COURT OF APPEAL FOR ONTARIO

CITATION: Baker v. Van Dolder's Home Team Inc., 2026 ONCA 568
DATE: 20260806
DOCKET: COA-25-CV-0297 & COA-25-CV-1034

Zarnett, Monahan and Rahman JJ.A.

BETWEEN

DOCKET: COA-25-CV-0297

Frederick Baker

Plaintiff/Responding Party
(Respondent)

and

Van Dolder's Home Team Inc.

Defendant/Moving Party
(Appellant)

AND BETWEEN

DOCKET: COA-25-CV-1034

Song Li

Plaintiff/Moving Party
(Appellant)

and

Wayfair Canada ULC.

Defendant/Responding Party
(Respondent)

Tim Lawson, Brandon Kain, Marco Fimiani and John Gray, for the appellant Van Dolder's Home Team Inc. (COA-25-CV-0297)

Filip Pejovic and Jason Jagpal, for the respondent Frederick Baker (COA-25-CV-0297)

Andrew J. McCreary, Mari T. Maimets and Stephanie Gellatly, for the intervener Ontario Chamber of Commerce (COA-25-CV-0297)

Jackie Esmonde, Cole Eisen and David McQuillan, for the interveners Parkdale Community Legal Services and Income Security Advocacy Centre (COA-25-CV-0297)

Simone Ostrowski and Benjamin Hahn, for the appellant Song Li (COA-25-CV-1034)

Edward J. O'Dwyer and Kelly Brennan, for the respondent Wayfair Canada ULC. (COA-25-CV-1034)

Heard: March 25, 2026

On appeal from the order of Justice John R. Sproat of the Superior Court of Justice, dated February 11, 2025, with reasons reported at 2025 ONSC 952 (COA-25-CV-0297).

On appeal from the order of Justice Grant R. Dow of the Superior Court of Justice, dated July 9, 2025, with reasons reported at 2025 ONSC 2959 (COA-25-CV-1034).

Monahan J.A.:

I. OVERVIEW

[1] In 2018, this court observed that, despite a myriad of cases considering whether termination clauses are compliant with the *Employment Standards Act 2000*, S.O. 2000, c. 41 (the "*ESA*"), "[i]t is fair to say that not all of the cases can be easily reconciled": see *Amberber v. IBM Canada Ltd.*, 2018 ONCA 571, 424 D.L.R. (4th) 169, at para. 42. At around the same time, a leading practitioner in the field delivered a much blunter assessment, arguing that "[c]ounsel can do little more than guess at the answers to the central questions of when a termination

clause will be upheld as valid and enforceable, and as displacing the employee's common law entitlement to reasonable notice or pay in lieu thereof": see Stephen J. Moreau, "Fixing the Broken Law of Termination Clauses" (2020) 22:2 C.L.E.L.J. 143, at p. 143. One of Moreau's chief complaints was that virtually identical termination clauses might in one case be found to be inconsistent with the *ESA* and therefore void, but in another be found to be valid and enforceable. He explains, "[t]he case law has often divided sharply on what can only be described as the most pedantic or trivial of grounds … [t]he failure to insert, or not insert, a word has often been fatal": Moreau, at p. 149.

[2] The two orders under appeal suggest that the uncertainty in the jurisprudence governing termination provisions in employment contracts has yet to be satisfactorily resolved. The impugned language in the without cause termination provisions in the two contracts at issue were virtually identical. Yet in *Baker v. Van Dolder's Home Team Inc.*, 2025 ONSC 952 ("*Baker v. Van Dolder*"), the inclusion of the words "at any time" was held to be inconsistent with the *ESA*, rendering the termination clause unenforceable, whereas in *Li v. Wayfair Canada ULC.*, 2025 ONSC 2959, 99 C.C.E.L. (4th) 242 ("*Li v. Wayfair*"), a provision permitting without cause termination "at any time and for any reason" was held to be valid and enforceable.

[3] These appeals provide an opportunity to clarify the relevant legal principles governing the interpretation of termination provisions in employment contracts.

This will not only assist trial courts which must determine the enforceability of such provisions but, more importantly, serve the mutual interest of the parties to such agreements, who might thereby be spared the necessity of litigating an issue of considerable consequence at a time when employees are particularly vulnerable.

[4] The interpretive framework I set out below, far from being novel, is an elaboration of established principles endorsed by this court as well as the Supreme Court of Canada on numerous occasions. These established principles begin with the recognition that employment contracts must be interpreted differently than other commercial agreements so as to further employment law principles, most notably the desirability of protecting the interests of vulnerable employees. At the same time, determining the meaning of an employment contract is still an exercise in contractual interpretation, with the goal being to understand the objective intentions of the parties as expressed in the wording of the contract as a whole, understood in light of the relevant surrounding circumstances.

[5] Applying this interpretive framework to the termination provisions in the two contracts at issue in these appeals, I find that the wording of the provisions, considered in the context of each contract as a whole and the relevant surrounding circumstances, reflects an objective intention to comply with the minimum standards in the *ESA* applicable upon the termination of employment. That interpretation is consistent with employment law principles – it protects employees by giving effect to the terms they would reasonably be understood to have agreed

to. Accordingly, I would allow the appeal in *Baker v. Van Dolder*, and dismiss the appeal in *Li v. Wayfair*.

II. BACKGROUND

[6] Given that these reasons address the appeals in both *Baker v. Van Dolder* and *Li v. Wayfair*, I set out the relevant background in respect of each appeal separately.

A. Baker v. Van Dolder

[7] Frederick Baker ("Mr. Baker") commenced employment with Van Dolder's Home Team Inc. ("Van Dolder") on November 2, 2020 as its Controller, Head of Finance, at an annual salary of $95,000 plus benefits.

