CITATION: Li v. Wayfair Canada Inc., 2025 ONSC 2959
COURT FILE NO. CV-23-00712014-0000
DATE: 2025-07-09

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:		
SONG LI	Plaintiff	*Simone Ostrowski and Sohrab Naderi,* Lawyers for the Plaintiff
– and –		
WAYFAIR CANADA ULC	Defendants	*Edward J. O'Dwyer and Kelly Brennan,* Lawyers for the Defendants
		HEARD: April 14, 2025

REASONS FOR DECISION

G. DOW, J.

[1] The plaintiff seeks summary judgment arising from being dismissed from his position as a Senior Product Manager with the defendant. The defendant did not dispute summary judgment was the appropriate manner by which to proceed.

[2] Song Li began working for the defendant on January 23, 2023 and was terminated effective October 17, 2023 or just under nine months of service. He was 45 years of age at the time of his dismissal and had a compensation package which consisted of:

a) annual salary of $221,564 CDN or $18,463.67 per month;

b) benefits valued at $10,831.86 per year or $902.66 per month;

c) RRSP Contributions of $8,861.84 per year or $738.49 per month;

d) potential Restricted Stock Units ("RSU") to vest February 1, 2024 in the amount of $73,017.00 (USD); and

e) a claim for "mitigation" expenses of $1,470.49.

[3] No letter of reference or outplacement services were provided. The plaintiff did not obtain alternative employment within the five months the plaintiff seeks as reasonable, common law notice, contingent on finding the employment agreement he entered into to be unenforceable.

[4] His position as Senior Product Manager, while very lucrative, did not involve his having others report to him or he to the Chief Executive Officer of the company. The Senior Manager, Talent Business Partner for the defendant deposed the plaintiff's position was neither senior nor specialized noting his position was at a level four or two levels below that of a Director (Affidavit of Sylvia Fernandes, sworn January 30, 2025). There was no evidence that the plaintiff was induced to leave a previous position to join the defendant.

[5] In addition to an employment agreement to be reviewed below, the plaintiff accepted RSU awards on May 17, 2023 (twice) and September 20, 2023 totalling 3,315. These were 20 page documents accepted by the plaintiff through his electronic signature.

[6] On termination, pursuant to the terms of his employment agreement, the plaintiff was paid one week of base salary and benefits.

[7] The employment agreement, dated December 23, 2022 was a six page document with subheadings and electronically signed by the plaintiff on December 26, 2022.

ANALYSIS

[8] The parties agreed the issues in dispute were appropriate for summary judgment under Rule 20. Further, the severance paid of one week was the minimum to which Song Li was entitled under the *Employment Standards Act,* S.O. 2000 c.41 ("ESA")

Issue – Enforceability of Termination Clause

[9] The plaintiff first submits the Termination Clause as found on the fourth page of the employment agreement under the heading "Termination" is unenforceable. It relies on the initial phrase in the sentence "The Company may terminate your employment at any time for Cause without notice, pay in lieu of notice, severance, benefits continuance or other compensation or damages of any kind" which goes on to add "unless expressly required by the ESA in which case only the minimum statutory entitlements will be provided".

[10] It should be noted the second page of the Employment Agreement, under the heading "Joining Bonus" contains the sentence "For all purposes in this letter, "Cause" means any willful misconduct, disobedience, or willful neglect of duty that is not trivial and has not been condoned by the company and that constitutes "cause" under the ESA".

[11] The plaintiff relies on Sections 2(1) and 9(1) of the ESA and the statement in *Render v. ThyssenKrupp Elevator (Canada) Limited*, 2022 ONCA 310 (at paragraph 79) where the level of the statutory misconduct involves willful actions beyond:

> "Careless, thoughtless, heedless or inadvertent conduct, no matter how serious does not meet the standard. Rather, the employer must show that the misconduct was intentional or deliberate. The employer must show that the employee purposefully engaged in conduct that he or she knew to be serious misconduct. It is, to put it colloquially, being bad on purpose".

[12] Further, if part of a termination clause is unenforceable, then the entire clause becomes void, even if found in a different part of the employment agreement (*Rahman v. Cannon Design Architecture Inc.*, 2022 ONCA 451 at paragraph 30). Second, the plaintiff submitted the termination without cause wording found in the next paragraph of the fourth page of the plaintiff's employment agreement, which begins "After your probationary period concludes, in the absence of Cause, the Company may terminate your employment at any time and for any reason" which goes on to state "by providing you with only the minimum statutory amount of written notice required by the ESA or by paying you the minimal amount of statutory termination pay in lieu of notice required by the ESA, or a combination of both, as well as paying statutory severance pay required by the ESA, providing benefits continuance for the requisite minimum statutory period under the ESA and all other outstanding entitlements, if any, owing under the ESA".

