ONTARIO

SUPERIOR COURT OF JUSTICE

TORONTO SMALL CLAIMS COURT

Court File No. SC-15-9949-00

BETWEEN:

MERCELINA PANALIGAN

Plaintiff

-and-

MAYFAIR TENNIS COURTS LIMITED

Defendant

J Prattas DJ

Heard: May 4, June 11 and October 21, 2016
Written submissions received: December 16, 2016
Reasons for Judgment Released: January 18, 2017

Persons Appearing:
B. Ayordele, Student-at-law for the plaintiff for the 1st day
Stan Fainzilberg, Counsel for the plaintiff for the 2nd and 3rd days
Jordan Waltman, Counsel for the defendant

REASONS FOR JUDGMENT

[1] **J PRATTAS DJ** – The plaintiff originally claimed $25,000 for damages for wrongful dismissal after twelve years of employment with the defendant. The amount was reduced at trial to $10,893.58 consisting of the following claims under the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (the "ESA"):

a)	8 weeks' notice termination pay	$4,189.84
b)	12 weeks' severance pay	6,284.76
c)	Vacation pay (at 4%)	418.98

[2] The defendant denies liability stating that the plaintiff was terminated for just cause for conduct that was wilful and is therefore not entitled to any notice of termination or pay in lieu thereof or severance pay, either under statute or common law.

[3] The parties provided written closing submissions which I received by December 16, 2017.

Background facts

[4] The plaintiff Mercelina Panaligan (the "plaintiff") was employed with the defendant for an indefinite period as a Maintenance Attendant from March 2003 to February 11, 2015, when she was terminated for cause and without any money paid to her. She was 64 years of age.

[5] The defendant Mayfair Tennis Courts Limited ("Mayfair" or the "defendant") is a recreational private club that provides fitness, tennis, squash and spa facilities to club members in four locations in Toronto.

[6] The plaintiff worked at the defendant's location known as Mayfair West in North York.

[7] At the time of termination the plaintiff was earning an hourly wage of $11.00 for forty hours per week with an annual base salary of $27,233.87 in 2014, which translates to $523.73 per week.

[8] The plaintiff found new employment at Whitehorse Janitorial Services Ltd. commencing on July 2, 2015 (about 20 weeks from termination) at an hourly rate of $11.50.

[9] The only witness for the plaintiff was herself.

[10] The following persons testified for the defendant: Magda Diaz, General Manager at Mayfair West ("Magda"), Anita Kennedy ("Anita"), Membership Services Manager, (sales, signs members up and assists in member issues), Stephanie Gonsko, Human Resources Manager ("Stephanie") and Melissa Raghurai, President of Mayfair.

Analysis

[11] The defendant submitted that not only did it have just cause at common law to terminate the plaintiff's employment when it did, but that she was also "guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer", pursuant to s. 9(1)(6), O. Reg. 288/01 under the ESA (the "Wilful Provision"), which disentitles her to termination and severance pay.

[12] The defendant relies cumulatively on several incidents and discipline letters issued to the plaintiff over the last several years prior to her termination, which it did not condone, that are, in its submission, of sufficiently serious or egregious and willful nature, to justify the plaintiff's termination for cause and for not making any termination or severance payments to her under the ESA.

[13] The onus is on the defendant to establish both just cause at common law and that the plaintiff's misconduct was wilful so as to disentitle her of termination and severance pay.

[14] Using the contextual approach established by jurisprudence, just cause at common law requires proof of serious misconduct that constitutes a repudiation of the employment relationship and that the actions of the employer are proportional to the misconduct. See *McNaughton v. Sears Canada Ltd*. (1997), 144 D.L.R (4th) 47 at para. 11 (NBCA); *McKinley v. BC Tel*, [2001] 2 S.C.R. 161 at para. 48; and *Dowling v. Ontario*, [2004] O.J. No. 4812, paras. 46-53 (ONCA).

[15] However, even if there is just cause at common law, this does not automatically equate with wilful misconduct within the meaning of the Wilful Provision. The two tests are not identical as the wilful misconduct under the Wilful Provision sets a higher standard to be met than that of just cause at common law. See *Oosterbosch v. FAG Aerospace Inc*. 2011 Carswell 1702 at para. 19 (ONSC).

