

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

<b>BETWEEN:</b>	)	
	)	
Tyler Waddilove	)	
	)	A. Circelli, for the Plaintiff
Plaintiff	)	
	)	
<b>– and –</b>	)	
	)	
1748960 Ontario Limited	)	M. Polvere, for the Defendant
	)	
Defendant	)	
	)	
	)	
	)	<b>HEARD:</b> September 13, 15, 18-19, 2017

2018 ONSC 448 (CanLII)

**MITCHELL J.**

**A. OVERVIEW**

[1] The plaintiff, Tyler Waddilove, is the former general manager of the defendant bingo hall, 1748960 Ontario Limited carrying on business as “Muncey-Delaware Nation Paradise Bingo” located on the Muncey-Delaware native reserve. On September 1, 2015 Mr. Waddilove’s employment with the bingo hall was terminated and he was provided with statutory notice in accordance with the *Employment Standards Act*. In the result, Mr. Waddilove was paid his salary<sup>1</sup> until November 1, 2015.

[2] Mr. Waddilove seeks payment pursuant to a written employment contract dated January 1, 2013 having a term of seven years which provides for payment of his wages for the balance of the term in the event his employment is terminated for any reason without cause due to a change of the board of directors and/or a “restructuring”. The contract was signed by Leander Snake (“Lee), Carmen Dolson (“Carmen”) and Jody Waddilove (“Jody”) on behalf of the defendant. The amount claimed by the plaintiff is \$225,000 representing his wages for the period November 1, 2015 until January 12, 2020.

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<sup>1</sup> \$1000 per week gross.

- [3] The defendant claims it was unaware of the existence of the contract until the plaintiff produced a copy of the contract following his termination.<sup>2</sup> The defendant defends the claim on the basis the contract is unenforceable as being unconscionable and void as a result of the existence of a conflict of interest between the parties at the time the contract was entered into. The defendant argues the individuals signing on behalf of the defendant were acting in breach of their fiduciary duties owed to the defendant and therefore were without authority to sign the contract on its behalf. In addition, the defendant argues no fresh consideration was provided by the plaintiff for the additional benefits conferred to him under the contract. In the alternative, should the court find the contract to be enforceable in accordance with its terms, the defendant takes the position the plaintiff was terminated for cause and is, therefore, not entitled to damages.
- [4] The trial spanned four days. A 34-tab joint document brief was filed on consent on the parties. Other loose documents were filed and made additional exhibits again with the consent of both parties. Only the plaintiff testified in support of his claim. Jody had died prior to the trial. Neither Lee nor Carmen were called as witnesses to corroborate the plaintiff's evidence at trial.
- [5] The defendant's case consisted of the exhibits and the testimony of Leroy Dolson ("Leroy"), Velma Thomas ("Velma"), Laura Stansfield ("Laura") and Maxine Albert ("Maxine").

## **B. BACKGROUND**

### *(i) Paradise Bingo*

- [6] Paradise Bingo was incorporated on January 31, 2008. At the date of incorporation, the first directors consisted of Jody, Carmen, Wahbuhnung Snake and Tammy Kechego. Paradise Bingo is a charitable corporation and its shareholders consist of all band members of the Muncey-Delaware Nation.
- [7] On May 17, 2011, the Muncey Delaware Nation Council passed a resolution naming Lee, Jody, Velma, Natasha Peters ("Natasha") and Luke Waddilove ("Luke"), as the new Paradise Bingo board of directors.
- [8] At a meeting conducted on May 19, 2011, the new board was affirmed. Jody was named as president, Lee as treasurer, Velma as Vice President and Natasha as secretary. Luke was named as the "Portfolio". Jody, Lee and Velma were appointed as signing authorities for Paradise Bingo.
- [9] The agenda for the February 21, 2012 board meeting indicates Natasha had resigned from the Board. Minutes of the meeting held May 30, 2012, indicate Carmen had been appointed as her replacement.

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<sup>2</sup> Located in his employee file in the defendant's offices.

- [10] Minutes from the August 25, 2012 meeting indicate Dan Miskokomon had joined the Board. No further reference to Dan was made in the documents or the evidence of the witnesses at trial.
- [11] The Board of Directors met on a monthly basis; however, the majority of the minutes from these monthly meetings was not made available at trial.
- [12] From the plaintiff's evidence, we learn that in March 2013 a new Board of Directors and Chief were elected, all of whom were not related to the plaintiff. The resolution naming the new members of the board and the new chief has not been produced.
- [13] Laura, the bingo hall's bookkeeper and financial planner, was hired in March 2014 and she testified that at that time there was no board and so she reported directly to Chief and Band Council. Leroy testified that the bingo hall was without a board for five months. In September 2014, Nicole Snake ("Nicole"), Leroy and Maxine were appointed to the board.
- [14] The next set of minutes produced at trial relate to a board meeting held on May 14, 2015 – more than two years after the signing of the contract. By that time, the board consisted of Nicole, Maxine, Leroy and Marion Thomas.

