CITATION: 2551965 Ontario Ltd. v. Warkentin, 2024 ONSC 4876
COURT FILE NO.: CV-18-16
DATE: 2024-09-04

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
2551965 Ontario Ltd. and Cabin Country Realty Ltd.	)	*S. French & C. West*, for the Plaintiffs
	)	
Plaintiffs	)	
	)	
- and -	)	
	)	
Harold Warkentin	)	*H. Markowitz*, for the Defendant
	)	
Defendant	)	
	)	
	)	**HEARD:** January 11-25, 2024, at Kenora, Ontario, written submissions completed August 9, 2024

Mr. Justice F. B. Fitzpatrick

Reasons For Judgment

[1] This matter was commenced by way of action for damages arising from an alleged breach of restrictive covenants and interference in contractual and economic relations. It was defended and met with a counterclaim for wrongful dismissal. The case evolved throughout the discovery and case management process; ultimately, it was tried much like a wrongful dismissal case.

[2] In 2018, the parties agreed to a temporary injunction with respect to defendant Harold Warkentin's ("Warkentin") conduct. This formed part of the initial relief sought by plaintiffs

2551965 Ontario Ltd. and Cabin Country Realty Ltd. ("Cabin") in their statement of claim. On consent, this claim was later amended. The plaintiffs now seek only nominal damages. The passage of time has rendered moot any claim for ongoing injunctive relief. Mr. Warkentin has moved permanently to British Columbia, and the non-compete clause expired in October 2020.

[3] The trial was held in person for four days in Kenora. An inability on behalf of parties and the court to find a suitable date to continue the trial in person led the parties to make certain decisions. Cabin decided not to call their final witness, Chris Clark. The parties also agreed to make their final submissions in writing. These submissions, including replies, were uploaded to Caselines and will be marked as lettered exhibits on this trial: A and A.1 for plaintiffs' final submission and reply; B and B.1 for defendant's final submission and reply.

Background

[4] The main characters in this matter are Chris Clark ("Clark") and Graham Chaze ("Chaze"), principles for the plaintiffs, and the defendant Harold Warkentin ("Warkentin"), former owner of Cabin.

Agreed Facts

[5] The parties agreed to many of the facts in this case. An agreed statement of facts was entered as Exhibit 1 on this trial, and I have relied on these facts in coming to conclusions regarding what has been demonstrated and proven. I will now repeat these agreed facts in the following paragraphs.

[6] Cabin is a real estate brokerage based in Kenora, Ontario. Its principal business focuses on cottage buyers and sellers in Northwestern Ontario.

[7] Cabin is owned by the Plaintiff/Defendant by Counterclaim, 2551965 Ontario Ltd., a corporation established pursuant to the laws of Ontario. Clark and Chaze own 2551965 Ontario Ltd.. Chaze is the Broker of Record for Cabin. Cabin has an annual payroll under $2,500,000.00.

[8] Warkentin is an individual residing in Victoria, British Columbia. He formerly resided in Kenora, Ontario and is a licensed real estate broker.

[9] Warkentin founded Cabin in or around 1990. Warkentin was the sole officer and director and worked as a realtor and Broker of Record for Cabin. He did not have an employment agreement with Cabin and did not receive vacation pay, vacation time, or health and dental benefits.

[10] Clark commenced employment at Cabin in or around 2004. Chaze commenced employment at Cabin in or around 2010.

[11] In or around 2011, Warkentin and his wife, Debra Warkentin ("Debra"), established the Warkentin (2011) Family Trust (the "Family Trust"). The Family Trust was issued ten common shares of Cabin, entitling it to dividend payments. The beneficiaries of the Family Trust are Warkentin, Debra, and their son, Steele Warkentin. In their capacity as trustees of the Family Trust, Warkentin and Debra owned 100% of the issued and outstanding shares of Cabin. The Family Trust also named 1489815 Ontario Inc. as a beneficiary thereby permitting the transfer of Cabin-owned funds to 1489815 Ontario Inc. by way of dividends via the Family Trust.

[12] Between 2009 and 2016, Warkentin did not receive a salary or have a defined commission rate. Warkentin paid both himself and Debra pursuant to Cabin's available funds, after paying employee wages and covering Cabin's operating costs; he issued T4's for himself and Debra accordingly. Debra did not perform any work for Cabin.

[13] Warkentin's T-4s show earned income from Cabin issued from 2009 to 2017 (I have omitted the annual numbers as they ultimately were not relevant to my decision). Debra's T-4s show earned income from Cabin starting in 2008 (again I have omitted the annual number as they were not relevant to my decision).

[14] In December 2016, Warkentin agreed to sell Cabin to 2551965 Ontario Ltd. Warkentin and Debra Warkentin (in their capacity as trustees of the Family Trust), 2551965 Ontario Ltd., and Cabin, executed a Share Purchase Agreement (the "SPA") for the sale of 100% of the shares of Cabin to 2551965 Ontario Ltd.

[15] At section 2.2 of the SPA, the parties agreed the shares of Cabin were purchased by 2551965 Ontario Ltd. for $200,000.00, less the amounts of Cabin's line of credit with Copperfin Credit Union Limited, plus or minus any adjustment to net working capital.

[16] Warkentin was further transferred ownership of a vehicle owned by Cabin.

[17] At section 5.4, the SPA states: "The Purchaser shall cause the Corporation to offer to Harold employment on a year to year basis as a real estate agent on a commission basis, whereby Harold would receive 80% of any commissions received." At section 5.5 of the SPA, Warkentin agreed for a "period of three (3) years following the date he ceases to be employed by [2551965

Ontario Ltd.] as a real estate agent," not to engage or participate in any business in competition with Cabin within the territory of Northwestern Ontario. Northwestern Ontario is not defined in the SPA.

[18] Also at section 5.5 of the SPA**,** Warkentin agreed not to solicit any business from any client or prospective client of Cabin and not assist or have interest in the activities of any business that consists of soliciting any client or prospective client of Cabin.

