CITATION: Stride v. Syra Group et al., 20245 ONSC 2169
COURT FILE NO.: CV-19-628311
DATE: 20240424

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Jennifer Stride	)	*Tara Vasdani*, for the Plaintiff
Plaintiff	)	
– and –	)	
Syra Group Holdings, Mona Singh, Jane Seale, Dwayne Jetty, Jamie Jetty	)	*Timothy M. Duggan*, for the Defendants
Defendants	)	
	)	
	)	**HEARD:** September 11, November 6 and 7, 2023
	)	

CAROLE J. BROWN

REASONS FOR DECISION

[1] The plaintiff, Jennifer Stride ("Stride"), brings this action for wrongful dismissal, damages for breach of the *Human Rights Code* and moral and punitive damages as against the defendant, Syra Group Holdings ("Syra").

[2] As against Mona Singh ("Singh") and Jane Seale ("Seale"), the plaintiff claims damages for intentional infliction of mental suffering.

[3] The defendants, Dwayne Jetty ("Dwayne") and Jamie Jetty ("Jamie"), did not defend this action and did not participate in the action or at trial. There was no evidence adduced at trial to establish that any action was taken against either of these defendants to obtain judgment against them.

[4] The defendants counterclaimed against the plaintiff in the amount of $500,000, which counterclaim was discontinued at trial.

[5] In this decision, where I refer to "the parties", I refer to Stride, Syra Group, Singh and Seale.

Statement of Agreed Facts

[6] The parties agreed upon the following Agreed Facts:

> TERMS OF EMPLOYMENT
>
> 1. The plaintiff, Jennifer Stride ("Stride"") was hired by the defendant, Syra Group Holdings ("Syra") on January 15, 2014.
>
> 2. Under the employment contract with Syra, Stride received a salary of $20,000.00 per annum, and credit for the full monthly rent for the use of Unit 506, 34 Dixington Avenue, at a value of $15,000 per annum.
>
> 3. Stride reported directly to the property manager, Jane Seale ("Seale").
>
> 4. Stride's hours of work were Monday to Friday from 8:30 AM to 5 PM, and Saturdays to clean the lobby and remove the garbage.
>
> 5. Stride was required to be on-call for emergencies at all times except when on vacation, absent from the property, or otherwise authorized by the Property Manager.
>
> 6. In or around November 2017, Stride was given the title Property Administrator, Customer Service Representative and Personal Assistant to the Property Manager.
>
> SEXUAL HARASSMENT, ASSAULT AND BULLYING
>
> 7. The defendant Dwayne Jetty ("Dwayne") was convicted of assault on December 6, 2018.
>
> 8. Dwayne was sentenced to one (1) year of probation, a condition of which was that he not contact Stride directly or indirectly, nor attend at 34 Dixington.
>
> 9. Dwayne was only permitted to return to 34 Dixington at the end of his probationary period, with building management permission.
>
> 10. In December 2019, following the completion of his probation, Dwayne returned to 34 Dixington, where he resides as of today.
>
> 11. Following his arrest for assault, Jamie Jetty entered into a peace bond, the terms of which included a prohibition on contacting Stride directly or indirectly, or residing at or attending 34 Dixington without the permission of Syra.
>
> 12. Syra did not permit Jamie to return to 34 Dixington during the period of the peace bond.
>
> 13. Jamie has returned to reside at 34 Dixington since 2021.

Background facts

[7] Syra is an Ontario Corporation which, at the time of trial, owned 13 apartment buildings in the GTA. Mona Singh was the CFO of Syra. Seale was the Property Manager of 34 Dixington.

[8] On January 15, 2014, Stride was hired by Syra as superintendent of one of the apartment buildings located at 3085 Queen Frederica. She was introduced to Syra through her husband, Colin Kennedy, who was the painter for Syra.

[9] In February 2015, Stride was moved to a larger apartment building at 2100 Camilla Road as superintendent. Colin Kennedy was also hired as a co-superintendent and the maintenance person for the building.

[10] In 2016, Stride became the superintendent of 34 Dixington in Etobicoke.

[11] In November 2017, the plaintiff was given the title Property Administrator, Customer Service Representative and Personal Assistant to the Property Manager, Jane Seale. Seale had a real estate certificate/license, but did not have property management certification.

[12] At 34 Dixington, Stride received a salary of $20,000 per annum, with credit for the full monthly rent for the use of Unit 506 at a value of $15,000 per annum.

[13] While Stride indicated that these moves were promotions, there was some dispute as to whether that was the case, or whether the moves were due to other factors. It was the position of Syra that the move to Camilla Road was due to the fact that Stride requested an increase in income, and Camilla Road which was a larger apartment building paid a larger salary. It was further their position that the move to Dixington was because Colin Kennedy was not a maintenance person, but rather a painter and Syra wished to maintain him on the payroll as a full-time painter.

[14] There was also some dispute between the parties as to who was Stride's employer. While Syra maintained that, at the material times, the plaintiff's employer was 34 Dixington Avenue, it was the position of the plaintiff that her employer was Syra.