[8] The provisions governing the termination of Mr. Baker's employment by Van Dolder were as follows:

> Termination without cause: we may terminate your employment <u>at any time</u>, 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. [Emphasis added.]
>
> [the "Without Cause Provision"]

> 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;
> >
> > 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.
>
> [the "With Cause Provision"]

[9] On March 24, 2023, Van Dolder gave Mr. Baker written notice that his employment was being terminated without cause, effective that date. Mr. Baker was 71 years old at the time. Pursuant to s. 57(b) of the *ESA*, Mr. Baker was entitled to two weeks of notice (or pay instead of notice), given his tenure was between one and three years at the company. Van Dolder offered to provide

Mr. Baker with four weeks of pay in lieu of notice if he signed a release. Mr. Baker declined to sign the release and instead commenced an action for wrongful dismissal on the basis that the termination provisions in his employment contract were inconsistent with the *ESA* and therefore void, with the consequence being that the common law reasonable notice regime applied. Van Dolder therefore paid Mr. Baker only the minimum two weeks in lieu of notice.

[10] On a motion for summary judgment, the motion judge found that both the Without Cause Provision and the With Cause Provision in Mr. Baker's employment contract were inconsistent with the *ESA* and therefore unenforceable.

[11] The Without Cause Provision was unenforceable because it permitted Van Dolder to terminate Mr. Baker's employment "at any time". The motion judge found that the language "at any time" was inconsistent with the *ESA*, since the *ESA* prohibits employers from terminating an employee's employment at certain times, including on the conclusion of an employee's leave (s. 53) or as a reprisal for the employee attempting to exercise a right under the *ESA* (s. 74). Moreover, the motion judge considered himself bound by *Dufault v. The Corporation of the Township of Ignace*, 2024 ONSC 1029, 93 C.C.E.L. (4th) 345 ("*Dufault (Ont. S.C.)*"), aff'd but not on this issue, 2024 ONCA 915, 504 D.L.R. (4th) 456 ("*Dufault (Ont. C.A.)*"), leave to appeal refused, [2025] S.C.C.A. No. 58. The motion judge in that case held that a without cause provision with similar "at any time" language

was inconsistent with the *ESA*: *Dufault (Ont. S.C.)*, at para. 46. This court expressly declined to decide that issue on appeal: *Dufault (Ont. C.A.)*, at para. 25.

[12] The With Cause Provision in Mr. Baker's contract was also unenforceable even though the provision stated that if Mr. Baker was terminated for cause he would be entitled to receive the minimum compensation or entitlements prescribed by the *ESA*. The motion judge acknowledged that this wording at least alerted Mr. Baker to the fact that the *ESA* may provide for something other than what is provided in the contract. He accepted that such a provision might well be valid if this were a commercial contract with lawyers involved, since in such a case the parties would be taken to understand the difference between the contractual definition of just cause, the common law definition of just cause, and the *ESA* definition of wilful misconduct. But he reasoned that the provision was potentially unfair in relation to "regular employees" because, although it set out what conduct constituted "just cause" for purposes of the contract, it did not explain the *ESA* definition of "wilful misconduct" and how that statutory standard differed from the contractual standard. In the motion judge's view, "[g]iven 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". Therefore, the provision was unenforceable.

[13] The motion judge concluded his reasons with the following observation:

> I have no doubt that [Van Dolder], 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.[1]

B. Li v. Wayfair

[14] Song Li ("Mr. Li") commenced employment with Wayfair Canada ULC. ("Wayfair") on January 23, 2023 as a Senior Product Manager, at an annual salary of $221,546 plus benefits.

[15] The provisions governing the termination of Mr. Li's employment by Wayfair were as follows:

> 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.
>
> …
>
> 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, unless expressly required by the ESA in which case only the minimum statutory entitlements will be provided.
>
> [the "With Cause Provision"]
>
> After your probationary period concludes, in the absence of Cause, the Company may terminate your employment

[1] The two cases the motion judge refers to are *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158, 134 O.R. (3d) 481 and *Rossman v. Canadian Solar Inc.*, 2019 ONCA 992, 444 D.L.R. (4th) 131.

> at any time and for any reason by providing you with only the minimum statutory amount of written notice required by the ESA or by paying you the minimum 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 notice period under the ESA and all other outstanding entitlements, if any, owing under the ESA. These payments and benefits shall fully satisfy all of the Company's notice, severance and benefits continuance obligations upon the termination of your employment, whether arising under the ESA, the common law or this Agreement, and you agree you shall have no further entitlements unless expressly required by the ESA. In no event will you receive less than your statutory minimum entitlements under the ESA. [Emphasis added.]
>
> [the "Without Cause Provision"]

[16] Mr. Li's employment was terminated without cause on October 17, 2023. He was 45 years old at the time. Pursuant to s. 57(a) of the *ESA*, Mr. Li was entitled to one week of notice (or pay instead of notice), given his tenure was less than one year at the company. He was indeed paid one week of salary and his benefits were continued for one week. Mr. Li commenced an action against Wayfair seeking common law damages for wrongful dismissal, arguing that both the Without Cause and the With Cause Provisions in his contract were inconsistent with the *ESA* and therefore unenforceable.

[17] On a motion for summary judgment, Mr. Li submitted that the Without Cause Provision was unenforceable because it permitted Wayfair to terminate his employment "at any time and for any reason". Relying on *Dufault (Ont. S.C.)*, Mr. Li

argued that this wording is inconsistent with various statutory provisions prohibiting the dismissal of employees in certain circumstances, including ss. 53 and 74 of the *ESA*, as well as s. 50 of the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 (the "*OHSA*"), which prohibits dismissing a worker because they exercised their rights under the *OHSA*.