[13] Here, the plaintiff relied on the decision in *Dufault v. The Corporation of the Township of Ignace*, 2024 ONSC 1029 (at paragraph 9) which held the right of the employer to dismiss is not absolute (at paragraph 46). The plaintiff relied on examples such as:

a) section 53 of the ESA which prohibits termination on conclusion of a leave, such as parental;

b) section 74 of the ESA for attempting to exercise a right under the ESA; or

c) section 50 of the *Occupational Health and Safety Act*, R.S.O. 1990, c. O. 1 for acting in compliance in provisions of that statute.

[14] That decision, which found both the "for cause" and "without cause" clauses unenforceable on the basis they do not comply with the minimum standards set out in the ESA was reviewed by the Court of Appeal (2024 ONCA 915) and upheld. The Court maintained that "the termination provisions in an employment contract must be read as a whole. If one termination provision in an employment contract violates the ESA minimal standards, all termination provisions in the contract are invalid" (at paragraph 23).

[15] The reason behind this conclusion was no doubt based on statements by appellate courts that employment contracts are interpreted differently than other commercial contracts in order to protect the interest of employees who are seen to have less bargaining power (*Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158 at paragraphs 26 to 28). Further, on termination, the employee is most vulnerable and in need of protection. As a result, the Courts should favour interpretation of employment contracts that give the greater benefit to the employee.

[16] That said, my reading of the employment agreement, as a whole, leads to the conclusion the agreement sought only limit the employer's obligation of that provided by the provisions of the ESA. The sentence defining "Cause" begins with "For all purposes in this letter" and ends with "that constitutes 'cause' under the ESA".

[17] The termination with cause wording limits severance payments "unless expressly required by the ESA in which case only the minimum statutory entitlements will be provided".

[18] The without cause termination provision clearly and repeatedly indicates payments will be made as "required by" or "under the ESA".

[19] Plaintiff's counsel submitted the termination clauses in this contract were similar to that reviewed in *Dufault v. The Corporation of the Township of Ignace, supra.* I disagree. While the termination clause in *Dufault v. The Corporation of the Township of Ignace, supra* contained the phrase "anytime", its definition of cause did not refer to the ESA or the definitions cited above. With regard to "without cause" dismissal, the wording failed to provide for all types of wages such as vacation pay or sick days.

[20] My review of the appellate authorities provide for employment contracts, when read as a whole, so long as they comply with the terms and provisions of employment legislation are permitted and can be enforceable. I prefer the reasoning and conclusion found in *Amberber v. IBM Canada Ltd.*, 2018 ONCA 571 (at paragraphs 59 to 62). To that end, plaintiff's counsel raised the need to follow decisions of judges of coordinate jurisdiction citing *Baker v. Van Dolder's Home Team Inc.*, 2025 ONSC 952. While I agree with the principle contained in that decision, I find the wording in this employment contract to be distinguishable to that contained in that case and thus requires a different conclusion.

[21] As a result, I find the terms of the Employment Agreement in the circumstances to be enforceable and the plaintiff's claim for common law damages beyond the ESA mandated payment of one week of basic salary and benefits (which was paid) should and is dismissed.

Issue – Notice Period and Damage

[22] As part of its submissions that the plaintiff was entitled to common law damages of five months, counsel relied on the required factors found in *Bardal v. Globe & Mail Ltd.,* [1960] O.J. No. 149 which have been detailed above. This compared to the defendant's position of up to four months. What is key to the assessment of the proper common law notice period was the next vesting of RSU's on February 1, 2024 in the amount of $73,017 (USD). That is, Song Li would be entitled to this additional amount if the notice period is any greater than 3.5 months.

[23] Regarding the character of the employment, it is clear that while not at the most senior level of management of the company, Song Li's title contained the word "senior" and his salary was at a level far in excess of the average Canadian wage earner. This suggests a longer period of notice should be considered.

[24] Regarding the length of service of just under nine months and the age of the plaintiff at 45 years, both counsel marshalled a series of cases to support their respective position. The plaintiff cited 20 cases with service ranging from 3 months to 20 months of individuals between the age of 25 to 55 years who were awarded four to nine months severance. The defendant referred to 10 cases with service ranging from 5.5 months to 12 months of individuals having an age of 38 to 48 years who were awarded between less than one month to four months.

[25] Regarding the availability of similar employment, no evidence detailing same was tendered aside from Song Li not having obtained alternative employment within the five months of notice he was seeking following his termination.

[26] The defendant also submitted a failure to mitigate on the basis only 28 positions were applied for in the five months and that some were positions for which Song Li was not qualified (such as ones with the title of Vice President). This is undermined by the defendant failing to provide any greater detail of job duties and/or qualifications required. In addition, the defendant failed to provide a letter of reference throughout placement services which would have assisted the plaintiff in finding suitable alternative employment.

[27] The law is clear the onus is on the defendant in this regard (*Yiu v. Canac Kitchens Ltd.*, [2009] O.J. No. 871 at paragraph 16) and "by no means a light one". I have concluded the defendant has not met its burden given the absence of cogent evidence of a comparable position at comparable compensation that the plaintiff failed to pursue.