[15] The plaintiff's employment agreements were signed between the plaintiff and defendant "34 Dixington Avenue, a division of the Syra Group Holdings", the ROE is issued by the employer, Syra Group Holdings and correspondence between the plaintiff and her employer described her employer as Syra Group Holdings, including correspondence from the defendant, Singh, indicating that she was CFO of the plaintiff's employer, Syra Group Holdings. The Statement of Agreed Facts, as agreed to between the parties and filed with this Court for trial, includes the following: "The plaintiff, Jennifer Stride ("Stride") was hired by the defendant Syra Group Holdings ("Syra") on January 15, 2014." Based on all of the foregoing, I am satisfied that the plaintiff's employer was, indeed, Syra Group Holdings.

[16] Stride was described as a hard worker, organized, and detail-oriented. She reported directly to Seale, and from all of the evidence, appears to have worked well with Seale. Stride

indicated that she looked at Seale as someone she wished to emulate and was eager to learn as much as she could from Seale.

[17] Syra apparently purchased 34 Dixington Avenue just prior to moving the plaintiff to the position of superintendent at that location. The previous superintendent had been one Linda Jetty, the mother of the co-defendants, Dwayne and Jamie Jetty, all of whom still lived at 34 Dixington Avenue. Dwayne had his own apartment and Jamie lived with his mother.

[18] It appears from the evidence that, from the time that Stride became superintendent at 34 Dixington, Jamie and Dwayne Jetty focused their attention on testing and then threatening Stride. Apparently, Jamie had applied for the superintendent position at 34 Dixington when Syra purchased the building, but Stride had already been hired. This may have been a cause of his antagonism toward her.

[19] The evidence indicates that in June 2016, Jamie walked past the office, while Stride was in the office, brandishing a hammer and later shouted from his balcony to Stride when she was walking her dog that he would bash her head in with the hammer. He subsequently kicked in Stride's dog's teeth when the dog was off leash in the backyard of the building. Stride contacted Seale to inquire as to what she should do and was told that if she was concerned about safety, she should call the police. The police were called and Jamie was arrested. Jamie subsequently entered into a peace bond, the terms of which included a prohibition on contacting Stride directly or indirectly or residing at or attending at 34 Dixington without the permission of Syra, which did not permit him to return until after the peace bond had expired. He has returned to reside at 34 Dixington since 2021.

[20] Both Seale and Singh were aware of Jamie's harassment of the plaintiff, as well as his arrest. Syra was aware of Jamie's assaults on stride from June 2016, when he was arrested.

[21] The evidence indicates that after Jamie was arrested, Singh sent an email and letter to all superintendents to advise that if Jamie were seen approaching any buildings, to call the police immediately and to post a notice to make other tenants aware that he is dangerous and should not be in the building. Stride testified that the defendants did not have a discussion with her regarding accommodating her after the incident, did not provide violence or harassment training to her and did not put in place a violence or harassment policy for the building. At the trial, Singh testified that a violence and harassment policy was "now" in place. There was no evidence about the policy, what provisions were contained in the policy or when it was put into place. Seale and Singh both told Stride that if she felt unsafe, she should call the police. They knew that Jamie had been arrested, had entered into a Peace Bond and was not to go into or near the building for one year.

[22] In 2017, Dwayne Jetty began sexually harassing Stride. He would often drop by the office, but not to discuss a tenant issue. Stride testified that he initially dropped by the office to tell her about a sexual harassment charge that he had ongoing regarding another female. Subsequently, he began to make sexual comments about Stride and her body. In March of 2017, in the presence of other tenants, William O'Sullivan and Carrie-Ann Jacobs, he made several explicit comments about sexually harassing Stride, even demonstrating how he would do this. He also touched her back side. All of this made her very uncomfortable. The

sexual comments continued and were said in the presence of other tenants. Stride reported this to Seale, who told her to contact the police if she did not feel safe. Stride did call the police and Dwayne was arrested. He was tried and convicted of assault on December 6, 2018, sentenced to one year of probation, during which he was not to contact Stride directly or indirectly and was not to attend at 34 Dixington. At the end of his probationary period, he was not to return to 34 Dixington without the permission of Syra.

[23] Singh and Seale were aware that Dwayne had sexually harassed Stride and that the police had been called by Stride and had arrested Dwayne. They were aware that he had been tried, convicted and was placed on probation with the conditions indicated above.

[24] At the sexual assault trial of Dwayne Jetty, Stride was a witness, along with Carrie-Ann Jacobs, who had witnessed Dwayne's conduct.

[25] As a result of the harassment by the Jettys experienced by Stride, she became fearful, distressed and depressed. Prior to the Jettys removal from the building, she would often ask someone to sit with her in the office and would also ask someone to accompany her to her own apartment in order to avoid contact with the Jettys. In 2018, during and after the Dwayne Jetty trial, Stride went through mental health issues, including self-harm and homicidal ideation. The evidence indicates that she had been sexually assaulted previously, and that this trial triggered many negative emotions in her.

[26] Stride experienced significant depression and mental health issues. Dwayne returned to reside at 34 Dixington in December 2019. Stride testified that since Dwayne returned to the building, she now only goes out for appointments and groceries. She has a protection dog and carries pepper spray with her. She testified that it would have been helpful to her if Syra had not let Dwayne back into the building, and had given her time off to cope and obtain medical and other assistance.

[27] On August 7, 2018, she was to have a performance review with Seale and Singh. On the day of the review, Seale arrived early. Stride advised her that she had been at the hospital the evening before to be treated for mental issues and homicidal tendencies. When Singh arrived, she was apprised of the same. Singh asked if Stride needed some time off.

[28] Stride took a medical leave at that time. The medical leave was extended several times, for which Stride presented her doctors' medical notes to Syra on August 16, 2018, August 28, 2018 and September 4, 2018.