[18] The motion judge rejected Mr. Li's argument and found the Without Cause Provision enforceable. In his view, reading the employment contract as a whole led to the conclusion that it sought only to exclude Mr. Li's right to common law damages and limit his entitlement on termination to the minimum required by the *ESA*. The motion judge relied on the fact that the Without Cause Provision "clearly and repeatedly indicates payments will be made as 'required by' or 'under the *ESA*'". The motion judge further found that *Dufault (Ont. S.C.)* was distinguishable and, in any event, he preferred this court's reasoning and conclusion in *Amberber*, at paras. 59-62.

[19] The motion judge similarly held that the With Cause Provision was enforceable since, unlike the provision considered in *Dufault (Ont. S.C.)*, Mr. Li's employment contract defined cause in relation to the *ESA* standard of "wilful misconduct" and provided that he would receive any minimum statutory entitlements required by the *ESA*.

III. GROUNDS OF APPEAL

A. Baker v. Van Dolder

[20] Van Dolder argues that the motion judge made the following errors of law in finding the Without Cause Provision to be unenforceable:

(i) failing to read the employment contract as a whole and creating an ambiguity where none was present;

(ii) ignoring numerous precedents from this court and other appellate courts which have enforced without cause termination provisions which contain similar “at any time” language; and

(iii) interpreting the phrase “at any time” without regard to Van Dolder’s implied duty to act in good faith.

[21] Van Dolder further argues that the motion judge made the following errors of law in finding the With Cause Provision to be unenforceable:

(i) ignoring the fact that the *ESA* permits terminations for cause not amounting to wilful misconduct;

(ii) therefore, mistakenly concluding that the With Cause Provision in Mr. Baker’s contract is inconsistent with the *ESA* regime for wilful misconduct; and

(iii) finding the With Cause Provision to be unenforceable because it failed to explain how the contractual standard of “just cause” differed from the *ESA* standard of wilful misconduct, contrary to appellate decisions permitting employers to referentially incorporate *ESA* entitlements.

[22] Finally, Van Dolder argues that if the Without Cause Provision complies with the *ESA* but the With Cause Provision does not, the Without Cause Provision should still be enforceable. To advance this position, Van Dolder necessarily argues that this court's decision in *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, should be overruled.

[23] Mr. Baker responds that the motion judge correctly found both the Without Cause Provision and the With Cause Provision to be inconsistent with the *ESA* and, further, that *Waksdale* should not be overruled.

B. Li v. Wayfair

[24] Mr. Li argues that the motion judge made the following errors of law in finding the Without Cause Provision to be enforceable:

(i) by failing to apply the plain grammatical meaning of the word "any" in the phrase "at any time and for any reason", since the use of the word "any" encompasses all times and all reasons without restriction;

(ii) by ignoring the fact that the plain grammatical meaning of the Without Cause Provision permits Wayfair to terminate Mr. Li's employment without limitation, contrary to ss. 53 and 74 of the *ESA* and various other Ontario statutes which restrict an employer's discretion to terminate employees at certain times or for certain reasons; and

(iii) by failing to adopt an interpretation of the Without Cause Provision that aligns with the policy goal of the *ESA* to protect vulnerable employees, since many employees may not be aware of their statutory protections against being terminated at certain times or for certain reasons, or may incorrectly conclude that the Without Cause Provision overrides these statutory protections.

[25] Mr. Li does not appeal the motion judge's finding that the With Cause Provision in his contract complies with the *ESA*.

[26] Wayfair responds that the motion judge made no such errors in finding that the Without Cause Provision complies with the *ESA* and is therefore enforceable.

C. Standard of review

[27] Both appellants submit that the grounds of appeal they have raised involve extricable errors of law subject to appellate review on a standard of correctness. While the respondents dispute that these alleged legal errors occurred, and courts should be cautious in identifying extricable questions of law in contractual interpretation, it is nevertheless well established that where an extricable legal error is apparent, the lower court's interpretation is reviewable on a standard of correctness: see *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014]

2 S.C.R. 633, at paras. 50-55; *Earthco Soil Mixtures Inc. v. Pine Valley Enterprises Inc.*, 2024 SCC 20, 492 D.L.R. (4th) 389, at paras. 27-28. This could include the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor: *Sattva*, at para. 53. Thus, to the extent that either appellant is correct in arguing that the motion judge made extricable legal errors, a standard of correctness applies.

IV. DISCUSSION

A. Governing interpretive principles

[28] It has long been recognized that a contract of employment "has many characteristics that set it apart from the ordinary commercial contract": *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at para. 91. These characteristics include the importance of employment to an individual's dignity and sense of self-worth; the pronounced power imbalance between employers and employees; and the fact that individual employees generally lack bargaining power vis-à-vis their employer in negotiating more favourable contract terms, especially concerning tenure: see *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at pp. 1002-03; *Wallace*, at paras. 90-94; *Ceccol v. Ontario Gymnastic Federation* (2001), 55 O.R. (3d) 614 (C.A.), at paras. 47-48; and *Wood*, at paras. 25-28.

