

# *De Castro v. Arista Homes Limited*: Judicial Guidance on Summary Judgment under Simplified Procedure, the Continued Importance of *Waksdale* and the Employer's Evidentiary Burden to Prove a Failure to Mitigate

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No two wrongful dismissal cases are exactly alike, but there are often similarities between them, including commencing the action under Ontario's Simplified Procedure, a process available for lawsuits in which less than \$200,000 is claimed, and bringing a summary judgment motion, in which the action is decided on a motion rather than following a fulsome trial. Many cases involve the validity and enforceability of an employment agreement, or the question of whether a terminated employee has made reasonable efforts to mitigate their damages by finding new employment.

The recently-released decision of Justice Koehnen in *De Castro v. Arista Homes Limited*<sup>[1]</sup> provides helpful guidance with respect to each of these common elements of wrongful dismissal actions. In *De Castro*, Justice Koehnen:

1. sheds light on when summary judgment might be available under Ontario's Simplified Procedure;
2. presents a reminder of the continued importance of the Court of Appeal for Ontario's landmark decision in *Waksdale v Swegon North America Inc.*<sup>[2]</sup> on the enforceability of contractual termination provisions; and
3. discusses the evidence which an employer must muster to establish that a terminated employee failed to mitigate their damages.

## Facts

Ellen De Castro had been employed with Arista Homes for approximately five years when her employment was terminated without cause. Ms. De Castro commenced a wrongful dismissal action under the Simplified Procedure, and then brought a motion for a summary judgment. Arista Homes opposed Ms. De Castro's motion for summary judgment, arguing (1) that deciding the case summarily would be unfair because cross-examinations on affidavits are not permitted under the Simplified Procedure, (2) Ms. De Castro's employment agreement limits her to statutory notice of termination and severance, and (3) Ms. De Castro had not adequately mitigated her damages by searching for new employment.

### 1. *Summary Judgment in Simplified Procedure Actions*

On a summary judgment motion, the court may decide the action without proceeding through a full trial. Given that a traditional trial is intended to allow the judge to assess witness credibility by observing their live testimony, a summary judgment is suitable for situations in which little or no facts are in dispute and there are no concerns about credibility. This is often the case in wrongful

dismissal actions which frequently turn on legal rather than factual issues such as the interpretation of contracts and the appropriate period of reasonable notice.

Like summary judgment, Ontario's Simplified Procedure aims to reduce legal costs and increase the efficiency of the judicial system by providing a streamlined set of rules, procedures and processes. One way in which the Simplified Procedure process is streamlined is that cross-examinations on affidavits are not permitted. This creates a conflict between summary judgment and the Simplified Procedure: in the former, affidavits and cross-examinations on those affidavits are used instead of live witness testimony, but in the latter, cross-examinations on affidavits are not permitted. That has led to case law suggesting that summary judgment is not appropriate in actions proceeding under the Simplified Procedure.

Arista Homes relied on this very line of jurisprudence to argue that deciding Ms. De Castro's claim on a summary judgment motion would be unfair, because it would not have the opportunity to test her evidence by cross-examining her. Justice Koehnen disagreed, and distinguished Ms. De Castro's motion from these previous cases on the basis that in her case, the Court had ordered a timetable for her motion which clearly provided both parties the opportunity to cross-examine one another. This Court Order trumped the bar on cross-examinations imposed by Simplified Procedure and thereby resolved the fairness issue raised by Arista Homes. The Court noted that if Arista Homes chose not to cross-examine Ms. De Castro on her affidavit, it did so at its own risk.

## **2. A Reminder of the Importance of *Waksdale***

Justice Koehnen then proceeded to summarily determine the enforceability of the termination provisions in Ms. De Castro's employment agreement. On this issue, Justice Koehnen accepted Ms. De Castro's argument that the contractual termination provisions were unenforceable, relying on the Ontario Court of Appeal's landmark 2020 decision in *Waksdale v Swegon North America Inc.* Per *Waksdale*, the termination provisions in an employment agreement must be read as a whole, and if one of them, such as the "for cause" termination provision, violates the *Employment Standards Act, 2000* ("ESA"), then all of the termination provisions are void and cannot rebut the presumption that the employee is entitled to reasonable notice at common law.

Ms. De Castro's employment agreement purported to allow Arista Homes to terminate her employment for any breach of her employment agreement, or for "Cause" which it defined to include her "involvement in any act or omission which would in law permit ARISTA to, without notice or payment in lieu of notice, terminate [her] employment." This provision provided a lesser entitlement than the minimum required by the ESA, which only permits termination without notice or pay in lieu where an employee is found guilty of wilful misconduct, disobedience, or wilful neglect of duty that is not trivial and is not condoned by the employer. Accordingly, the termination provisions Ms. De Castro's employment agreement were found to be an attempt to contract out of the minimum standards of the ESA and therefore void.

Justice Koehnen's interpretation of the enforceability of the termination provisions in Ms. De Castro's employment agreement is another in a long list of reminders for employers to be mindful of the *Waksdale* decision when drafting employment contracts.

## **3. Alleged Lack of Mitigation**

The final argument advanced by Arista Homes was that Ms. De Castro had failed to mitigate her damages. Arista Homes argued that she should have been able to secure comparable employment based on her abilities. Justice Koehnen, however, pointed out that Arista Homes provided no evidence to support this claim, nor did they provide Ms. De Castro with any job counseling, job leads, or reference letters to assist her in finding new employment. Justice Koehnen also noted that Arista Homes' submission of a list of LinkedIn profiles showing other individuals who secured comparable employment during the time that Ms. De Castro was unemployed was unsatisfactory evidence and did not demonstrate inadequate efforts to mitigate on her part.

This aspect of Justice Koehnen's decision serves as a reminder to employers that the employer bears the onus of establishing that a

terminated employee has failed to make reasonable efforts to mitigate by finding new employment. To meet this onus, employers should provide assistance to terminated employees appropriate in the circumstances and should compile evidence of comparable positions to which the terminated employee could have applied during any claimed period of reasonable notice.

*If you have questions or need advice with respect to the topics discussed above or any other employment or labour matter, please do not hesitate to contact Daniel Wong, Seth Holland, Max Skrow or your regular lawyer in WeirFoulds' Employment & Labour Practice Group.*

***The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.***

[\[1\]](#) 2024 ONSC 1035 [**De Castro**]

[\[2\]](#) 2020 ONCA 391 [**Waksdale**]

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