[29] On September 13, Singh, on behalf of Syra, made a written request for more detailed medical evidence of Stride's diagnosis and prognosis, requesting a medical report from her treating physician addressing the following questions:

> 1. What are Ms. Stride's current symptoms?
>
> 2. Is Ms. Stride currently undergoing treatment for these symptoms? What treatment is she receiving?
>
> 3. When did Ms. Stride first see you in respect of the symptoms?

4. What should Ms. Stride not do in order to avoid aggravation of her symptoms?

[30] Syra did not receive an answer and, as a result, on October 2, wrote another letter to Stride requesting detailed medical evidence. That letter advised her that if she did not respond, she would be taken to have abandoned her employment.

[31] On October 23, Dr. Philip Maerov of the Humber River Hospital Mental Health Unit, her treating psychiatrist, wrote in response to Syra's inquiry, advising as follows:

> Ms. Stride has been unable to work since August 7, 2018. She is struggling with mental health difficulties and is experiencing symptoms of anxiety, panic, anger, irritability, problems concentrating and depression. She is receiving treatment at Humber River Hospital in The Mental Health Urgent Care Clinic and has been meeting regularly with the psychiatrist and social worker. Efforts are being made to connect her with longer term supports in the community as the clinic is short-term in nature. She was first seen in the clinic on September 27, 2018. At this time, to avoid aggravation of symptoms, she should not return to work.

[32] On December 3, 2018, while Stride was still on medical leave, Syra terminated her employment, alleging frustration of contract. That correspondence from Singh on behalf of Syra, read, in part, as follows:

> In our letter of September 6, 2018, we sought clarification on your anticipated return to work date of October 1, 2018 and requested information in order to accommodate any medical restrictions you may have, up to the point of undue hardship. In reviewing your response, we confirm that we have reviewed the medical documentation provided by you from Dr. Maerov, dated October 23, 2018 that confirms that you have been unable to work since August 7, 2018 and that also confirms that you are unable to return to work given your medical concerns.
>
> As such, it is apparent that your employment relationship with Syra Group Holdings Inc. and 34 Dixington Inc. has been frustrated.

[33] Following her termination, on December 18, 2018, Syra offered to re-instate Stride to her position as superintendent. The letter read, in part, as follows:

> Your client has been off work since August 7, 2018. In response to seeking clarification on her expected return to work date, your client provided a medical note by Dr. Indirjit Bolla dated August 16, 2018 and then a subsequent note dated September 4, 2018 from a doctor Nourian Pejman, with respect to her absence up to October 1, 2018, which simply stated that she was unable to work for "medical reasons".
>
> In light of my client's recognition of its procedural and substantive duty to accommodate, on September 6, 2018 my client wrote to Ms. Stride seeking clarification on her anticipated October 1, 2018 return to work date and requested information regarding her accommodation needs. Rather than providing such information, your client instead provided a medical note from Dr. Philip Maerov at

> Humber River Hospital dated October 23, 2018 that confirmed that Ms. Stride had been off since August 7, 2018 and that, to avoid aggravating her mental health issues, "she should not return to work". This note, therefore gave no indication of when, if ever, Ms. Stride would be in a position to return to work, nor did it offer any guidance on what accommodation measures she would require to be able to return to work.
>
> In such circumstances, and given that there was no reasonable prospect of your client returning to work in the foreseeable future, my client took the position that your client's employment relationship had been "frustrated". As such, my client issued your client's ROE and has confirmed that it will pay your client her ESA minimum entitlements.
>
> In spite of this, my client remains committed to its duty to accommodate your client. As such, if your client has now been cleared to return to work or is able to provide a concrete date for her return to work, and if your client can provide specific accommodation measures that my client can consider and evaluate, my client will take all steps necessary to assist your client in returning to work and would be happy to discuss such accommodation requests.

[34] Stride declined the offer to discuss accommodations and/or return to work. It was her evidence that she did not want to return to employment where she was not protected by her employer, and where those who harassed her had not been evicted or asked to leave.

[35] To the date of the trial, no new superintendent was hired for 34 Dixington.

Testimony/Credibility

[36] I make the following comments with respect to the testimony of the witnesses at trial.

[37] *Stride*. I found Stride's testimony to be generally straightforward and candid in answering the questions asked of her in examination and cross-examination. While the defendant submits that her evidence was "inconsistent, internally contradictory and implausible", I do not find that to be the case. The defendants give two examples to bolster their submission, as follows. (1) The two employee contracts which the LTB dealt with. The LTB found one to be susceptible to alteration and the other to be the valid contract, and (2) her evidence that she had sent to the defendant the medical letter of Dr Maerov of October 23, 2018 as well as the medical certificate of same date. This was denied by the defendant. I do not accept these arguments as rendering her evidence implausible. I find that the plaintiff's evidence is credible and reliable.

[38] *Carrie-Ann Jacobs*. I found Jacob's evidence to be straightforward and candid. I do not accept the defendant's arguments about her evidence nor about its content, which I do not find to be correct. I accept her evidence as regards the Jettys' behaviour *vis a vis* Stride, and about her fear arising from this. I accept her evidence that she witnessed the sexual harassment by Dwayne Jetty, as she was in the office at the time. I accept her evidence that Stride reported the harassing behaviour to Seale by telephone while Jacobs was in the office. I find Jacob's evidence to be credible and reliable.