[29] Employees are most vulnerable and in need of protection at the point at which the employment relationship ruptures: *Wallace*, at para. 95. Given this need, courts have given prominence to the remedial nature of the *ESA,* s. 5 of which

prevents parties from contracting out of its standards, and have favoured interpretations of termination provisions in employment contracts which encourage employers to draft agreements that comply with it. This is because “[i]f the only consequence employers suffer for drafting a termination clause that fails to comply with the ESA is an order that they comply, then they will have little or no incentive to draft a lawful termination clause at the beginning of the employment relationship”: *Wood*, at para. 28, citing *Machtinger*, at p. 1004. Although parties may agree to termination without reasonable notice as required at common law, they may not agree to do so in a way that limits the employer’s obligations under the *ESA*. A termination clause will rebut the presumption of reasonable notice at common law and comply with the *ESA* only if its wording is clear and, if a termination clause could reasonably be interpreted in more than one way, courts should prefer the interpretation that gives the greater benefit to the employee: *Wood*, at paras. 20, 28; *Ceccol*, at para. 49.

[30] At the same time, the determination of the meaning of an employment contract is still an exercise in contractual interpretation. The modern approach to contractual interpretation has shifted away from technical and legalistic formulations and towards a “practical, common-sense approach” that focuses on the objective intention of the parties in light of the words used and the surrounding circumstances: *Sattva*, at paras. 47, 49, 56-58. The overriding concern is to ascertain “what the parties would have reasonably understood their words to mean

and to ensure the parties' objective intention is not thwarted by strict rules of interpretation…": *Earthco*, at para. 95. To achieve this objective, courts must "read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract": *Sattva*, at para. 47.

[31] The requirement that contracts must be interpreted in light of their surrounding circumstances is important. It is premised on the fact that contractual intention cannot be properly ascertained by looking at words in isolation, since "words alone do not have an immutable or absolute meaning": *Sattva*, at para. 47; *Earthco*, at para. 64. Thus, while "the meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean": *Sattva*, at para. 48, citing *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.), at p. 115. Moreover, courts should avoid a legalistic "magic words" approach whereby the use of certain words considered in isolation will necessarily determine the legal effect of a contractual provision: see *Earthco*, at para. 98.

[32] A further important interpretive principle is that a contractual provision is not ambiguous merely because it is possible to identify multiple potential or hypothetical interpretations. Genuine ambiguity only arises where there are two or more reasonable but differing interpretations considered in the context of the entire

contract: *Amberber*, at paras. 43-45; *Bertsch v. Datastealth Inc.*, 2025 ONCA 379, at paras. 9-11; see also *Emond v. Trillium Mutual Insurance Co.*, 2026 SCC 3, 509 D.L.R. (4th) 583, at paras. 37-47. Moreover, courts should not strive to find an ambiguity where none reasonably exists: *Amberber*, at para. 65.

B. When considered in context, the Without Cause Provisions in both employment contracts are consistent with the *ESA*

[33] Mr. Baker and Mr. Li argue that the Without Cause Provisions in their respective employment contracts are inconsistent with the *ESA* because they permit termination of employment "at any time" (in Mr. Baker's case) and "at any time and for any reason" (in Mr. Li's case) (in both cases, the "Impugned Words"). They argue that the ordinary and grammatical meaning of the Impugned Words is that they permit their employer to terminate their employment at times or for reasons that are expressly prohibited by the *ESA* or other Ontario statutes. Therefore, the Without Cause Provisions are inconsistent with the *ESA* and void.

[34] I do not agree. The interpretation proposed by Mr. Baker and Mr. Li requires a literal reading of the Impugned Words, considered in isolation from the context in which they are found. Moreover, it ignores entirely the overriding concern of modern contractual interpretation, which is to ascertain the objective intention of the parties in light of the words used and the surrounding circumstances known at the time the contract was entered into. As I explain below, when viewed through the proper interpretive lens, the parties could not have intended that the inclusion

of the Impugned Words meant that the employers in these cases were thereby entitled to terminate Mr. Baker's or Mr. Li's employment despite express statutory provisions to the contrary.

1. The Without Cause Provision in Mr. Baker's contract is consistent with the *ESA*

[35] I turn first to the Without Cause Provision in Mr. Baker's contract.

[36] As set out above, the provision permits Van Dolder to terminate Mr. Baker's employment "<u>at any time</u>, without just cause, upon providing you [Mr. Baker] with only the minimum notice, or payment in lieu of notice and, if applicable, severance pay, required by the *Employment Standards Act*" (emphasis added).

[37] The relevant question is whether, by including the Impugned Words in the Without Cause Provision, the parties could reasonably have intended that Van Dolder was entitled to terminate Mr. Baker's employment in circumstances that are expressly prohibited, either in the *ESA* or other statutes.

[38] The motion judge did not make a factual finding that the parties intended the Without Cause Provision to be read in this way. In fact, the motion judge "had no doubt that [Van Dolder], advised by capable counsel, intended only to comply with the *ESA*". As for Mr. Baker, although he argued before the motion judge that it was <u>possible</u> to interpret the Without Cause Provision as permitting termination contrary to statutory prohibitions, he also did not propose that the parties <u>intended</u> this result.

[39] This should have been sufficient, in itself, for the motion judge to conclude that the inclusion of the Impugned Words did not give rise to an inconsistency with the *ESA*. But rather than focus on what the parties could reasonably have intended, the motion judge instead fastened on the fact that it was <u>possible</u> to interpret the Impugned Words as permitting Van Dolder to ignore statutory provisions that would prohibit terminating Mr. Baker's employment in certain circumstances. This mere possibility, even if unintended by the parties, was fatal to the enforceability of the Without Cause Provision in the motion judge's view.

[40] I agree that, when read literally and in isolation, it is indeed possible to find an inconsistency between the Impugned Words and provisions of the *ESA*. But as explained above, contractual provisions must be read in context, with a view to identifying "what the parties objectively intended based on the text and surrounding circumstances": *Earthco*, at para. 73. When that proper interpretive framework is applied, it becomes evident that the parties could not have intended for the Impugned Words to have the meaning proposed by Mr. Baker on this appeal.

