should arrange for that hearing in accordance with the procedure set out in their agreement, as referred to in paragraph 4 of the defendant's factum.

[23] I have no doubt that the defendant, advised by capable counsel, intended only to comply with the *ESA*. While I take no issue with the law and logic of cases such as *Wood* and *Rossman*, they set an exacting standard that many employers and knowledgeable counsel have failed to attain despite their good faith and best efforts.

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Sproat, J

Released: February 11, 2025