[39] *Seale.* I found Seale's evidence to be guarded in examination and cross-examination. She appeared hesitant about answering questions that may counter Syra's positions taken at trial. She attempted to avoid answering difficult questions, the answers to which did not fit the defendant's narrative. She changed her evidence and made concessions on cross-examination. Her evidence about knowledge of the plaintiff's mental health challenges was inconsistent and contradictory. I did not find her testimony to be straightforward or candid and do not find it to be credible or reliable.

[40] *Singh*. As with Seale, I found Singh's evidence to be guarded in examination and cross-examination. She attempted to avoid answering questions which did not fit Syra's narrative of events, and attempted to explain away certain facts and evidence which would have an adverse impact on Syra. Her evidence in certain areas was inconsistent and not plausible. I did not find her evidence to be reliable or credible.

[41] Where the plaintiffs and defendants evidence may differ, I take the above into account in assessing credibility and reliability.

Issues

[42] The issues for determination are as follows:

1. Whether Stride was terminated without cause;

2. If so, whether Stride is entitled to reasonable notice;

3. Whether Stride's contract was frustrated;

4. Whether the defendants breached their obligations under the *Employment Standards Act, 2000*, the *Ontario Human Rights Code,* the *Occupational Health & Safety Act*, and the common law, when they failed to protect the plaintiff and address the assault and sexual harassment that she had experienced;

5. Whether the defendants, Seale and Singh, are liable for the tort of intentional infliction of mental suffering because their owners and/or employees subjected the plaintiff to taunts, slurs, harassment, threats and sexual assault;

6. Whether Stride is entitled to moral damages; and

7. Whether the conduct of the defendants, either jointly or severally, was malicious, high-handed and shocking to the point where punitive damages should be assessed.

Whether Stride was terminated without cause

[43] I find that Stride was terminated without cause.

[44] Termination provisions in an employment contract must be interpreted as they were at the time the contract was entered into: *Waksdale v Swegon North America Inc*., 2020 ONCA391 at paras 7-8.

[45] A termination provision is unenforceable if it attempts in any way to contract out of an employment standard pursuant to the *Employment Standards Act, 2000,* S.O. 2000 c. 41 ("ESA"). A termination clause rebuts the common-law presumption of reasonable notice only if it is clearly written: *Wood v Fred Deeley Imports*, 2017 ONCA 158. Where one part of a termination clause is held to be illegal, or ambiguous enough to be read in a way that would contract out of an ESA minimum, the entirety of the termination clause will be unenforceable: *Wood*, *supra* at para 24; and see *Rossman v Canadian Solar Inc.,* 2019 ONCA 992.

[46] The "with cause" provision in question includes 11 categories of conduct which could amount to "wilful misconduct" required to dismiss an employee for cause. These categories include, *inter alia*, material breaches of the employment agreement, improper use of organization property, dishonesty, wilful refusal to take directions, failure to report for work, and off-duty conduct that "prejudices the employer's reputation". These categories of conduct are ambiguous and can be read to include conduct that does not correspond to the minimum amount of wilful disobedience required for a termination. Accordingly, the clause is not in compliance with the *ESA* standards and is unenforceable: see *Peratta v Rand A Technology Corporation*, 2021 ONSC 2111.

[47] I further hold that the defendant is unable to rely on the without cause provision or the severability clause, as severability clauses cannot sever unenforceable provisions of termination clauses from the larger termination clause: *Waksdale, supra.*

Whether Stride was entitled to reasonable notice

[48] I have found that the termination clause of the employment agreement is not enforceable. As a result, the plaintiff is entitled to reasonable notice having consideration of the factors in *Bardal v Globe and Mail Ltd.*, 24 DLR (2d) 140, including, *inter alia*, the age of the employee, the length of employment, the nature of the employment, the position of the employee and the availability of similar work.

[49] In this case, the plaintiff was 43 years of age, she had worked for the defendant for four years as superintendent of three different buildings in succession and, when moved to the third building, 34 Dixington, became the Property Administrator, Customer Service Representative and Personal Assistant to the Property Manager. Her position entailed dealing with the tenants of the building, all paperwork related to the building, and ensuring that all inspections, such as fire alarms, elevators, pest control, etc. were undertaken.

[50] In considering the *Bardal* factors and the plaintiff's ability to find other similar work, I also take into account the plaintiff's circumstances. The plaintiff was undergoing ongoing

treatment for mental health issues arising from the assault and sexual harassment she experienced at her place of employment at the hands of the two tenants, and the fact that she had surgery scheduled for her ankle injury, which had been sustained at the entrance of the defendant's property where the city was undertaking work, which injury and surgery were known to the defendants. I am of the view that she would not have been able to look for other employment immediately on termination by Syra, and that this must be taken into account in determining reasonable notice. I am further of the view that, given all of the circumstances of this case, she would not have been expected to mitigate her damages. This will be addressed below.

[51] While the plaintiff sought "at least eight months" reasonable notice and the defendant sought a maximum of 12 weeks, I am of the view that Stride is entitled to eight months reasonable notice with all of the benefits she would normally be entitled to during that time, less any amounts paid and any applicable statutory deductions.