[41] It is obvious that at the time the contract was formed, Mr. Baker would not have intended that the inclusion of the Impugned Words in the Without Cause Provision would entitle Van Dolder to deprive him of rights guaranteed in the *ESA* and other Ontario statutes. There are potentially dozens of provisions in the *ESA*, the *OHSA*, the *Human Rights Code*, R.S.O. 1990, c. H.19, and other remedial statutes which specifically protect employees from having their employment

terminated at certain times or circumstances: see *Henderson v. Slavkin et al*., 2022 ONSC 2964, 81 C.C.E.L. (4th) 244, at para. 33. If Mr. Baker's employment were to be terminated without cause, there is no reason why he would have intended to waive his right to these statutory protections.

[42] Nor could Van Dolder have reasonably intended that the inclusion of the Impugned Words give rise to an inconsistency between the contract and these statutory protections.

[43] First, such an interpretation would entirely defeat the purpose of the Without Cause provision, which is to rebut the presumption of common law reasonable notice and provide Mr. Baker with the minimum requirements on termination prescribed by the *ESA*. If the inclusion of the Impugned Words were also intended to permit Van Dolder to ignore express statutory prohibitions on termination found in the statute, this would render the clause unenforceable, thereby negating the reason for including the Without Cause Provision in the first place.

[44] Not only would this understanding of the Impugned Words be self-defeating, it would also expose Van Dolder to far more draconian consequences than the mere obligation to provide Mr. Baker with common law reasonable notice. This is because the remedy for a violation of ss. 53 or 74 of the *ESA* is not a requirement to pay common law damages but, rather, either the reinstatement of the employee or a "make whole order" that seeks to place the employee in the position they

would have been in had the breach not occurred. See e.g., *Markovic v. 1756982 Ontario Limited*, 2015 CanLII 58892 (Ont. L.R.B.), at paras. 50-51. Moreover, a violation of ss. 53 and 74 of the *ESA* is an offence subject to prosecution and up to 12 months' imprisonment and/or a fine of $100,000: *ESA*, s. 132. It is contrary to common sense to interpret the provision as reflecting an intention to engage in conduct that would expose Van Dolder to such severe consequences.

[45] This conclusion is reinforced by other provisions in Mr. Baker's employment contract which repeatedly state that Van Dolder intends to comply with the *ESA*. This includes a clause entitled "The Minimum Standards of the *Employment Standards Act* to Prevail" (the "Minimum Standards Clause"), which provides as follows:

> [W]e will, <u>at all times</u>, comply with the *Employment Standards Act*. If any term of this Agreement is inconsistent with the minimum requirements of the *Employment Standards Act*, the *Employment Standards Act* shall prevail, and you will receive all entitlements prescribed by the *Employment Standards Act*. [Emphasis added.]

[46] This express commitment to comply with the *ESA* "at all times" must include "at any time" when Van Dolder exercises its right to terminate Mr. Baker's employment pursuant to the Without Cause Provision. Thus, the Minimum Standards Clause confirms that if Mr. Baker's employment is terminated without

cause, Van Dolder's intention is that the termination would only occur in a manner consistent with the *ESA*, which necessarily includes ss. 53 and 74.

[47] What, then, is the meaning of the words "at any time" in the Without Cause Provision? Read in context, this wording simply reflects a mutual intention that a without cause termination will be valid and legally effective regardless of when it occurs. But the use of this wording is not intended to render legally effective a termination that is expressly prohibited by the *ESA*.

[48] This understanding of the words "at any time" is consistent with the jurisprudence on the employer's right to terminate employment contracts without cause, including Iacobucci J.'s foundational judgment in *Wallace* nearly three decades ago.

[49] The appellant in *Wallace* proposed that an employer should only be permitted to terminate an employment contract "for cause or legitimate business reasons". In the absence of such reasons, the termination would be a breach of contract entitling the employee to damages: see *Wallace*, at para. 75. Iacobucci J. dismissed the argument summarily as follows:

> [The appellant] submitted that the Court should imply into the employment contract a term that the employee would not be fired except for cause or legitimate business reasons. I cannot accede to this submission. The law has long recognized the mutual right of both employers and employees to terminate an employment contract at any time provided there are no express provisions to the contrary.

[50] By affirming that an employer could terminate an employment contract "at any time", Iacobucci J. was simply saying that a termination would be consistent with the contract and therefore legally effective regardless of when or why it was executed, provided of course that the employer gives reasonable notice. But, as Iacobucci J. points out, the employer's discretion to terminate an employee "at any time" is subject to express contractual provisions to the contrary. Likewise, the employer's discretion is also subject to express statutory provisions prohibiting termination at certain times or for certain reasons, since contractual rights are subject to and can be modified or limited by statute. Therefore, there is no inconsistency between saying on the one hand that an employer has the contractual right to terminate an employment contract "at any time", and on the other acknowledging that such discretion is necessarily subject to any conditions the parties agreed to in the contract itself and any applicable statutory provisions found in the *ESA,* or other statutes.

[51] Consistent with Iacobucci J.'s observation in *Wallace*, courts in Ontario have on many occasions upheld the validity of provisions permitting without cause terminations "at any time": see e.g., *Roden v. Toronto Humane Society* (2005), 202 O.A.C. 351 (C.A.), at paras. 55, 62; *MacDonald v. ADGA Systems International Ltd.* (1999), 117 O.A.C. 95 (C.A.), at paras. 3, 24; *Fogelman v. IFG*, 2021 ONSC 4042, at paras. 66, 80; *Singh v. Adecco Employment Services Limited*, 2019 ONSC 1512, at paras. 2, 5; *Farah v. EODC Inc.*, 2017 ONSC 3948, 40 C.C.E.L.