[16] The evidence disclosed several letters of discipline being issued from 2009 to 2014 for various and sundry reasons, including the following: February 9, 2009 for "talking negatively about another staff"; August 13, 2010 for complaining to another staff member that her colleague (Delfin) did not help her with the towels; following a complaint from a member in September 2010 about alleged intrusion in the shower and allegedly lecturing a member and her daughter on how to shower and not get water on the floor which led to a four-day suspension of the plaintiff; the "soiling" incident of July 15, 2013 where the plaintiff allegedly "vocalized her disgust" when she was cleaning the area soiled by a child; a complaint from a member about various issues dated November 24, 2013 that did not relate to the plaintiff other than about inadequate supply of towels in the change room.

[17] The evidence also demonstrated that the plaintiff received what was called the "final warning" issued following a member complaint about inadequate towels and insulting a nanny of a friend of a member by the plaintiff on October 21, 2014.

[18] The lack of towels from time to time was a general complaint from members that affected the entire maintenance staff as the plaintiff was not the sole person responsible for the towels.

[19] I am not persuaded that all of the discipline letters were warranted. From the evidence, I got the distinct impression that these letters were already prepared before meeting with the plaintiff and without any prior input from her -- there is hardly any mention of the plaintiff's side of the story in them. The meetings seemed perfunctory to simply announce the disciplinary action to her. They did not appear to be genuine attempts at truly hearing and considering the plaintiff's explanation or her side of the story before taking action.

[20] The evidence was also not persuasive that the plaintiff received any subsequent or adequate coaching or counselling or training following any of these incidents. In cross-examination Magda conceded that she did not ask anyone to give the plaintiff any soft skills or customer service training.

[21] Apart from the four-day suspension in September 2010 and the placing of the discipline letters in her file, the extent of her discipline included the plaintiff being required to report any future incidents to her superiors and to refrain from engaging in dialogue with her co-workers or from addressing any members.

[22] The defendant did not produce any cogent or persuasive evidence of having fully investigated some of the incidents before it issued the discipline letters that it now relies on for terminating the plaintiff.

[23] Though the defendant readily issued a discipline letter against the plaintiff on August 13, 2010 merely for talking about another fellow employee (Delfin), it did not produce any convincing evidence that the defendant had fully investigated the more serious July 20, 2010 incident reported by the plaintiff that she was threatened by Delfin and that he had previously "pushed his hand into her chest", nor what action it took against Delfin or that it considered this incident at all or the plaintiff's complaint before issuing the August 2010 letter.

[24] The apparent failure by the defendant to investigate the plaintiff's potentially serious allegation indicates some inconsistencies in its employment relations policy.

[25] Given the nature of the defendant's business which requires excellent customer service and satisfaction in a relaxing environment, I accept that it was justified in acting upon customer complaints, especially the privacy intrusion and the soiling incidents. But even here, I am not convinced that the defendant sought out and considered the plaintiff's explanation before it decided on the disciplinary action.

[26] Contrary to the defendant's version, the plaintiff testified that when she cleaned the soiled area the lady member thanked her for her work and there was no privacy intrusion as the member had asked her to clean the shower, which she did.

[27] Were the complaints therefore excessive and any disciplinary action disproportionate? After all, the plaintiff was required to be in the change room and shower areas to pick up the towels, clean up and generally to perform her maintenance duties.

[28] There was also some doubt as to whether the plaintiff signed or read or even understood some of the incident reports and discipline letters. The September 21, 2010 incident report has a notation by the signature portion that "employee REFUSED TO SIGN – refused to sign") yet a signature appears on the report which purports to be that of the plaintiff. When the plaintiff was asked to write out "employee refused to sign" in court (Exhibit 3) her writing did not resemble anything like the purported writing on that report. And if the plaintiff had refused to sign, how does her purported signature appear on this document?

[29] Though some of these documents were signed, the plaintiff testified that on some occasions she did not have her glasses and could not have read the documents before signing them as alleged by the defendant.

[30] There is also contradictory evidence regarding the culminating incident of February 10, 2015 with the lockers which led to the plaintiff's dismissal.