[52] I do not accept the defendant's argument that the amount of reasonable notice should be reduced due to failure to mitigate. As indicated above, I have taken into account that Stride was suffering from mental health issues and also recuperating from ankle surgery, and would not have been able to search for employment immediately after termination. Further, she testified that, when she began to look for employment, she avoided interviews and jobs where she would be alone with a man, due to her trauma from the assault and sexual harassment suffered at the hands of the Jetty brothers during her work at 34 Dixington. This likely narrowed her opportunities for alternative employment. These circumstances merit additional reasonable notice. In all of the circumstances, as indicated above, I do not find that Stride failed to mitigate.

[53] Only in a rare case would an employee who was terminated be expected to mitigate damages*: see Evans v Teamsters Local Union 31 (SCC),* 2008 SCC 20; [2008] 1 SCR 661 and *Forshaw v Aluminex Extrusions Ltd.* (1989), 1989 CanLll 234 (BCCA), 39 BCLR (2d) 140 (CA).

[54] As stated by the Supreme Court of Canada in *Evans v Teamsters:*

> [30] I do not mean to suggest with the above analysis that an employee should always be required to return to work for the dismissing employer and my qualification that this should only occur where there are no barriers to re-employment is significant. This Court has held that the employer bears the onus of demonstrating both that an employee has failed to make reasonable efforts to find work and that work could have been found (*Red Deer College v Michaels*, [1976] 2 S.C.R. 324). Where the employer offers the employee a chance to mitigate damages by returning to work for him or her, the central issue is whether a reasonable person would accept such an opportunity. In 1989, the Ontario Court of Appeal held that a reasonable person should be expected to do so "[w]here the salary offered is the same, where the working conditions are not substantially different or the work demeaning, and where the personal relationships involved are not acrimonious" (*Mifsud v MacMillan Bathurst Inc*. (1989), 70 O.R. (2d) 701, at p. 710). In *Cox*, the British Columbia Court of Appeal held that other relevant factors include the history and nature of the

> employment, whether or not the employee has commenced litigation, and whether the offer of re-employment was made while the employee was still working for the employer or only after he or she had already left (paras. 12-18). In my view, the foregoing elements all underline the importance of a multi-factored and contextual analysis. The critical element is that an employee "not [be] obliged to mitigate by working in an atmosphere of hostility, embarrassment or humiliation" (Farquhar, at p. 94), and it is that factor which must be at the forefront of the inquiry into what is reasonable. Thus, although an objective standard must be used to evaluate whether a reasonable person in the employee's position would have accepted the employer's offer (*Reibl v Hughes*, [1980] 2 S.C.R. 880), it is extremely important that the non-tangible elements of the situation – including work atmosphere, stigma and loss of dignity, as well as nature and conditions of the employment, the tangible elements – be included in the evaluation.

[55] In this case, I find that no mitigation is required. When an employee, such as Stride, has sustained assault, sexual harassment and has experienced a severe loss of trust between herself and her employer, she would not and should not be expected to return to her employment. She was terminated while tending to the injuries associated with the assault and sexual harassment experienced while she was at work by two tenants of the building in which she was a superintendent. She would return to the same work environment, where, as I have found herein, the employer did nothing to protect Stride after she experienced the assault and harassment, such that the work atmosphere remained the same, including working at the front office while the tenants who had committed the assault and sexual harassment are still residents of the building. Further, Stride would have to return to an employer in whom she has lost trust, and to a work environment where she felt unsafe. I am of the view that a reasonable person would not return to work in such a situation. Stride cannot and should not be expected to return to a work environment of fear, stress and potential ongoing assault and sexual harassment.

Frustration of contract

[56] The defendant, Syra, maintains, as a defence, that the plaintiff's contract was terminated due to frustration, rendering Syra liable only to the minimum amounts prescribed by the ESA, which have been paid.

[57] The doctrine of frustration applies when a contract becomes incapable of being fulfilled*: Antonacci v Great Atlantic & Pacific Co. of Canada (1998),* 1998 CanLll 14734 (ONSC), 35 CCEL (2d) 1 at para 37*; Skopitz v Intercorp. Excelle Foods Inc. (1999),* 40 3CCEL (2d) 553 at para 21. Frustration of contract is established at the time of termination: *Naccarato v Costco Wholesale Canada Ltd*. 2010 ONSC 2651; *Ciszkaaski v Canac Kitchens,* 2015 ONSC 73. Permanent disability will frustrate a contract. However, employment is not frustrated by temporary illness. The law permits temporary illness and moreover, allows the disabled to recover: *Dartmouth Ferry Commission v Marks (1904),* 1904 CanLll 61 (SCC), 34 SCR 366 at para 9. To prove "frustration", there must be evidence that there is no reasonable likelihood of the employee returning to work in the foreseeable future. The onus is on the employer to so prove. *Naccarato v Costco Wholesale Canada Ltd.,* 2010 ONSC 2651 at para 19. And see: *Dragone v Reva Plumbing Limited,*

2007 CanLll 40543 (ONSC). *Nagpal v IBM Canada Ltd*., 2019 ONSC 4547; *Altman v Steve's Music*, 2011 ONSC 1480.

[58] The defendant maintains that the contract was frustrated because the plaintiff was unable to return to work and failed to provide a date on which she would be able to return to work. It is of note that the correspondence from Syra did not specifically request a return date. Further, as indicated below, it is the evidence of the plaintiff that her return date was contained in the medical certificate for Service Canada that Stride testified that she provided to Syra. It is the position of Syra that they never received the medical certificate of October 23 from Stride, although they received the correspondence of October 23 regarding her diagnosis and prognosis.