[19] At section 8.1 of the SPA, Warkentin, his wife and the Family Trust agreed to "indemnify and save harmless [2551965 Ontario Ltd.] from and against any claims, demands, actions, cause**s** of action, damage, loss, deficiency, cost, liability and expense" arising out of, *inter alia* any breach of the following:

> Any liabilities, damages or other costs incurred by [Cabin] or [2551965 Ontario Ltd.] in respect of any litigation or claim by a third part against [Cabin] in respect of the operations or activities of [Cabin] prior to the Closing Date except as may be directly related to any action or inaction of [Chaze] or [Clark]; and
>
> All costs and expenses, including, without limitation, legal fees on a solicitor-and-client basis, incidental to or in respect of the forgoing.

[20] Schedule "F" of the SPA included a list of employees of Cabin.

[21] Warkentin executed a Release on January 1, 2017, stating as follows:

> Harold R. Warkentin (hereinafter called the "Releasor"), in his capacity as a director, officer, shareholder, employee and creditor, for valuable consideration, the receipt of which is hereby acknowledged, does hereby remise, release and forever discharge Cabin Country Reality Ltd. ("Cabin Country") and each of its respective officers, directors, employees, successors and assigns (hereinafter collectively called the "Releasees") of and from all manner of actions, causes of

> action, claims and demands whatsoever, which against the said Releasees the Releasor ever had, now has or which its successors or assigns, can, shall or may have or by any reason of any cause, matter or thing whatsoever existing up to the present time, except for claims and demands and any obligations and/or liabilities of the Releasees to the Releasor arising from, or contemplated in, a Share Purchase Agreement between the Releasor, Debra I. Warkentin, The Warkentin (2011) Family Trust, 2551965 Ontario Ltd. and Cabin Country, made as of the 31st day of December, 2016.
>
> And the Releasor, for the consideration aforesaid, hereby covenants and agrees not to make any claim or to take any proceedings against any person, firm or corporation who may claim contribution or indemnity from the Releases under the provisions of any statute or otherwise, except as provided in the immediately preceding paragraph.

[22] Warkentin executed a Resignation as Director and President of Cabin on January 1, 2017. Warkentin and 2551965 Ontario Ltd. both had legal counsel during the negotiation and execution of the SPA.

[23] Other than the language set out at section 5.4 of the SPA, there was no employment agreement executed between 2551965 Ontario Ltd., Cabin, and Warkentin following the execution of the SPA. Commencing January 1, 2017, Warkentin was paid 80% commission pursuant to his sales. The peak sales period for Cabin typically runs between April and September.

[24] In or around April 2017, significant conflict developed between Warkentin and Chaze, which culminated in a verbal altercation in Cabin's office.

[25] Warkentin was terminated for cause on October 10, 2017. He received a termination letter from Cabin advising the reason for his termination being:

(a) Writing unprofessional and insulting notes in the Top Producer System

(b) Threating your Broker of Record with violence

(c) Multiple instances of you poaching leads from info@cabincountry.com

(d) Instances of late or incomplete listing information, late datasheets and late or missing required forms for trade records

(e) Telling clients to pay for appraisals in advance

(f) A general careless attitude that is unbecoming of an agent of this company

(g) Misleading a former client into accepting an offer and signing a listing agreement with another firm (Davis).

[26] Warkentin denies these allegations.

[27] Warkentin was not paid any termination pay and was issued a Record of Employment bearing code "M", indicating dismissal. Warkentin was 62 years of age when his employment with Cabin was terminated.

[28] Following the termination of his employment, Warkentin sent emails to numerous clients and real estate agents in Northwestern Ontario informing them of the termination and attaching his termination letter. On October 17, 2017, Warkentin contacted legal counsel in relation to the termination of his employment. Warkentin held himself out to the public as actively working as a real estate broker in and around the Kenora, Ontario area between October 10, 2017 and June 1, 2018

[29] Warkentin did not attempt to conceal his competing activities. Harold attended the Lake of the Woods District Property Owner's Association Show on May 7, 2018, and marketed

himself as a realtor. Harold purchased advertising materials in the form of key tags, magnets, advertising signs, website, and magazine articles. Warkentin transferred his real estate license to ICI Real Estate ("ICI") on November 21, 2017. Warkentin transferred his real estate license from ICI to Re/Max Real Estate ("Re/Max") on February 14, 2018.

[30] On February 21, 2018, counsel for Cabin wrote to Re/Max to inform them its position that Warkentin was bound to a three (3) year non-competition and non-solicitation covenant. Warkentin listed three (3) properties with Re/Max. None of these properties were sold by Warkentin. On July 26, 2018, Warkentin transferred his real estate license from Re/Max to ICI and resigned from Re/Max as an active real estate broker. On October 24, 2018, the Ontario Superior Court ordered, on consent of Warkentin and Cabin, that Warkentin refrain from working as a realtor in Northwestern Ontario until October 10, 2020.

[31] On November 2, 2020, Warkentin resigned from his position as a broker for ICI. On November 3, 2020, Warkentin commenced employment with Century 21. Warkentin has been licensed as an associate broker in British Columbia since 2018. Warkentin worked at Royal Lapage in Campbell River, British Columbia, in the summer of 2019. Warkentin commenced work for Smith Transportation in Nanaimo and Victoria British Columbia in January 2020. Warkentin worked for ANW Trucking in Nanaimo and Victoria British Columbia between November 2020 and November 2021. Warkentin earned income in 2017, 2018 and 2019 (I have omitted these amounts, as they were not relevant to my decision).

Trial Testimony

[32] In addition to testimony from Chaze and Warkentin, the court heard testimony from an independent witness, Ron Davis. Mr. Davis engaged Warkentin's services in late August 2017 to sell a rural residential property.

Issues in Dispute

[33] There is no issue that Warkentin was an employee of Cabin on January 1, 2017. There is no dispute that Cabin terminated Warkentin's employment with alleged cause on October 10, 2017.

[34] Following conclusion of the evidence in this trial, the parties structured their submissions differently with respect to the fundamental issues to be resolved. The plaintiffs listed eight issues, the defendant ten. There was overlap in the essential elements of most of the issues as described by the parties. In my view, the evidence before the Court is most logically dealt with on an issue-by-issue basis, although not necessarily in the same order and/or manner as set out by the parties.