(4th) 273, at paras. 13, 62; and *Ilie v. S210 Technologies Corp.* (2003), 33 C.C.E.L. (3d) 170 (Ont. S.C.), at paras. 9, 21.

[52] I recognize that these cases did not expressly consider whether the “at any time” language was somehow inconsistent with statutory prohibitions on termination of employment. Presumably this was because it simply never occurred to any party to advance such an argument or, even if the possibility was considered, it was regarded as too implausible to be worth raising.

[53] I conclude that there is no conflict between the inclusion of the Impugned Words in the Without Cause Provision and statutory provisions in the *ESA* or other statutes which limit when or why an employer can terminate a contract of employment. The motion judge’s finding to the contrary proceeded on the basis of an error in principle, namely, reading the words literally and in isolation without regard to the parties’ objective mutual intentions. With respect, his analysis strained to find an ambiguity where none existed. I would therefore set aside his finding and instead find that the Without Cause Provision in Mr. Baker’s employment contract is compliant with the *ESA*.

2. The Without Cause Provision in Mr. Li’s contract is consistent with the ***ESA***

[54] The Impugned Words in Mr. Li’s Without Cause provision provide that Wayfair may terminate his employment without cause “at any time and for any reason”. Simultaneously, the provision expressly and repeatedly affirms Wayfair’s

intention to comply with the *ESA*. This includes the following contractual commitments that will apply in the case of a without cause termination:

- Wayfair will provide “only the minimum statutory amount of written notice required by the ESA or […] the minimum amount of statutory termination pay in lieu of notice required by the ESA, or a combination of both”;
- Wayfair will provide “statutory severance pay required by the ESA”;
- Wayfair will provide “benefits continuance for the requisite minimum statutory notice period under the ESA”;
- Wayfair will provide “all other outstanding entitlements, if any, owing under the ESA”; and
- “In no event will you [Mr. Li] receive less than your statutory minimum entitlements under the ESA”.

[55] This repeated affirmation of Mr. Li’s entitlement to the minimum benefits provided by the *ESA* makes it implausible to interpret the Impugned Words as reflecting a mutual intention to permit Wayfair to violate statutory prohibitions on termination in the *ESA* and other statutes.

[56] I have already explained in detail why the use of the “at any time” language in Mr. Baker’s employment contract does not give rise to an inconsistency with

statutory prohibitions. That analysis applies equally to the “at any time” language in Mr. Li’s employment contract and I will not repeat it here.

[57] What remains to be considered is whether the addition of “for any reason” requires a different result.

[58] The parties to the grouped appeal generally agreed that the prohibitions in ss. 53 and 74 of the *ESA* are not absolute. For example, the requirement in s. 53 of the *ESA* that an employer must reinstate an employee upon the conclusion of their leave does not apply if the employment is terminated “solely for reasons unrelated to the leave” (see s. 53(2)). Similarly, ss. 74(1)(a) and (b) only prohibit a dismissal where the employer dismisses an employee <u>because</u> the employee exercised a right under the *ESA*. In other words, these prohibitions are focused on the reasons for the termination, not simply the timing. Therefore, I must consider whether the phrase “for any reason” gives rise to an inconsistency with the *ESA*, even if the words “at any time” are on their own unproblematic.

[59] I do not find the words “for any reason” in the Without Cause Provision to be inconsistent with the *ESA*. As the motion judge correctly found, the provision “clearly and repeatedly indicates payments will be made as ‘required by’ or ‘under the ESA’”. Given this scrupulous intention to comply with the *ESA*, it is illogical to read the inclusion of the words “for any reason” as somehow expressing a contrary intention by either Wayfair or Mr. Li.

[60] Moreover, the motion judge's interpretation of the "for any reason" wording is consistent with Iacobucci J.'s judgment in *Wallace*. As discussed above, Iacobucci J.'s affirmation that an employer can terminate an employment contract without cause "at any time" was made in response to the argument that the court should imply into an employment contract a term that the employee could not be fired "except for cause or legitimate business reasons". By rejecting that suggestion, Iacobucci J. was necessarily accepting that an employer could terminate an employment contract without cause regardless of the reason, provided that the employee receives reasonable notice or pay in lieu thereof.

[61] Just as courts have frequently found without cause provisions with the wording "at any time" to be enforceable, many Ontario judges have enforced provisions containing the words "for any reason" (or analogous phrases like "at its sole discretion"): see e.g., *Oudin v. Centre Francophone de Toronto*, 2016 ONCA 514, 34 C.C.E.L. (4th) 271, at paras. 2, 10, leave to appeal refused, [2016] S.C.C.A. No. 391; *Dimson v. KTI Kanatek Technologies Inc.*, 2013 ONCA 454, 10 C.C.E.L. (4th) 309, at paras. 5, 7; *Clarke v. Insight Components (Canada) Inc.*, 2008 ONCA 837, 70 C.C.E.L. (3d) 13, at paras. 1, 6; *Gracias v. Dr. David Walt Dentistry*, 2022 ONSC 2967, 79 C.C.E.L. (4th) 224, at paras. 57, 94; *Raposo v. CA Canada Company*, 2018 ONSC 4226, 49 C.C.E.L. (4th) 329, at paras. 10, 46; *Simpson v. Global Warranty Management Corporation*, 2014 ONSC 724, at paras.

8, 75, 77, aff'd 2014 ONSC 6916 (Div. Ct.); and *Nikolic v. Computer Associates*, [2000] O.T.C. 458 (S.C.), at paras. 4, 19.