[59] I find that while Stride's treating psychiatrist did not, in his letter, indicate a date on which the plaintiff could return to work, there was a medical certificate which Stride maintains she scanned and sent to Syra and which did indicate her return to work date, namely December 31, 2018. There is some dispute as to whether that certificate was provided with the letter of Dr. Maerov, explaining her diagnosis and prognosis, whether it was provided at a separate time, or whether it was provided at all. The plaintiff's evidence was that the medical certificate was scanned and sent, although it is unclear as to when that occurred.

[60] In any event, in my view, if the employer did not have all of the information it needed or wanted, the employer should have followed up with Stride or Dr. Maerov, the treating psychiatrist, to obtain the information it sought, before simply terminating her employment. It was known to Syra, Seale and Singh that the plaintiff was undergoing treatment for mental health issues, including self-harm and suicidal/homicidal ideation. The employer should have followed up to obtain additional information it sought prior to terminating her outright.

[61] The onus is on the employer to prove frustration: *Lemesani v Lowerys Inc*., 2017 ONSC 1808 at para 137. In this case, the correspondence from Dr. Maerov stated that "***At this time,*** *to avoid aggravation of symptoms, she should not return to work"*. There was no indication that she could not, at any time, return to work, but only at the time the correspondence was written, on October 23, 2018. Contrary to the defendant's submissions, Dr Maerov did not state that the plaintiff would not be returning to work for the foreseeable future. Further, I reject the defendant's submission that the plaintiff had not worked "in several months". As at October 23, she had been off work, to the defendants' knowledge, for 2 ½ months.

[62] There was no evidence in the record to establish that the defendant had sought a return to work date in its correspondence of September 13 or October 2, 2018. Further, there is no evidence to establish that the defendant followed up to request a return to work date. There was, further, no evidence that Dr. Maerov, at any time, opined that Stride was incapable of ever returning to work. His opinion of October 23, 2018 simply indicated that she should not return to work **at that time**. Again, there is no evidence that the defendant ever followed up with Dr. Maerov to determine when Stride may be able to return to work, if they had not received the medical certificate, as they maintained.

[63] Further, I find that her total absence of four months at the time of termination did not unduly affect the operations of the defendant as regards 34 Dixington. There was no evidence of hardship or disruption to the operations of 34 Dixington. To the time of trial, five years later, no one was hired to replace the plaintiff and there is no permanent superintendent at the premises: see *Nagpal, supra*. And see: *Skopitz v Intercorp.Excelle Foods Inc.,* 1999 CanLll 14852 (ONNSC), [1999] O.J. No. 1543.

[64] In all of the present circumstances, Syra's defence of frustration fails.

Whether the defendants breached their obligations under the Employment Standards Act, 2000, the Ontario Human Rights Code, the Occupational Health & Safety Act, and the common law, when they failed to protect the plaintiff and address the assault and sexual harassment that she had experienced

[65] It is the position of the plaintiff that the defendant failed to protect the plaintiff's rights pursuant to the *ESA*, the *Human Rights Code*, the *Occupational Health & Safety Act* and the common law. The plaintiff submits that the defendant, Syra, breached s.5(1) of the HRC which requires that every person be treated equally in their employment regardless of, *inter alia*, sex and disability.

[66] The common law test for discrimination requires the plaintiff to prove (1) that they embody a protected characteristic under the *Human Rights Code*; (2) that they suffered a disadvantage or adverse impact; and (3) that the protected characteristic was a factor in the disadvantage or adverse impact. See *British Columbia Human Rights Tribunal v Shrenk,* 2017 SCC 62.

[67] At the time of the plaintiff's termination, she was on a temporary medical leave due to her mental health issues and, as such, was protected by the HRC on the basis of her disability. I do not accept the defendant's position that her medical reason for being off work did not amount to a "disability" pursuant to the *Code*, or that if it did amount to a disability, it was not a factor in her termination.

[68] I further do not accept Syra's submission that they were not aware of Stride's disability until after the litigation was commenced. Seale was aware of the plaintiff's fears as a result of Jamie's assault from June of 2016. Stride informed Seale of her poor mental state in May of 2017, advising that she was physically and mentally suffering from panic, her body trembling, fear and stress from Dwayne Jetty's sexual assault. Seale and Singh were also aware of her mental issues and the fact that she had sought help at the hospital for homicidal tendencies.at the time of the meeting on August 7, 2017. The litigation was not commenced until after the plaintiff's termination.

[69] I am satisfied that the plaintiff was *temporarily* unable to fulfil her employment duties at the time of her termination and have so found. There is no evidence to suggest that she was permanently disabled and unable to fulfill her duties.

[70] It was also known to the defendants that the plaintiff's mental health issues arose from repeated assaults and sexual harassment caused by Jamie and Dwayne Jetty, for which the plaintiff was protected by the *HRC* on the basis of sex.

[71] The defendants were aware of the harassment and discrimination experienced by the plaintiff. They were aware of all of the criminal charges and convictions of Jamie and Dwayne and, indeed, Seale had witnessed an assault by Jamie, had advised the plaintiff that if she felt unsafe, that she should contact the police and, on one occasion contacted the police herself on behalf of the plaintiff. Syra were apprised of the incidents verbally and through emails. They were aware of the terms and conditions of the peace bond for Jamie and the probation order for Dwayne, and indeed, considered the Jetty brothers "a danger on site". As well, Syra was aware of and provided with some of the plaintiff's medical records.