[35] I see the broad issues to be determined as follows:

1. Did Cabin have just cause to dismiss Warkentin on October 10, 2017;
2. Did Warkentin's conduct as an employee of Cabin's, at any time from January 1, 2017 to October 9, 2017, constitute willful misconduct and willful neglect of duty within the meaning O. Reg. 288/01 under the Employment Standards Act, 2000, S.O. 2000, c.41 ("ESA");
3. If Cabin did not have just cause to dismiss Warkentin, what is the period of reasonable notice of termination to which Warkentin was entitled and what damages, if any, should he receive;

4. Were the restrictive covenants in the share purchase agreement enforceable, and if so, did Warkentin breach these covenants causing economic loss to the plaintiffs; and

5. Are the plaintiffs entitled to an award of punitive damages as the result of the defendant's post termination conduct.

[36] There are several different sub issues to be determined in the context of resolving Issue 3; these will be addressed in the independent analysis of Issue 3.

Credibility and Reliability of the *Viva Voce* Trial Testimony

[37] This was a three-witness trial with substantial agreed facts. At trial, any issues of witness credibility go to the trier of fact to decide "using their experience of human affairs and basing judgment upon their assessment of the witness and on consideration of how an individual's evidence fits into the general picture revealed on a consideration of the whole of the case.": *R. v. Béland*, [1987] 2 S.C.R. 398, at para. 20.

[38] An assessment of a witnesses' credibility involves considering two distinct aspects of their testimony: credibility and reliability.

[39] The Court of Appeal for Ontario succinctly reviews this distinction in *R. v. H.C.*, 2009 ONCA 56, 241 C.C.C. (3d) 45, at para. 41:

> Credibility and reliability are different. Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately
>
> i. observe;
>
> ii. recall; and

iii. recount

> events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence. [Citations omitted.]

[40] In this matter, neither party attacked the credibility of evidence given by the opposition. While Mr. Davis was called by Cabin, I found his testimony was honest and forthcoming. He had some difficulty remembering certain details, but this was not surprising to me given the impugned events occurred seven years ago. I found his testimony to be both credible and reliable.

[41] In my view, the evidence regarding details of events at issue at trial was straightforward and not contested by either party. I find both Chaze and Warkentin to be credible witnesses. I had some initial concerns with respect to the reliability of both witnesses, given that their testimony, at times, sought to justify their actions. This was particularly a concern for Warkentin's testimony. His counsel candidly admitted in submissions that he had made several admissions in his testimony against his own interests. From their testimony, both men appeared familiar with basic legal principles concerning contracts and employment law. As real estate agents, I was not surprised that both had more than a passing familiarity with the importance of written agreements in matters involving real property and commercial transactions. However, I found their testimony as to what they thought the other side was doing at any given time - from an employment law standpoint - was less reliable.

[42] Counsel did make objections to certain evidence during the proceedings which arguably strayed into opinion. I indicated my awareness of this issue, and of the tendency by certain individuals in high-emotion situations to occasionally stray into that kind of testimony, during the trial. However, given the limited time available to conduct the trial, I simply instructed counsel to move on. All counsel in this matter were experienced employment law practitioners who conducted the trial in a way that most efficiently and effectively sought to uncover the truth.

[43] Overall, I find that the testimonies of both Chaze and Warkentin with respect to the central aspects of this relationship, from its being formed to its breaking down, were straightforward and direct. However, what I am to make of this evidence is another matter, one which was the primary focus of both parties' submissions.

Issue 1. Just Cause for Dismissal

The Law

[44] The Court of Appeal's decision in *Hucsko v A.O. Smith Enterprises Ltd.,* 2021 ONCA 728, reaffirmed a three-part analysis from *Dowling v. Ontario (Workplace Safety and Insurance Board)* (2004), 246 D.L.R. (4th) 65, used to identify whether acts complained of represent an irreparable breakdown in the employment relationship. At para. 34 of *Hucsko*, Feldman J.A. succinctly states the following:

> 34 In Dowling, the court went on to explain the requirements of each step. At the first step, the nature and extent of the misconduct must be determined, and the employer is entitled to rely on wrongdoing by the employee that is discovered both before and after the termination. The second step considers the employee within the employment relationship, including the employee's age, employment history, seniority, role and responsibilities, and for the employer, the type of business, any

> relevant policies or practices, and the employee's position in the organization, including the degree of trust reposed in the employee. The third step assesses "whether the misconduct is reconcilable with sustaining the employment relationship", and "whether the misconduct is sufficiently serious that it would give rise to a breakdown in the employment relationship". [Citation omitted].

The Evidence regarding Just Cause

[45] The termination letter of October 10, 2017 particularized Cabin's allegations of cause against Warkentin. There were seven different reasons alleged. They were set out above in the agreed facts.

[46] I will now discuss my findings with respect to the evidence at trial and the allegations proven. I will then discuss these findings in the context of the *Dowling*/*Hucsko* framework. I will begin by discussing, what I view to be, three of the most serious allegations.

Threatening your Broker of Record with violence.

[47] A verbal altercation occurred between Chaze and Warkentin at the Cabin office on April 13, 2017. The incident descended into physical threats by Warkentin against Chaze and was witnessed by two staff members, along with Chaze's wife.

[48] The termination letter asserted a general complaint against Warkentin for engaging in insolent behaviour and unprofessional conduct on April 13, 2017. Warkentin and Chaze both testified as to what happened that day, and both indicated shame regarding their behaviour.

[49] Warkentin explained the incident as precipitated by Chaze's actions with respect to Warkentin's listing for a person named Stuart.

[50] The property in question was vacant land. Warkentin had previously sold the land to Stuart, who then wanted to sell it in 2017. Warkentin drafted the description of the property in the listing and listed it with Cabin. The listing is important because it represents the nature of the property and is used by potential buyers and other brokers to generate interest. Warkentin described the property as "waterfront". Chaze took exception to this description. The basis for Chaze's position was an Ontario Ministry of the Environment ("MOE") prohibition against the property, which forbid construction of any structures within 200 feet of the lake's high-water mark. However, notwithstanding this prohibition, Stuart had obtained a ten-year land use permit from the MOE, allowing him to place a dock on the lake abutting his parcel of land.