[31] When the defendant decided to disallow staff to use the lockers it placed a note to vacate them within seven days.

[32] Some of the staff, including the plaintiff, was understandably upset about this change.

[33] The ensuing controversy between the plaintiff and the defendant appears to have been triggered when Anita, who was also present in the locker room, took exception and felt it necessary to admonish the plaintiff for inappropriately speaking to a member about the change in locker policy.

[34] The plaintiff testified that she merely responded to the member's inquiry about the lockers by referring him to management.

[35] Whatever transpired between the two of them led to a heated verbal exchange with each contending that the other person started it. This animated exchange continued later on in Anita's office.

[36] Anita characterized the plaintiff's verbal outburst as "violent", with Stephanie testifying that this "violent outburst" was instrumental in her terminating the plaintiff.

[37] As far as I could determine, the outburst, besides the heated verbal exchange, included the plaintiff pacing impatiently outside Anita's office while waiting to see her after the locker room exchange and punching the wall divider once inside her office. The evidence was clear that the plaintiff was not physically violent with Anita as it was equally clear that the plaintiff did not have any history of violent behaviour in the past.

[38] The following day, February 11, 2015, the plaintiff was called into the office in the presence of Magda and Stephanie where they gave her a letter announcing the plaintiff's termination, without any prior input from the plaintiff.

[39] The plaintiff asked not to be fired but to be given another chance and that no other incident will occur in the future. When the defendant refused to withdraw the termination, the plaintiff, according to Magda and Stephanie, became distraught, crying and being unable to believe or accept her termination. In her distressed state the plaintiff voiced something which Magda and Stephanie perceived as potentially harmful to the plaintiff. They became concerned and tried to calm her down offering to send her home in a taxi. When this offer was refused they called the police out of concern for the plaintiff's safety. By the time the police arrived the plaintiff had left.

[40] The plaintiff refuted that she was distraught and needed any police protection or oversight. The police subsequently confirmed to the defendant that upon visiting the plaintiff at her home everything was peaceful, the plaintiff was in a good state and they had no concerns about her well-being.

[41] Admittedly there were certain issues with the plaintiff. It was quite evident during her testimony that the plaintiff did not deal well with stressful situations and her ability to comprehend information or adequately respond to difficult questions was visibly affected. She did not remember dates or events clearly and at times she looked confused and dazed and did not demonstrate a level of sophistication sufficient to have understood all aspects of what went on especially when she was terminated.

[42] In my view her reactions to her being disciplined and most especially when she was terminated manifested themselves more out of frustration and the difficulty in expressing herself articulately in English.

[43] I do not think that any particular incident as described by the defendant is so egregious as to warrant dismissal without notice. This becomes especially evident when viewed within the context of over twelve years of employment with the defendant, including her performance reviews, which for the most part were satisfactory or positive, and the testimony from the defendant's witnesses that she was a hard worker and that she knew her job very well.

[44] Applying the *McKinley* test as expanded in *Dowling* to the incidents and the discipline letters in the instant case, and taking into account her overall performance record and the apparent lack of any meaningful or serious coaching, counselling or training to address any of the plaintiff's areas requiring improvement during her relatively long period of employment with the defendant, in my view, there was not just cause at common law to justify the plaintiff's dismissal.

[45] Even if there was just cause at common law for the dismissal, I am not prepared to characterize the plaintiff's overall behaviour and conduct or what happened on February 10 and 11, 2015, as "willful misconduct, disobedience or wilful neglect of duty" that would disentitle her to receipt of termination and severance payment under the provisions of the ESA. In my view, on the evidence, the defendant did not meet the higher standard for wilful misconduct under the Wilful Provision.

[46] For all these reasons I conclude that the plaintiff is entitled to notice and severance pay pursuant to the ESA to be paid by the defendant.

Mitigation and reasonable common law notice period

[47] I am satisfied that the plaintiff discharged her mitigation onus. She found other employment about 20 weeks after termination and at a greater hourly pay.

[48] Both counsel briefly discussed in their closing submissions reasonable common law notice with the plaintiff submitting the appropriate period being 10 months and providing me with appropriate case law in this regard and the defendant 6 months.

