2010 CarswellOnt 52, 2010 ONSC 237, 79 C.C.E.L. (3d) 131, 183 A.C.W.S. (3d) 745

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Taylor v. Design Plaster Mouldings Ltd.

Thomas Taylor and 1362620 Ontario Inc. (Plaintiffs) and Design Plaster Mouldings Ltd. (Defendant)

Ontario Superior Court of Justice

D.L. Corbett J.

Judgment: January 8, 2010
Docket: Brampton CV-09-4124-00

Counsel: Ethan M. Rogers for Plaintiffs

David Hager for Defendant

Subject: Labour and Employment; Public; Civil Practice and Procedure

Labour and employment law --- Employment law — Termination and dismissal — Practice and procedure — Pleadings

Application to strike — Employee alleged in statement of claim that it was express or implied term of his employment contract that (i) employer would ensure its representatives acted ethically; (ii) that where employee brought forward evidence of improper behaviour by another representative of employer, evidence would be investigated and measures would be taken to correct behaviour; and (iii) employee would not face retaliation — Employer brought motion to strike portions of employee's statement of claim pleaded in support of claim for Wallace damages — Motion granted — Impugned pleadings were scandalous and vexatious and should be struck — Contract of employment did not support allegations — There was no authority for proposition that alleged implied terms were implicit in all contracts of employment — DR was sole owner and directing mind of employer, alleged improper conduct was committed by DR, and complaint was made to DR — Employee's theory that there was implied term of his employment contract that DR would cause his own company to investigate himself and take appropriate steps against himself in response to employee's concerns, was absurd — Alleged misconduct, if true, might be matter of legal concern to employer's shareholders or to third parties, but they were not relevant to employee's wrongful dismissal claim — Acts which constituted DR's misconduct were pleaded to cause him embarrassment — In any event, there was no basis for Wal-

lace damages claim.

Labour and employment law --- Employment law — Termination and dismissal — Remedies — Damages for mental distress arising from dismissal (Wallace damages)

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Civil practice and procedure --- Pleadings — Application to strike — When available — General principles

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Cases considered by *D.L. Corbett J.*:

Keays v. Honda Canada Inc. (2008), 2008 SCC 39, *(*sub nom. *Honda Canada Inc. v. Keays)* 2008 C.L.L.C. 230-025, 376 N.R. 196, 294 D.L.R. (4th) 577, *(*sub nom. *Honda Canada Inc. v. Keays)* [2008] 2 S.C.R. 362, 92 O.R. (3d) 479 (note), *(*sub nom. *Honda Canada Inc. v. Keays)* 63 C.H.R.R. D/247, 66 C.C.E.L. (3d) 159, 2008 CarswellOnt 3743, 2008 CarswellOnt 3744, 239 O.A.C. 299 (S.C.C.) — considered

Wallace v. United Grain Growers Ltd. (1997), 123 Man. R. (2d) 1, 159 W.A.C. 1, 152 D.L.R. (4th) 1, 1997

CarswellMan 455, 1997 CarswellMan 456, 219 N.R. 161, [1997] 3 S.C.R. 701, [1999] 4 W.W.R. 86, 36 C.C.E.L. (2d) 1, 3 C.B.R. (4th) 1, [1997] L.V.I. 2889-1, 97 C.L.L.C. 210-029 (S.C.C.) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 30.04 — referred to

MOTION by employer to strike portions of employee's statement of claim in wrongful dismissal case.

***D.L. Corbett J.*:**

1 This is a pleadings motion in a wrongful dismissal case. The defendant moves to strike various portions of the statement of claim pleaded in support of a claim for *Wallace v. United Grain Growers Ltd.* [1997 CarswellMan 455 (S.C.C.)] damages.

2 I am satisfied that the impugned pleadings are scandalous and vexatious and should be struck. They are included for the purpose of causing embarrassment to the defendant's principal, and to require disclosure of documents related to alleged misconduct by the plaintiff's principal in circumstances where that misconduct is irrelevant to the claim for wrongful dismissal.

3 The plaintiff alleges in paragraph 6 of the statement of claim that it was an express or implied term of his employment contract that (i) the defendant would ensure that its representatives acted ethically and with a view to the defendant's best interests; (ii) that where an employee brought forward evidence of improper behaviour by another representative of the defendant, that evidence would be thoroughly investigated and that appropriate measures would be taken to correct any improper behaviour; and (iii) that where an employee brought forward evidence of improper behaviour on the part of another representative of the defendant, the employee would not face retailiation.

4 The contract of employment was produced in response to a demand under Rule 30.04. None of the alleged terms are in the contract. Thus it was not an express term of the contract.

5 There is no authority for the proposition that the alleged implied terms are implicit in all contracts of employment. Thus the issue is whether they may be inferred in this employment contract, in all the circumstances of this case.

6 It is common ground between the plaintiff and the defendant that David Ryan is the sole owner and directing mind of the defendant. It is also common ground that the alleged improper conduct was said to have been done by Mr. Ryan. It is also common ground that the complaint about Mr. Ryan's conduct was made to Mr. Ryan.

7 Thus, it is the plaintiff's theory that there was an implied term of his employment contract that Mr. Ryan would

cause his own company to investigate himself and take "appropriate steps" against himself, in response to the plaintiff's concerns. This is absurd.

8 The alleged misconduct - if it is true - might well be a matter of legal concern to the defendant's shareholders or to third parties. They are not, however, relevant to the claim for wrongful dismissal.

9 I have not specified the acts said to constitute Mr. Ryan's misconduct. In my view they were pleaded to cause him embarrassment, and I do not think it appropriate, therefore, to embarrass him by including them in the text of this decision. It is sufficient, for the purposes of these reasons, to conclude that there is no air of reality to the suggestion that it was an implied term of employment that Mr. Ryan would investigate himself if one of the employee's did not like the manner in which he was conducting the affairs of his own business.

10 There is one additional point raised by the plaintiffs. They plead that the defendant mis-stated the reason for termination. They say the real reason was Mr. Taylor's "whistle-blowing" but the reason given was that the business did not have sufficient work. Assuming but not finding that these allegations are true, they do not form a basis for an award of *Wallace* damages. The allegedly false explanation for termination is not one that would cause harm to Mr. Taylor. It does not suggest that Mr. Taylor acted inappropriately or was in any way at fault for his own dismissal. As such, the explanation, even if false, cannot give rise to a claim.

11 The Supreme Court of Canada's decisions in *Wallace* and *Keays v. Honda Canada Inc.* [2008 CarswellOnt 3743 (S.C.C.)] have opened the door in a narrow range of cases for additional damages where there is significant misconduct by an employer in connection with the termination of an employee's employment. Here, the plaintiff did not like how Mr. Ryan was running his own business, and told him so. There was nothing wrong with the plaintiff voicing his concerns to Mr. Ryan, of course. If those concerns could not be addressed to the satisfaction of both, it was likely that the employment relationship would come to an end. But this is no basis for *Wallace* damages.

12 The motion is granted. The defendant shall have its costs of the motion on a partial indemnity scale fixed at $3,000 inclusive.

Motion granted.

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