[51] On or about April 13, 2017, Chaze texted Warkentin that he was going to "pull the listing". Warkentin was quite upset. After receiving the text, Warkentin drove to Cabin's office, which took him a bit of time. He admitted in his testimony that he was 'stewing" during the drive. When he arrived, he went into the office building and proceeded to his internal office space. After some time, he came out into the main lobby area of the office where Chaze was with his wife, their young child, and two office staff.

[52] Warkentin said "[f]uck you Graham" and the altercation started.

[53] The evidence of what happened next varies slightly between Warkentin and Chaze's accounts. However, their evidence regarding the essence of the interaction was largely consistent. Based on the testimonies of both witnesses, I find as fact the following:

i. Warkentin "started it" with the comment in front of Chaze's wife, young child, and the two office staff;

ii. This was a very regrettable thing for Warkentin to say to his employer;

iii. Warkentin then went into his office and Chaze followed;

iv. Warkentin resisted Chaze's attempts to close the door and then moved to the doorway, wanting the other office staff to hear what was going on;

v. Warkentin then threatened Chaze, saying words to the effect of, "if you ever talk to me like that again I am going to hit you";

vi. Chaze was made afraid by Warkentin's threats. He was shaken. He installed security cameras at the office and at his home as a result;

vii. Chaze and Warkentin met on April 14, 2017. Warkentin was directed by Chaze to apologize. Warkentin did not apologize for what happened, but instead told Chaze that he "had no balls"; and

viii. Warkentin knew that his behaviour was wrong, entirely inappropriate for morale, and a hindrance to fostering a respectful workplace environment.

The Ron Davis Incident

[54] I will now discuss the allegation "misleading a former client into accepting an offer and signing a listing agreement with another firm".

[55] Warkentin and Davis both testified at trial as to Cabin's allegation that Warkentin breached his non-competition covenant during the course of his employment. This was the Ron Davis incident. Warkentin admitted to actively working to facilitate the sale of Davis's property in late August 2017, despite knowing the listing was held by another brokerage at the time of

sale. Warkentin admitted that his efforts did not result in compensation of any kind, either for himself or for his employer, as the competing brokerage collected full commission on the transaction. Chaze testified that Warkentin's actions caused economic detriment to Cabin.

[56] As noted earlier, I have found the evidence of Ron Davis to be credible and reliable. He testified in a forthright manner. I find that, at all material times, Mr. Davis believed himself to be represented by Warkentin acting as Cabin's agent. Email correspondence between Warkentin and Davis, Exhibit 15 at trial, indicates that Warkentin was communicating as if the deal was being done through Cabin. A sale was imminent in late August 2017. Cabin had had the listing for over a year.

[57] I accept Mr. Davis' evidence that, at the time, he had no concerns with his representation by Cabin. Warkentin then arranged to have Mr. Davis sign a listing agreement with Wally Domareski of Vogue Realty. I accept Mr. Davis' testimony that he was confused as to why he was being asked to do this. Mr. Davis sent an email to Warkentin on August 25, 2017, at 5:54 p.m., asking "[w]hy am I listing with Wally and not you?" Mr. Davis testified that he had never heard of Vogue Realty, nor had he ever spoken or corresponded with Mr. Domareski. He testified to being assured by Warkentin that Vogue Realty and Cabin were related companies.

[58] In the face of Mr. Davis' testimony, and the email of August 25, 2017, I do not accept Warkentin's evidence that Davis and Domareski had met, nor that Mr. Davis was upset with Cabin; neither do I accept that Mr. Davis understood he was signing a listing agreement with a brokerage other than Cabin. I do accept Cabin's submission that the absence of any evidence at trial showing correspondence between Davis and Domareski supports the proposition that the

two men never met. I find, on the balance of evidence, that Mr. Davis was being misled by Warkentin, at least with respect to the issue of which broker was actually representing him.

[59] I do not accept Warkentin's evidence that he was only trying to facilitate sale of the property. Warkentin had no such authority absent consent from Cabin. He did not have Cabin's permission to facilitate Mr. Davis signing a listing agreement with another brokerage. Email evidence shows that Warkentin was actively counselling Mr. Davis on his negotiating position with buyers represented by Mr. Domareski. Providing this type of counsel is appropriate behaviour for an agent unless that agent has arranged for another broker to obtain all the commission from a sale. I do not accept Warkentin's testimony that he was only seeking to help the client and preserve the reputation of Cabin.

The Allegation of Writing Unprofessional and Insulting Notes

[60] Cabin used an in-house computer system called Top Producer at the time; the program allowed all staff to review and update the company's active listings.

[61] In his testimony, Warkentin admitted to writing unprofessional and insulting notes in the Top Producer program, including the following:

i. April 18, 2017, "I get more respect or honor from agents in other buildings than my own";

ii. April 18, 2017, "GC had a showing, an offer and accepted offer and not a single note. Then we've had face to face meetings and still nothing. sniveling idiot" ;

iii. August 12, 2017, "so I guess my b of r is just a greedy asshole"; and

iv. August 18, 2017, "accepted offer on Katz. We got the deposit of a hundie on Tuesday, postdated to today. With days off we didn't get the deposit in Trust. For

> fear of being accused of being "not professional" I wont say what I am thinking. A hundred thousand dollar cheque siting in a drawer for the weekend is acceptable??? Holy Shit!

[62] These notes speak for themselves. I find that they were unacceptable, unprofessional, and inappropriate messages for a workplace data base to which all employees had access.