[72] Both Seale and Singh indicated that they told the plaintiff to call the police if she felt unsafe. They further indicated that they called her and checked in with her on numerous occasions to see that she was all right.

[73] An employer must take reasonable steps to address an employee's complaints of harassment. The criteria for "reasonable steps" are as follows: (1) Awareness of the discrimination/harassment, applicable policies, company complaint mechanisms and training; (2) The employer's post-complaint conduct such as seriousness, promptness, investigation and action; and (3) resolution of the complaint, including communication and providing the complainant with a healthy working environment: *Laskowska v Marineland of Canada Inc.* (2005), [2005] HRTO 30.

[74] However, despite their knowledge, and this seeming display of concern, they did not take reasonable steps or any remedial steps to address Stride's harassment complaints. Syra did not have and did not, after the complaints, prepare a violence or harassment policy for the defendant, did not organize and provide violence or harassment training for their superintendents, including Stride. While they indicated that they checked in with her on numerous occasions to see that she was alright, they did nothing further to provide a safe environment in which she could work. They did not provide any security cameras or any other form of security for the superintendent's office or the building. They did not provide any updated policies for addressing harassment in the workplace and did not establish a complaint mechanism for employees who experienced harassment. They did not investigate the incident themselves and took no steps to address Stride's working situation following the criminal charges and convictions, or the Jettys' return to the building. They permitted both Jamie and Dwayne to return to 34 Dixington once the terms and conditions of their peace bond and probation had ended. See *Laskowska v Marine Land of Canada Inc*., *supra.*

[75] They did not offer Stride employment at another building which they owned, but only offered her the opportunity to move to another building, which she declined due to pest-control issues at the other building of which she was aware, given that she had previously been the superintendent there and was responsible for pest-control.

[76] While Singh testified that there is now a violence and harassment policy, this was not put in place directly as a result of the plaintiff's complaints. Furthermore, there was no documentary evidence on the record at trial that there is indeed a violence and harassment policy now, what it is or when it was put into effect.

[77] Rather than evicting either Jamie or Dwayne, they attempted to evict Stride after they had terminated her. Said eviction was found to be improper and invalid by the LTB.

[78] The complaint was clearly serious, and the harassment had significant effects on Stride, the employee of the defendant, Syra. Syra provided no resolution for the assault and sexual harassment.

[79] An employer has a duty to intervene to stop the harassment of its employees in the workplace, including harassment by third parties. This is particularly so when third parties attend the workplace on a regular basis, as in the case of regular service contractors or when third parties reside on the premises, as in this case. The duty to act applies to a single incident of harassment, if serious: see *Walmsley v Ed Green Blueprinting*, 2010 HRTO 1491. In this case, it is clear that the employer considered the harassment to be serious, as Seale and Singh both told the plaintiff to contact the police if she felt unsafe, and Seale called the police herself as regards Jamie.

[80] In all of the circumstances of this case, I am satisfied that the plaintiff is entitled to damages for the defendant's violations of the *Acts.* I find this to be the case for the following reasons: the lack of any reasonable response; the lack of any policies in place addressing violence and harassment or put in place as a result of the plaintiff's complaints and the tenants conduct; the fact that no investigation was done and no safety mechanisms were put in place for the plaintiff following Jamie's arrest, and one year later following Dwayne's arrest.

[81] I have further taken into consideration that there is no ceiling on awards of general damages under the *Code*: *Lane v ADGA Group Consultants Inc*. (2008, 295DLR (4th) 425, 2008 CLLC 230 – 037. I award damages to the plaintiff in the amount of $125,000.

Is Stride entitled to moral damages

[82] Moral damages are awarded where an employer, through the bad faith handling of an employee's dismissal, causes mental distress to the employee: *Keays v Honda Canada Inc,* 2008 SCC 39. This conduct must be unfair, or committed in bad faith by being, for example, untruthful, misleading or unduly insensitive. And see *Calisto v Thaytel*, 2019 ONCA197.

[83] An employer must take special care to treat their employees with respect, dignity, and good faith on termination – the way an employee is dismissed can be just as impactful as the dismissal itself (see *Wood, supra* at para 27).

[84] Moral damages cannot be claimed to address the "normal distress and hurt feelings" resulting from termination, which are non-compensable. To make out a claim for moral damages, the plaintiff must establish that the employer's conduct caused psychological injury to the plaintiff and goes beyond the "hurt feelings" intrinsic to a standard termination process. It is not necessary to provide medical evidence of psychological injury: see *Groves v UTS Consultants Inc*., 2019 ONSC 5605, affd 2020 ONSC 630 (C. A.).

[85] The Supreme Court of Canada has confirmed that medical evidence is not required for a moral damage award*: Saadati v Morehead*, 2017 SCC 28.

[86] In *Pohl v Hudson's Bay Company*, 2022 ONSC 5230, the court held as follows:

> Moral damages are available where the employer engages in a breach of the duty of good faith and fair dealing at the time of termination. An employer can breach this duty, for example, by being untruthful, misleading, or unduly insensitive. No independent actionable wrong is required to sustain an award of damages for mental distress resulting from a breach of the employment contract. If an employee can prove the manner of dismissal caused mental distress that was in the reasonable contemplation of the parties, the court may make an award that reflects the actual damages: *Honda Canada*, at paras 54 – 57; *Galea v Walmart Canada Corp,* 2017 ONSC 245 at para 232; *McLean v Dynacast*, 2019 ONSC 7146, at para 92 .