[49] As the plaintiff withdrew at trial and is not seeking any common law reasonable notice damages but solely damages under the ESA, it is unnecessary for me to address this issue.

Damages

[50] Since I have found that the plaintiff's misconduct was not wilful within the meaning of the Wilful Provision I will assess her damages only in accordance with the ESA.

[51] I might note in passing that the defendant essentially conceded in the alternative that the plaintiff may be entitled to termination and severance pay under the ESA if the alleged just cause that it put forward did not amount to wilful misconduct, disobedience and neglect of duty under the Wilful Provision.

[52] The parties agreed on the number of weeks (8 plus 12) and the amounts for termination and severance pay which the plaintiff would be entitled under ESA. These combined 20 weeks also coincided with the plaintiff finding new employment.

[53] I accept the 8 weeks for termination notice pay and the 12 weeks for severance pay under the ESA.

[54] The parties had differing views whether vacation pay was payable on both the termination notice and the severance amounts.

[55] The defendant referred me to the Ontario Court of Appeal case of *Cronk v. Canadian General insurance Co.* (1995), 25 O.R. (3d) 505 that vacation pay would be payable during the statutory notice period of 8 weeks, but not on any amount of severance pay. This is stated in part in paras 14 and 15:

> 14. I agree with the per curiam judgment of the British Columbia Court of Appeal (a five judge panel) in *Scott v. Lillooet School District No. 29* (1991), 60 B.C.L.R. (2d) 273,

which contains a full discussion of the vacation pay issue at pp. 276-80, and which concludes as follows:

> Vacation pay arises as a result of the contract of employment providing for a period of time during the employment year when the employee is not required to "work" but yet is entitled to pay.
>
> During the 15-month notice period awarded to the respondent, he was free from any obligation to the appellant, either to go to work or to expend any effort on its behalf.
>
> In the case at bar, the respondent led no evidence of loss or expense associated with lost vacation benefits nor did he lead any evidence that he had suffered in any way as a result of his not being able to take a meaningful holiday.
>
> To award the respondent damages for vacation pay, on top of an award of full salary for the period of notice to which he was entitled, (which necessarily includes payment of his salary for any vacation he may have taken had he worked during that notice period), is to provide double indemnity, or put another way, to provide compensation for loss that he has not suffered.
>
> 15. The respondent was entitled to receive vacation pay upon the termination of her employment. The statutory benefit must obviously be calculated in accordance with the provisions of the statute and does not apply to the period of notice to which the respondent is entitled at common law if that period exceeds the period to which the statutory benefit applies. [emphasis added]

[56] Based on *Cronk* I conclude that vacation pay is payable only on the ESA termination notice amount and not on the severance amount.

[57] Reflecting her twelve years of employment with the defendant I therefore assess the plaintiff's damages as follows:

a)	8 weeks' notice termination pay	$4,189.84
b)	12 weeks' severance pay	6,284.76
c)	Vacation pay on $4,189.84 at 4%	167.59
	Total	**$10,642.19**

Disposition

[58] In the result, there will be judgment for the plaintiff against the defendant as follows:

a) $10,642.19 for the Claim;
b) $175.00 for court disbursements;
c) Prejudgment interest at court rate on and from March 11, 2015;
d) Postjudgment interest at current court rate.

Costs

[59] Costs are discretionary to the trial judge. The plaintiff reduced her claim and was content to seek damages only pursuant to the ESA. She could have done that prior to the commencement of the trial to simplify and perhaps even shorten the trial. Even with the change in the amount of

damages this was nevertheless a three-day trial where she was successful. In the circumstances of this case I assess a fair and reasonable amount for costs in the amount of $2,500, all-inclusive, to be paid by the defendant to the plaintiff and I so order.

[60] If necessary, the parties may write to court for an appointment within 15 days from the release of these reasons to appear before me on the issue of costs, including if there were any offers to settle under the Rules, otherwise my order of $2,500 shall stand.

[61] I would like to thank both counsel for their written submissions and books of authorities, which were helpful, with one exception: had plaintiff's counsel highlighted the passages of the cases that he was relying on, as I suggested at the end of trial, it would have made for a more expeditious consideration of the cases.

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J PRATTAS DJ