The Allegations of Inappropriate Behaviour as a Real Estate Agent

[63] There were four other allegations relating, in my view, to conduct falling below expectations for any Cabin agent. I accept that Cabin was concerned with Warkentin acting "as if he owned the place" rather than as the employee he had chosen to be when he sold to Clark and Chaze. I agree, based on the evidence indicated, that Warkentin did not expect to be treated as a mere agent. Cabin used a duty schedule for all of its agents to ensure that potential client inquiries could be quickly addressed by whoever was "on duty". Warkentin testified that he did not want to be scheduled for duty, despite his attempts to contact prospective clients who otherwise would have been serviced by the duty agent. I accept Chaze's evidence regarding clients W. and M. Barnes. I agree with Cabin's submission that Warkentin was attempting to "poach" these clients, who otherwise would have been serviced by Chaze as the duty agent.

[64] The other allegations, such as poorly completed business forms and telling clients to pay for appraisals in advance, were demonstrated both by Chaze's evidence and by Warkentin's dismissiveness regarding the severity of his actions. Based on this evidence, I find that Warkentin was not serious about his role at Cabin, nor about any role other than one which would allow him to act however he pleased, without having to take direction from Chaze or Clark.

Disposition of the Issue of Just Cause for Dismissal

[65] I find, based on the evidence given at trial, that Cabin had just cause to terminate Warkentin in November 2017. I say this for the following reasons.

[66] In my view, Warkentin admitted during his testimony to the commission of two of the particularized acts which Cabin asserts gave them just cause for termination. These acts were the following:

i. Writing unprofessional and insulting notes in the Top Producer System; and

ii. Threatening the broker of record with violence.

[67] I also find that Warkentin willfully and intentionally engaged in conduct amounting to a conflict of interest with respect to the Ron Davis sale. The incident caused Cabin economic harm; Warkentin could have foreseen this risk, but nevertheless continued to act in a way that caused the loss. I agree with the Cabin's submission that the evidence at trial indicates Warkentin actively deceived Mr. Davis as to the nature of his representation. Furthermore, Warkentin intentionally deprived his employer, Cabin, of the commission it should have earned from Warkentin's efforts to assist Mr. Davis with negotiating the sale of his property.

[68] I will now utilize the *Dowling*/*Hucsko* framework to analyze the trial evidence with respect to the allegations of just cause for dismissal.

Step 1: The nature and extent of the misconduct

[69] Cabin relies on the allegations contained in the termination letter. I find that the behaviour Warkentin has admitted to - the notes and threats, both physical and verbal - constitutes unprofessional and insulting conduct from a person employed as a real estate agent. I further accept Chaze's evidence that he felt personally threatened with violence by Warkentin.

[70] I find that, in the April 17, 2017, incident, both men hurled insults at each other. However, I find on the evidence that it was Warkentin who ultimately threatened Chaze with violence, effectively saying he would punch Chaze in the face if he ever spoke to him like that again. Warkentin also started the altercation, with the opening "[f]uck you". These are particularly insulting words to utter to anyone in the workplace, let alone your employer. Furthermore, I find that they were not uttered spontaneously. Warkentin had ample time to think about what he was going to do after learning of Chaze's determination to "pull the listing". He testified to "stewing" on the drive back to the office. In my view, for a mature and experienced businessperson like Warkentin, this should have been an opportunity to calm down and consider a more appropriate strategy, as opposed to confronting his employer in the public area of the workspace.

[71] Regardless of what Warkentin thought about Chaze's actions concerning the listing, in my view this did not create an occasion where Warkentin could say he was "provoked". He had sufficient time to think about what happened, calm down, and then approach Chaze in a business-like manner. He chose not to do that. In my view, Warkentin's actions on April 13, 2017, constituted an occasion of willful misconduct on his part.

[72] The misconduct was significant, and entirely unacceptable for a modern workspace.

[73] The writing of the notes using a platform available to all employees also constitutes occasions of significant misconduct.

[74] Warkentin's actions with respect to the Davis deal were also acts of willful misconduct. He breached his duty of loyalty to Cabin and knowingly caused the company economic loss.

Step 2: The employee within the employment relationship

[75] Context is everything in employment circumstances. Step two of the *Dowling/Hucsko* analysis requires a close look at the circumstances of the individual employee at issue. I agree with the submissions of both counsel that Warkentin was a "different" kind of employee. He was different because he had owned the business previously and had been a mentor to the two new owners. Warkentin also had considerable experience in what is essentially a customer relations business. Success in any for-profit economic enterprise depends on customer relations. In my view, the real estate brokerage business is a pure service business. In the main, it does not provide a tangible good to a customer; instead, it provides knowledge, experience, and advice to customers who sell, or want to acquire, real property. In facilitating the conclusion of a client's desired transaction, the brokerage earns the right to derive economic return in the form of a commission.

[76] Warkentin and Chaze both testified to the significance of long-term relationships in the real estate brokerage business, especially one focusing almost exclusively on residential cottage properties. However, for Warkentin, being a "different" type of employee does not, in my mind, mean that a different standard would apply to his actions in the workplace. His conduct was

inappropriate and willful. He should not have let his emotions get the better of him in the workplace.

[77] In my view, regardless of Warkentin's personal situation and the nature of Cabin's business, there should be zero tolerance for abusive language or threats of violence directed at anyone in the workplace. Warkentin should not have done what he did. In my view, he knew better, and did it anyway.

[78] The same goes for the notes and his handling of the Ron Davis deal. These were overt acts in no way consistent with any reasonable expectations of how Warkentin should behave as a Cabin employee.

Step 3: Is the misconduct reconcilable with sustaining the employment relationship and whether the misconduct is sufficiently serious that it would give rise to a breakdown in the employment relationship

[79] Chaze testified he was afraid of Warkentin in the moments after Warkentin said "[f]uck you Graham". Counsel for Warkentin began cross examination of Chaze with questions about his physical size relative to Warkentin. I limited that line of cross examination; in my view, it sounded like the beginning of a line of questioning that would lead to some kind of victim blaming. I could understand on the evidence why Chaze said he was afraid of Warkentin in that moment. I was not prepared to entertain submissions about why I should doubt or question the evidence based on the respective sizes of persons involved. To me, this was an irrelevant line of questioning. It suggested a subtle, "why didn't he man up," theory put forth by Warkentin to minimize the results of his behaviour. I could see both men in the courtroom. It appeared to me

that Chaze was slightly bigger physically. However, this would in no circumstances lead me to discount his evidence that he was, on that occasion, afraid of Warkentin.