[62] The words "for any reason" simply mean that a termination will be consistent with the contract and therefore legally effective regardless of the reason for the termination. Putting it another way, the employer is not required to give the employee a reason for terminating the employment contract. They simply need to provide the employee with their contractual entitlement on termination, express or implied, which must, at a minimum be the *ESA* entitlements. But the fact that the employer is not required to give a reason for terminating a contract without cause does not mean that the employer could plausibly maintain that the contract somehow purported to exempt it from prohibitions on termination found in the *ESA*, such as ss. 53 and 74.

[63] I therefore conclude that the motion judge did not err in finding that, when read in its proper context, there is no inconsistency between the Without Cause Provision in Mr. Li's employment contract and the *ESA*.

C. The With Cause Provision in Mr. Baker's contract is consistent with the *ESA*

[64] The With Cause Provision in Mr. Baker's contract permits Van Dolder to terminate his 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*". The provision goes on to define "just cause" as including six different categories of misconduct.

[65] In order to appreciate the purpose and legal effect of this provision, it is necessary to briefly review the difference between "just cause" at common law ("Just Cause") and the standard of "wilful misconduct" under the *ESA* ("Wilful Misconduct").

[66] At common law, an employer is permitted to terminate an employment contract without notice or compensation where there is Just Cause for doing so. In this context, Just Cause is considered employee misconduct "that is incompatible with the fundamental terms of the employment relationship": *Render v. ThyssenKrupp Elevator (Canada) Limited*, 2022 ONCA 310, 78 C.C.E.L. (4th) 200, at paras. 61, 65, citing *Dowling v. Ontario (Workplace Safety & Insurance Board)* (2004), 246 D.L.R. (4th) 65 (Ont. C.A.), at paras. 49-50, leave to appeal refused, [2005] S.C.C.A. No. 25. In other words, when an employer has Just Cause to terminate the employee, it does not need to provide the employee with reasonable notice or payment in lieu under the common law.

[67] However, under the *ESA*, employees are entitled to notice (or pay instead of notice), benefits continuation, and severance pay when their employment has been terminated, except where they have been "guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned

by the employer". This is the combined effect of ss. 55 and 64(3) of the *ESA* and ss. 2(1)3 and 9(1)6 of the associated regulation, *Termination and Severance of Employment*, O. Reg. 288/01 (the "Regulation").

[68] This court has held that a higher level of employee misconduct is required to fall within the Wilful Misconduct standard in the Regulation as compared with Just Cause at common law. In particular, Wilful Misconduct has been characterized as the employee doing something "deliberately, knowing they are doing something wrong" and as being "bad on purpose": *Render*, at paras. 79-80, citing *Plester v. Polyone Canada Inc.*, 2011 ONSC 6068, aff'd 2013 ONCA 47.

[69] Therefore, even if there is Just Cause at common law to terminate an employment contract without the need to provide reasonable notice, the employee will still be entitled to *ESA* notice (or pay instead of notice), benefit continuation, and severance pay, unless they have engaged in Wilful Misconduct as defined in the Regulation.

[70] This court has recently considered a number of with cause provisions which defined "cause" in terms broader than Wilful Misconduct: see *Dufault (Ont. C.A.)*; *De Castro v. Arista Homes Limited*, 2025 ONCA 260, 95 C.C.E.L. (4th) 253; and *Rahman v. Cannon Design Architecture Inc.*, 2022 ONCA 451, 81 C.C.E.L. (4th) 1, leave to appeal requested but application for leave to discontinued, [2023] S.C.C.A. No. 83. The provisions in these cases were held to be inconsistent with

the *ESA* and therefore unenforceable because they purported to deny the employee <u>any</u> notice or compensation (i.e., including *ESA* notice) merely for having engaged in misconduct that satisfied the common law standard of Just Cause or a separately defined contractual standard of “cause”, but fell short of the *ESA* standard of Wilful Misconduct.

[71] For example, the with cause provision in *Dufault (Ont. C.A.)* provided that if the employee’s employment was terminated with cause, “no further payments of any nature, including but not limited to, damages are payable to the employee…”. The provision defined “cause” as including “the failure of the employee to perform the services as hereinbefore specified without written approval of [the employer]”. The panel in *Dufault (Ont. C.A.)* therefore offered the following conclusion, at para. 22:

> The “for cause” termination clause purports to deny notice or pay instead of notice where the grounds for termination do not meet the high standard of wilful misconduct required under s. 2(1)3 of the *Regulation*. As such, the “for cause” termination clause in the employment contract fails to meet the minimum standard provided for in the *ESA*.

[72] At the same time, the holding in *Dufault (Ont. C.A.)* is not inconsistent with the fact that an employer can terminate an employment contract for Just Cause not amounting to Wilful Misconduct, as long as it provides the employee with the minimum compensation required under the *ESA*. This must be the case in any

event since, as discussed above, an employer can legally terminate an employee's contract at its election, even in the absence of cause, provided that the employer satisfies the employee's minimum entitlements under the *ESA*.

[73] As in *Dufault (Ont. C.A.)*, the definition of "cause" in Mr. Baker's contract is broader than the *ESA* standard of Wilful Misconduct. However, unlike the provision in *Dufault (Ont. C.A.)* and the termination provisions considered in other recent decisions of this court, the With Cause Provision in Mr. Baker's contract provides that if Mr. Baker's employment is terminated for "cause", he will still be entitled to any "minimum compensation or entitlements prescribed by the *Employment Standards Act*". The legal effect of this proviso is to bring the With Cause Provision into alignment with the *ESA*, since even if Mr. Baker's employment is terminated for cause pursuant to his employment contract, he will still be entitled to notice, benefits continuation, and severance pay unless his conduct falls within the narrower category of Wilful Misconduct. In other words, the inconsistency between the employment contracts and the *ESA* in *Dufault (Ont. C.A.)*, *De Castro*, and *Rahman* does not arise in the case of Mr. Baker's contract.