[87] The plaintiff argues that the manner in which the defendants handled the plaintiff's termination merits a moral damage award. The plaintiff points to the fact that the defendants terminated her while she was on medical leave for mental health issues arising from the assault and harassment she experienced at the hands of the Jetty tenants while she was at work. Syra later attempted to evict her using a falsified employment agreement (or what the LTB held was a contract susceptible to falsification), and offered her ESA entitlements, but did not pay them for one year post-termination. The defendant states that the ESA entitlements were not paid because their lawyer indicated that, in the circumstances, they may not need to be paid. The plaintiff takes the position that this conduct caused her additional mental distress and also financial harm.

[88] I am satisfied that the manner in which the plaintiff was terminated, namely while she was on medical leave, and at a time when she believed she had provided the defendants with the information necessary, caused her additional mental distress which, in the circumstances of this case, was reasonably foreseeable and in the reasonable contemplation of the parties. The defendants knew that she was receiving psychiatric assistance for her mental health issues. The defendants failed to follow up after Dr. Maerov's correspondence to obtain additional information.

[89] In all of the circumstances of this case, I award the plaintiff $50,000 for moral damages.

Whether the defendants, Seale and Stride, are liable for the tort of intentional infliction of mental suffering because their owners and or employees subjected the plaintiff to taunts, slurs, harassment, threats and sexual assault

[90] Intentional infliction of mental suffering is an intentional tort, the elements of which include flagrant or outright conduct; calculated to produce harm; and resulting in a viable and provable illness: *Calisto v Thaytel*, 2019 ONCA 197. While the first and third elements of intentional infliction of mental suffering are objective, the second has been found to be subjective: *Prinzo v Baycrest Centre for Geriatric Care*, 60 O.R. (3d) 474; *Piresferreira v Ayotte,* 2010 ONCA 387.

[91] The plaintiff submits that the defendants knew of the plaintiff's mental distress, arising from the assault and sexual harassment of Jamie and Dwayne that she suffered while in her position as superintendent, and also knew of the Jettys' charges and convictions, but did nothing to address the work environment and, further, attempted to evict her from her apartment, located in the building, once she had been terminated. The plaintiff maintains that the three elements required for intentional infliction of mental suffering are all met in this case. The plaintiff argues that the defendants' conduct was flagrant and outrageous and calculated to produce harm, in that they knowingly failed to address the issue of the Jettys' conduct and treatment of her. The plaintiff argues that the second element is satisfied by virtue of the fact that knowledge of harm is sufficient to amount to a finding that the defendants' conduct was calculated to produce harm. The plaintiff argues that exposing the plaintiff to sexual harassment at work and discriminating against her based on her disability would cause the plaintiff to experience negative feelings, injury to self-respect and self-loathing. The plaintiff argues that the defendants knew the plaintiff was being harmed but did nothing to prevent it. The plaintiff further argues that the third element is satisfied as the plaintiff experienced extreme psychological distress.

[92] I have considered all of the evidence in this case and do not find there to have been flagrant and outrageous conduct **calculated** to produce harm. It is clear that the inaction of the defendants in the face of the assault and sexual harassment did result in the plaintiff's mental health issues. However, there is no evidence to clearly indicate that the mental health issues were the result of **intentional** conduct on the part of Seale and Singh. The evidence indicates that Jamie was removed from the building on the day that Seale was at the building herself and that she knew of the conduct and the removal. As regards Dwayne, he remained on the premises for approximately one year after the defendants' knowledge of his harassment of Stride, until his trial and conviction. Nevertheless, I do not find the conduct of the defendants to be intentional or calculated to produce harm in Stride. I find the conduct to be negligent, reckless and in breach of the *Human Rights Code,* the *ESA* and the *Occupational Health & Safety Act*, but not intentional and calculated to produce harm.

Whether the conduct of the defendants, either jointly or severally, was malicious, high-handed and shocking to the point where punitive or moral damages should be assessed.

[93] I find the conduct of the defendants as regards their employee, Stride, to be unreasonable, incomprehensible in light of the issues the plaintiff was facing, negligent and reprehensible, in light of all of the complaints concerning the conduct of the Jettys, and the issues Stride was facing. The defendants have a duty to protect their employees from harassment and assault and did not do so in this case.

[94] However, I do not find the conduct to rise to the necessary level of oppressiveness, high-handedness or maliciousness to warrant punitive, damages.

Conclusion

[95] Based on all of the above, I find that the plaintiff is entitled to damages as follows:

1. 8 months' notice, plus benefits to which she was entitled during that period of time;

2. Damages of $125,000;

3. Moral damages of $50,000

4. Costs; and

5. PJI.

Costs

[96] I strongly urge the parties to agree upon costs in this matter. If they are unable to do so, they are to provide their Bills of Costs of no more that three (3) pages in total within 60 days of the release of these Reasons for Decision.

C.J. Brown J.

Released: April 24, 2024

CITATION: Stride v. Syra Group et al., 20245 ONSC 2169
COURT FILE NO.: CV-19-628311
DATE: 202404124

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Jennifer Stride

Plaintiff

– and –

Syra Group Holdings, Mona Singh, Jane Seale, Dwayne Jetty, Jamie Jetty

Defendants

REASONS FOR DECISION

C.J. Brown J.

Released: April 24, 2024