[80] "Fuck you" has a well-known meaning. It is aggressive. An employee saying it to an employer - or an employer saying it to an employee - is inappropriate conduct, particularly for those who like to apply the moniker "professional" to their occupation. As such, it was inappropriate for the workplace in question. It was also closely followed by a threat from Warkentin to hit Chaze if he ever spoke to him like that again. In my view, that threat colours what Warkentin meant when he opened the conversation with "[f]uck you". It was a serious act of misconduct.

[81] In past employment law jurisprudence, there has been an unstated tolerance for objectively unacceptable behaviour from a certain level of employees towards their employers, behaviour which would be unreservedly condemned if the shoe were on the other foot. In the past, this tolerance has been based on the accepted theory of power imbalance in the workplace: see *Dennis v. Ontario Lottery and Gaming Corp*, 2014 ONSC 3882, O.J. No. 3355, at para. 41. However, the workplace has evolved in the past ten years. The gig economy, a tight Canadian labour market, and long-term low unemployment rates have leveled the playing field to a degree. That said, in a non-union environment where the employer has ultimate, unilateral authority to terminate an employment relationship, there is no question that a continuing difference in bargaining power exists. Nevertheless, in my view, this difference does not excuse Warkentin's behaviour towards Chaze on April 13, 2017.

[82] At para. 44 of *Hucsko*, Feldman J.A. noted the following:

> 44 And as far back as 1998, Carthy J.A. concluded this court's decision in Bannister v. General Motors of Canada Ltd. (1998), 40 O.R. (3d) 577 (C.A.), with the observation that, even in an industrial plant where "no one expects profanity or vulgarity to be eliminated ... unwelcome conduct or expression based upon gender cannot be tolerated [citations omitted].

[83] The case of *Bannister v. GM* was decided over a quarter century ago. Things have changed. The way people drop F-bombs in office environments today would never have happened in the 90's. However, the phrase's modern acceptance in popular culture does not translate into its acceptance when directed in anger in the context of a small, intimate workspace. Based on who Warkentin and Chaze were in the employment context, and the circumstances of the incident, I find that it was a serious act of misconduct for Warkentin to speak those words to Chaze.

[84] Recently, in *Render v. ThyssenKrupp Elevator (Canada) Ltd.*, 2022 ONCA 310, the Ontario Court of Appeal addressed a case of unwelcome touching in the workplace where a supervisor slapped a female co-worker on the buttocks. He was fired. At para. 70, Feldman J.A. stated the following:

> [70] I would also add that this was a most unfortunate situation that arose out of an overly familiar and, as a result, inappropriate workplace atmosphere that was allowed to get out of hand. As this court said in Bannister almost 25 years ago, it is a workplace atmosphere that can no longer be tolerated. Although some may perceive it to be benign and all in good fun, those on the receiving end of personal "jokes" do not view it that way. And when things go too far, as they did in this case, the legal consequences can be severe. Every workplace should be based on mutual respect among co-workers. An atmosphere of mutual respect will naturally generate the boundaries of behaviour that should not be crossed.

[85] Like the Court in *Render* eschewed tolerance for unwelcome conduct based on gender, I too find that aggressive profanity cannot be tolerated in the workplace: not in 2017, and not now. Warkentin's words, and the context in which they were used, represented a circumstance of

misconduct that was irreconcilable with his continued employment by Cabin. In my view, the company has just cause to dismiss him at that moment.

[86] Furthermore, the threat of violence made by Warkentin during the incident also represented a circumstance of misconduct irreconcilable with his continued employment by Cabin.

[87] Counsel for Warkentin argued that Cabin's decision to wait until October to terminate represented an act of condonation. Counsel relied on the decision of the High Court in *Tracey v. Swansea Construction*, [1965] 1 O.R. 203, at para. 80, where Thompson J. states the following:

> While a master, upon becoming aware of a servant's misconduct sufficient to justify immediate dismissal, is entitled to a reasonable time to decide whether or not he will dismiss, yet, if he retains the servant for any considerable time after discovering his fault, he condones such conduct and is not entitled subsequently to dismiss him on account of that which he has condoned: Smith's Law of Master & Servant, 8th ed., p. 80.

[88] This authority was most recently cited with approval in *Sandid Enterprises Ltd. v. Komtech Inc.*, 2010 ONSC 4779, 85 B.L.R. (4th) 249, at para. 129.

[89] In the context of this professional relationship, I find that the six months between the mid-April incident and the October firing was not a "considerable time". In my view, this was a reasonable period for Cabin to assess what had happened, particularly because it represented such a fundamental blow to the parties' newly undertaken relationship.

[90] Chaze said the incident left him shaken. I accept his evidence on that point. He did not expect Warkentin's behaviour. I can understand this, given he had just taken over a business where he had previously worked with Warkentin for over seven years. The fact that it took Cabin

six months to respond strikes me as appropriate in all the circumstances. Chaze and Clark had paid a lot of money for the business, and Warkentin continuing to be a part of it was a key component of their economic success. This is part of the reason that Chaze and Clark took the chance they did in buying the business and keeping Warkentin around. Yet here was Warkentin, acting in a way they had never encountered before. It was the beginning of the first sales season under new ownership, and Warkentin was not acting according to plan. I can understand how the incident would have left the owners stunned and grasping at what to do. Furthermore, this was not the only instance of behaviour indicating that Warkentin would not be accepting his new role, nor his newfound lack of control in the business.

[91] In this context, and considering the inappropriate comments on the Top Producer platform, I am of the view that Cabin's decision to wait until Warkentin had finished the season and was preparing to move back to Victoria for the winter - as he always had - before formally terminating the employment relationship for just cause represented a reasonable period of time.

[92] I agree with the Cabin's submission that the incident between Warkentin and Chaze in April 2017 constituted an occasion where Warkentin committed acts of insolent behaviour and unprofessional conduct. Warkentin admitted in cross examination that he was sorry for this event and that it should not have happened.