[28] Aside from the defendant's description of the plaintiff's role as a problem solver by "leveraging various technology to scale Wayfair's operations, and develop strategic plans for further growth" (Silvia Fernandes Affidavit, sworn January 30, 2025, paragraph 4), there was little evidence as to his experience, training and qualifications. As a result, and mindful that periods of service (here the relatively short period of service) should not be given disproportionate weight (see *Love v. Acuity Investment Management Inc.*, 2011 ONCA 130 at paragraphs 19-20), in the event my conclusion that the employment agreement was unenforceable, I find the appropriate notice period to be four months.

[29] As a result, at common law, the notice period would extend beyond the February 1, 2024 vesting of the RSU's. In this regard, the defendant submitted that its 22 page Incentive Award Plan, not signed by the plaintiff made it clear the granting of vesting of RSU depended on the employment as of the vesting date and that employment ended on the earliest of:

a) the effective date of the participant's termination of service;

b) the date the participant received written notice of his or her termination of service; or

c) the date the participant was no longer actively providing services to the company,

subject to *Employment Standards Legislation* extending the date as part of the employee's statutory notice period.

[30] The defendant relied on *Lin v. Ontario Teacher's Pension Plan*, 2016 ONCA 619 (at paragraph 86) which provided that a "bonus plan may contain entitlement terms, setting out limitations on or conditions for the payment of a bonus" and that clear language is required to take away a dismissed employee's common law rights.

[31] I prefer the statement and principle set out in the previous paragraph of that decision which states "for common law contract damages, as compensation for what the employee would have earned had the employer not breached the employment contract by failing to give reasonable notice". That is, had the defendant advised the plaintiff on October 17, 2023 that his services was

no longer be required as of February 17, 2024, his entitlement to the RSU's would have vested and then have been paid. This principle has been repeated in other appellate decisions (for example *Paquette v. TeraGo Networks Inc.*, 2016 ONCA 618 at paragraphs 16-17).

[32] The application of this principle assists in determining the plaintiff's entitlement to the $1,470.49 in expenses incurred while seeking alternative employment. Had the common law notice of four months been given and the plaintiff's full compensation continued to February 17, 2024, these expenses would not have been the responsibility of the defendant and I would decline to award same.

[33] Regarding the value of benefits and RSP's contributions, the parties agreed same to be $902.66 per month and $738.49 per month which, for four months becomes $3,610.64 and $2953.96 respectively (less any payment previously made as part of the one week severance provided).

COSTS

[34] If successful, the defendant sought $20,197,82 inclusive of partial indemnity fees, HST and disbursements arising to $30,296.74 for a substantial indemnity fees. If successful, the plaintiff sought $35,126.89 inclusive of partial indemnity fees, HST and disbursements arising to $52,342.82 and at the substantial indemnity level.

[35] I was advised of a plaintiff's Offer to Settle which I agreed would not be disclosed to me pending the result.

[36] I urge the parties to agree on costs. If they cannot, the party seeking costs shall forward its position to me, in writing, at the email address from which they received this decision, not to exceed five typed written pages in compliance with Rule 4.01 on or before **August 18, 2025**. The page number limit shall exclude any essential attachments being relied upon (such as the Offer to Settle). The responding party shall have until **September 18, 2025** to respond, identically limited.

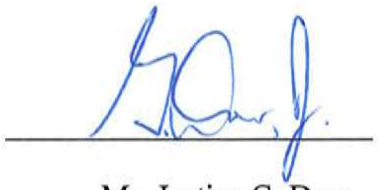
POSTSCRIPT

[37] Following my drafting of these reasons (but before their release), on June 11, 2025, counsel for the defendant emailed my assistant requesting two recent decisions be brought to my attention for consideration as to whether additional submissions were required. Counsel for the plaintiff responded the same day by e-mail to my assistant complaining that the first e-mail was sent without their consent and contrary to Rule 1.09.

[38] Plaintiff's counsel went on submit that the first case, *Bertsch v. Datastealth*, 2025 ONCA 379, released May 16, 2025 was "entirely irrelevant to, and distinguishable from, the present proceeding". That decision upheld a decision of this court that the "termination provision in the employment agreement is unambiguous, and that, it did not depart from minimum standards guaranteed by the ESA" (at paragraph 11).

[39] The other decision was that of the Supreme Court of Canada, released June 5, 2025 in *Corporation of the Township of Ignace v. Karen Dufault*, 2025 CanLII 51603 dismissing the leave to appeal request by the employer. The Court of Appeal reasons were referenced above. Neither decision alters my analysis.

[40] I agree counsel for the defendant ought not to have communicated to me without the consent of plaintiff's counsel. However, it appears this was done with no submission other than the offer to make further submissions unlike counsel for the plaintiff, whose comments I have quoted above. I urge both counsel to reconsider such conduct in the future.



Mr. Justice G. Dow

Released: July 9, 2025

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