[74] The motion judge did not seem to disagree with this interpretation of the With Cause Provision. He reasoned as follows:

> [T]he 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.

[75] However, even though the With Cause Provision as drafted seems to be consistent with the *ESA*, the motion judge found that the provision gives rise to "potential unfairness" because "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". In the motion judge's view, because "regular employees" will likely not be familiar with the *ESA*, many "would assume that they had no entitlement if they breached the contractual standards". On this basis, the motion judge found the With Cause Provision to be unenforceable.

[76] There are a number of difficulties with this analysis.

[77] First, the motion judge does not explain the basis for his conclusion that many employees would assume that they have "no entitlement" if they breach the contractual standards. As the motion judge acknowledges himself, the contract expressly says the opposite, namely, that even if the employee is dismissed for cause, they will be entitled to receive the minimum compensation provided by the *ESA*. While an employee may not be familiar with what those entitlements are, this is quite a different matter from the employee leaping to the conclusion that the entitlements are nonexistent.

[78] Second, the motion judge suggests that what the employer should have done is provide details and an explanation of the *ESA* Wilful Misconduct standard and how it differs from the contractual standard. The difficulty with this suggestion is that, as is evident from the discussion above, the relationship and interaction between the Wilful Misconduct standard in the *ESA* and Just Cause standard at common law is complicated. It is unclear how attempting to draft contractual language to describe these different legal concepts would enlighten "regular employees" as to precisely what their entitlements would be if they were to be terminated for cause.

[79] Here, there is no ambiguity in the wording of the With Cause Provision, which expressly provides that if Mr. Baker is terminated for cause, he will in any event receive his minimum entitlements under the *ESA*. It is well established that employers may referentially incorporate *ESA* entitlements in an employment contract and that such provisions are valid: *Machtinger*, at pp. 1004-05; *Roden*, at paras. 61-62; and *Nemeth v. Hatch Ltd.*, 2018 ONCA 7, 418 D.L.R. (4th) 542, at para. 11.

[80] I therefore conclude that the motion judge made an error in principle by failing to consider the objective intentions of the parties as expressed in the wording of the contract. I would set aside his finding that the With Cause Provision in Mr. Baker's employment contract violates the *ESA* and instead find that the provision complies with the *ESA* and is enforceable.

D. No reconsideration of *Waksdale* on this appeal

[81] Pursuant to the court's "Practice Direction Concerning Civil Appeals at the Court of Appeal for Ontario", (March 1, 2017), at 13, prior to this appeal being heard, Van Dolder requested that the court convene a five-judge panel to reconsider *Waksdale*. It specifically took issue with the holding that if one termination provision in an employment contract violates the *ESA*'s minimum standards, all termination provisions in the contract are invalid and unenforceable.

[82] The Associate Chief Justice denied the request to convene a five-judge panel. Van Dolder argues we still have jurisdiction to reconsider *Waksdale*, suggesting it was decided *per incuriam*. We decline to consider that argument as in this case the Without Cause and the With Cause Provisions in both Mr. Baker's and Mr. Li's contracts comply with the minimum requirements of the *ESA*.

V. CONCLUSION

[83] For the above reasons, the termination provisions in both employment contracts reflect an objective intention to provide Mr. Baker and Mr. Li with the minimum statutory entitlements set out in the *ESA*. The provisions are thus valid and enforceable.

[84] Because this result rebuts the presumption of common law reasonable notice to which Mr. Baker and Mr. Li would otherwise have been entitled, it might be thought to be a harsh outcome that fails to give effect to the remedial purpose

of the *ESA.* But this cannot be the case because the *ESA* itself contemplates that the presumption of reasonable notice is a mere common law principle that can be excluded by express contractual terms to the contrary. If the minimum entitlements under the *ESA* are for any reason deemed to be insufficient or inadequate substitutes for common law reasonable notice, that is a matter for the legislature rather than the courts. The proper judicial role is to focus “on what the parties objectively intended and what they reasonably understood their words to mean” (*Earthco*, at para. 64), rather than straining to find ambiguity where none exists, on the assumption that such an approach will somehow benefit employees.

[85] In any event, it is far from obvious that such a search for ambiguity will actually benefit employees in the long run. This is because formalistic or technical interpretations of contractual language without regard to the intentions of the parties leads to indeterminacy and inconsistent results: see *Earthco*, at para. 96. Very few employees possess the resources required to undertake litigation to resolve such ambiguity.

[86] I would allow the appeal in *Baker v. Van Dolder* and set aside the order below. Since I have found that both termination provisions in Mr. Baker’s contract comply with the *ESA* and are enforceable, and it is conceded that Van Dolder provided Mr. Baker with his full statutory entitlements under the *ESA*, I would dismiss Mr. Baker’s action for wrongful dismissal. In accordance with the

agreement of the parties, Mr. Baker shall pay Van Dolder $2,500 in costs, inclusive of taxes and disbursements.

[87] I would dismiss the appeal in *Li v. Wayfair*. Wayfair submitted that its costs of the appeal on a partial indemnity basis were $12,600, but sought costs of $10,000. Mr. Li would have sought partial indemnity costs of $39,000 had he been successful on appeal. I find Wayfair's request to be reasonable in the circumstances. Therefore, Mr. Li shall pay Wayfair $10,000 in costs, inclusive of taxes and disbursements.

Released: August 6, 2026 BZ

P.J. Monahan J.A.

I agree B Zarnett J.A.

I agree. M Rahman J.A.