[93] I also find the making of the admittedly unprofessional notes and the breach of duty exhibited during the Ron Davis deal was misconduct that was not reconcilable with sustaining the employment relationship. In my view it was sufficiently serious misconduct that would give rise to a breakdown in the employment relationship.

[94] Therefore, with respect to Issue 1, I find Cabin did have just cause to dismiss Warkentin on October 10, 2017

Issue 2. Did Warkentin's conduct as an employee of Cabin's at any time from January 1, 2017 to October 9, 2017 constitute willful misconduct and willful neglect of duty within the meaning O. Reg 288/01 of the Employment Standards Act, 2000, S.O. 2000, c.41 ("ESA")

[95] As noted above, I find that the Warkentin's acts of verbal and threatened physical violence toward Chaze on April 13, 2017, were acts of willful misconduct. I also find that they were acts of willful misconduct within the meaning of the ESA.

[96] Additionally, in my view, Warkentin's conduct with respect to the Davis sale constituted an act of wilful misconduct and wilful neglect of duty within the meaning of O. Reg. 288/01 under the ESA. I say this for the following reasons.

[97] The evidence of Davis was objective, unbiased, credible, and reliable. He had no interest in this litigation. He has sold his property and a commission was paid. He testified to believing that the broker who completed the deal was somehow affiliated with Cabin. I find that it was Warkentin's action that led him to this conclusion.

[98] Retail customers of real estate brokerages cannot be expected to understand the nuances of agency law. Furthermore, they are not the guardians of profits to be earned by those they have retained. That duty flows from the agent to the principal and not the other way around.

[99] In this case, it seems to me from the evidence that Warkentin was acting out of pure spite regarding the Davis transaction. He was unhappy with how things were going at Cabin. He did not seem to have accepted that he was no longer the boss. There was no legitimate business

reason, given his duties to Cabin, for him to assist Davis with completing the transaction. It was not up to Warkentin to gratuitously offer his services to the competing broker, Vogue Realty, nor to allow them to complete the deal and collect all the commission. It appears from Warkentin's trial evidence that he had to prepare the computerized DocuSign documents for Mr. Davis; Mr. Domareski did not have the basic computer skills necessary to prepare the documents and complete the transaction. Warkentin was the only person able to facilitate the deal because the client, Mr. Davis, thought he was acting as an employee of Cabin.

[100] Therefore, with respect to Issue 2, I find that Warkentin's conduct as a Cabin employee on April 13, 2017, as well as his conduct in late August 2017 with respect to the Ron Davis deal, constitute willful misconduct and willful neglect of duty within the meaning of O. Reg 288/01 under the ESA.

Issue 3. If Cabin did not have just cause to dismiss Warkentin, what is the period of reasonable notice of termination to which Warkentin was entitled and what damages, if any, is Warkentin entitled

[101] Based on the above, it is my view that Warkentin was dismissed for just cause, including willful misconduct, and therefore was not entitled to any payments, either at common law or under the ESA. I order his counterclaim for wrongful dismissal and damages under the ESA to be dismissed.

[102] If I am wrong with respect to my conclusion on Issue 2, I would then find that Warkentin was entitled to three months' notice of his termination or pay in lieu thereof. If pay in lieu of three months was made, it would have included Warkentin's entitlement to one week of wages as termination pay under the ESA.

[103] There is no issue Warkentin was an employee of Cabin as of October 2017. The parties raised a sub-issue necessary for the resolution of the main issue, namely whether Warkentin - at the time of termination - was the subject of a fixed term of employment, or whether he was hired for an indefinite period. I find, based on the evidence of Chaze, that Warkentin's employment was not subject to a fixed term contract. I say this because of his testimony that he expected Cabin would have preferred to keep Warkentin employed "until the cows came home".

[104] The SPA provided for Warkentin to receive a written contract. Section 5.4 of the agreement indicated that Cabin would offer Warkentin employment on a year-to-year basis. Warkentin had the opportunity to negotiate this clause. He had counsel with respect to the document's preparation. No such agreement was ever made. Both Chaze and Warkentin testified to the effect that they never really got around to it before October 2017.

[105] I find from the evidence that a formal, year-to-year employment contract was never made, as the importance of that issue was subsumed and overborne by the conflict that arose relatively quickly in April 2017. Cabin had more important things to worry about once Warkentin's completely inappropriate behaviour manifested itself on April 13, 2017. The other instances of misconduct by Warkentin were inconsistent with his duties as an employee.

[106] A second sub-issue necessary to resolve the question of reasonable notice would be how long Warkentin was employed by Cabin. I find on the evidence that Warkentin was a ten-month employee as of his termination in October 2017. I do not accept the argument that he should have been treated as a 27.5-year employee for the purpose of determining reasonable notice. I say this for the following reasons.

[107] Warkentin's name being listed on Schedule "F" of the SPA is not sufficient evidence to satisfy any test regarding his employee status at that time. His start date was handwritten in the document. I accept the evidence of Chaze that he had not seen a version of the share purchase agreement with the handwritten start date until the trial. I prefer Chaze's evidence and conclude that Warkentin added the date sometime after the transaction had closed. This notation was not a term accepted by Cabin.

[108] I accept Cabin's submission that Warkentin was not an employee of the company (also called Cabin Country Realty Ltd.) when it was sold to Chaze and Clark effective January 1, 2017. I do not accept Warkentin's submission that he was an employee who was required to resign and then be reemployed once the company was sold. For the purposes of this action, I find that Warkentin was a Day One hire for Cabin starting January 1, 2017.

[109] The evidence clearly demonstrates that Warkentin was the operating mind of the business from 1990 up until December 31, 2016. He was the boss. He negotiated the SPA. He was the controlling mind and director of the company. A person can be a director and an employee of a corporation, but that distinction must be shown through objective facts, such as

the presence of an employment contract or the input and acquiescence of other directors and shareholders. No such evidence was put forward during this trial.

[110] I agree with Cabin's submission that the following evidence from the agreed facts, and from trial, indicates that Warkentin was not an employee of Cabin as of December 31, 2017:

i. He was the sole officer and director;

ii. He did not give himself an employment agreement;

iii. He did not give himself performance reviews;

iv. He did not give himself a bonus plan;

v. He did not give himself an incentive plan;

vi. He did not give himself a salary or defined commission rate;

vii. He did not have a defined amount of vacation time;

viii. He did not pay himself vacation pay;

ix. He unilaterally provided himself income from Cabin's cumulative earnings without applying a metric and at his sole discretion;

x. He paid his wife from the profits of the company and issued her T4s despite her never working for Cabin;

xi. He unilaterally determined the commission rates of his employees;

xii. He had the discretion to determine whether employees at Cabin would be given a benefits plan;

xiii. He had sole discretion who to hire;

xiv. He had sole discretion who to fire; and

xv. He had sole discretion to establish a family trust and transfer ownership shares to Cabin accordingly.

[111] I find that Warkentin's inability to produce T-4's predating 2009, despite staring his business in 1990, indicates that his "employment status" was a tax planning device rather than an actual reflection of his employment status at common law. Persons are free to make any representations they wish to the Canada Revenue Agency regarding their employment status. However, for the purposes of determining length of service, which is an integral part of the so-called *Bardal* test (*Bardal v. Globe and Mail Ltd*., (1960), 24 D.L.R (2d) 140) I find that Warkentin did not become an employee of Cabin until January 1, 2017.

[112] Section 5.4 of the SPA contemplated Cabin offering Warkentin an employment contract on a year-to-year basis. This provision is inconsistent with Warkentin's submission that, at the time of termination, he was to be treated as a 27.5-year employee for the purposes of determining length of service.

[113] If Warkentin was a Cabin employee as of December 31, 2017, I would have expected the SPA to acknowledge this in a more substantial way, rather than just a listing of his name on a schedule without a start date. Furthermore, I would expect the agreement to provide recognition of Warkentin's alleged years of service, other than through the promise of a year-to-year employment contract. The offering of a year-to-year contract to a long-service employee without their consent would have represented an act of constructive dismissal.

[114] On December 31, 2016, Warkentin also executed a Release discharging Cabin - in his capacity as, among other things, an "employee" - of and from any and all claims he might have against the company. In my view, this release would bar any claims for reasonable notice for any service to the company prior to January 1, 2017.

[115] Otherwise, given Warkentin's age of 62 years, the character of his employment as a real estate agent, and the availability of similar employment opportunities, I would find a period of reasonable notice to be three months.

Issue 4. Were the restrictive covenants in the share purchase agreement enforceable, and if so, did Warkentin breach these covenants causing economic loss to the plaintiffs

[116] In December 2023, the plaintiffs' amended their statement of claim to reduce the requested damages for inducing breach of contract and intentional interference with economic and contractual relations from $500,000.00 to $500.00.

[117] Both parties spent considerable time in their closing submissions dealing with this issue.

[118] Myers J., writing for the Divisional Court in *Pollard Windows Inc. v. 1736106 Ontario Inc.*, 2019 ONSC 5361, 5 C.L.R. (5th) 152 (a panel on which I was a member), opened the decision with the following remark: "All this over $10,000.00."

[119] I echo the spirit of Myers J.'s statement in this case. To borrow again from an old metaphor, this particular aspect of the game is not worth the candle.

[120] I have agreed with Cabin's submission that Warkentin was fired for just cause. In these circumstances, I find it unreasonable to believe that Warkentin would have treated any of his previous obligations as being binding. However, I agree with Warkentin's submission at trial that the geographic area of non-competition, described in the SPA as "Northwestern Ontario," is too broad and ambiguous given the nature of the real estate business. I further agree that this general geographic description is unnecessary to protect Cabin's legitimate interests, given that Cabin's

business was confined primarily to real estate transactions of recreational property on Lake of the Woods. Lake of the Woods is a large region by itself; however, it is a lot smaller than Northwestern Ontario.

[121] Warkentin ultimately "parked" his real estate license with a Re/Max brokerage in Thunder Bay. No doubt Thunder Bay is in Northwest Ontario. However, it is a vastly different real estate market from that of Lake of the Woods and Kenora. Despite the agreed fact that Cabin's business focused on cottage buyers and sellers in Northwestern Ontario, I find that the evidence at trial concerning the scope of the business demonstrated the use of the term "Northwestern Ontario" to be overly broad.

[122] I also find that the restrictive covenant was overly broad, and therefore unenforceable against Warkentin post termination.

[123] Therefore, the answer to Issue 4 is No.

Issue 5. Are the plaintiffs entitled to an award of punitive damages as the result of the defendant's post termination conduct.

[124] The breach of a restrictive covenant in an employment context may justify an award of punitive damages.

[125] I accept the submissions of Cabin that Warkentin actively disparaged the company in the period shortly after his termination. However, I have found the restrictive covenant to be unenforceable. Warkentin could not have breached an unenforceable provision following his termination.

[126] Therefore, the answer to Issue 5 is No.

Conclusion

[127] For the following reasons, order to go dismissing the plaintiffs' claim and the defendant's counterclaim for damages for wrongful dismissal.

Costs

[128] Prior to trial I had counsel provide me with sealed costs submissions. I have yet to open those sealed packages. Both parties' claims were dismissed. Usually this would lead to a no costs order. However, I leave it to counsel to arrange a case conference with me sometime in October if they want to pursue the issue any further. I will not open the packages until I hear from both counsel that they consent to me doing so. If there are offers to settle that would have an impact on a costs decision, these can be addressed at the case conference.

"original signed by"
The Hon. Mr. Justice F.B. Fitzpatrick

Released: September 4, 2024

CITATION: 2551965 Ontario Ltd. v. Warkentin, 2024 ONSC 4876
COURT FILE NO.: CV-18-16
DATE: 2024-09-04

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

2551965 Ontario Ltd. and Cabin Country Realty Ltd.

Plaintiffs

- and -

Harold Warkentin

Defendant

REASONS FOR JUDGMENT

Fitzpatrick J.

Released: September 4, 2024