*(ii) Third Party Action*

- [15] Based on the allegations contained in the statement of claim, the defendant commenced a third-party action against Jody, Carmen and Lee. No defence was filed by any of the third-party defendants and all were noted in default.
- [16] Having been noted in default, the third-party defendants<sup>3</sup> are deemed to admit the following allegations contained in the third-party claim:
- (a) by signing the plaintiff's 7 year contract, the third parties:
    - (i) failed to act honestly and in good faith;
    - (ii) acted negligently, and
    - (iii) failed to act carefully, diligently and skilfully with a view to the best interests of Paradise Bingo; and
  - (b) the third-party defendants acted in a manner that was contrary to and prejudicial to the interests of Paradise Bingo;
  - (c) the third-party defendants failed to educate themselves to make an informed business decision about the employment contract;

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<sup>3</sup> In the case of Jody Waddilove, his estate.

- (d) the third-party defendants failed to retain a consultant to provide an independent opinion regarding the employment contract;
- (e) the third-party defendants failed to properly protect Paradise Bingo from a potential claim;
- (f) the third-party defendants breached their fiduciary obligations to Paradise Bingo;
- (g) the third-party defendants, either intentionally or by wilful neglect, acted negligently, unreasonably and in breach of their respective duties and obligations to Paradise Bingo;
- (h) the third-party defendants failed to disclose a bias in favour of the plaintiff and/or failed to properly declare a conflict of interest; and
- (i) the third-party defendants acted in their own personal interests and not in the best interests of Paradise Bingo.

*(iii) The Plaintiff's Employment History*

- [17] The plaintiff grew up on the reserve and upon graduation from high school enrolled in an international business program at Niagara College with the intention of working in casinos internationally. After completing the first year of the program, he left college and worked for approximately a year at Casino Rama. When Paradise Bingo opened in 2008 he was hired as its operational manager.
- [18] Prior to his termination effective September 5, 2015, the plaintiff had a significant employment history with the defendant, punctuated by an earlier termination and subsequent re-hire and a seven month period of suspension during which he was not paid.
- [19] When it opened, Mike Duvall was general manager of the bingo hall. Sometime later, another individual was hired into the position of general manager. Approximately seven months later, Mr. Waddilove was terminated for cause. He was captured on video asleep at his desk.
- [20] On March 1, 2009, the plaintiff was re-hired as the operational manager. Sometime later, he was demoted to card seller and received a reduction in pay. In December 2010, Mr. Waddilove was suspended without pay. In response, the plaintiff filed a complaint with the Labour Board.
- [21] In September 2011, Mr. Waddilove was offered the position of general manager of Paradise Bingo. The plaintiff accepted the offer and discontinued his grievance.
- [22] At the time of his re-hire as general manager in September 2011, the plaintiff's father, Jody, was president of board. Lee, a close personal friend of the plaintiff's father, was also a member of the board. Carmen, also a member of the board, worked for Jody at

Ontario Works. Jody, Lee and Carmen had all been appointed to the board a few months earlier. At the time, the plaintiff was retired, the Chief was Pat Waddilove, the plaintiff's cousin.

- [23] Lee and the plaintiff negotiated a wage of \$1,000 per week. The plaintiff was not given nor did he request a fixed term contract of employment.

*(iv) The Contract*

- [24] The plaintiff testified that the idea of employee contracts was first raised at the board meeting held February 1, 2012. He recalls that at this meeting the board presented the idea to the Chief and council. The plaintiff believed that contracts would provide job security to existing employees and would attract better quality employees as well as improve morale.
- [25] The plaintiff was tasked with drafting the form of contract to be used. The plaintiff explained that he awarded himself the longest term contract (seven years) based on his seven-year employment history with the bingo hall. By my math, at the time the contract was signed, Paradise Bingo had only been in existence five years.
- [26] The plaintiff signed the contract on January 1, 2013.
- [27] For purposes of the plaintiff's claim, the following provisions contained in the contract are the most relevant:

**6. Termination**

- (a) the Employee may at any time terminate this agreement and his Employment by giving not less than two weeks written notice to the Employer.
- (b) the Employee agrees to return any property of Paradise Bingo at the time of termination.

**7. Restructuring and Changing of the Board of Directors**

At any time there is a change in Board of Directors or a Restructuring, this contract will be honoured in its entire length. Any dismal (sic) that does not have sufficient grounds will declare all wages of the remaining contract is (sic) paid out in full. This also includes demotion, layoff, lack of work, decrease in pay, change of title and shutdown of business.

- [28] Other employees of the bingo hall also entered into fixed term employment contracts effective January 1, 2013. The one-year contract for bookseller, Natasha Peters, and the two-year contract for the janitor, Todd Cornelius ("Todd") were included in the joint document brief. The plaintiff testified that Crystal Abram, the operational manager was provided with a five-year contract. However, her contract was not produced at trial.

- [29] The contracts for Natasha and Todd provided that in the event of termination without cause, the employee was restricted to payment in accordance with the *Employment Standards Act*, 2000.
- [30] Conspicuously absent from the plaintiff's contract were subparagraphs 6(b) and (c) contained in the contracts for Natasha and Todd under the heading "Termination". These subparagraphs read as follows:
- b. The Employer may terminate this agreement and the employee's employment at any time, without notice or payment in lieu of notice, for sufficient cause.
  - c. The Employer may terminate the employment of the Employee at any time without the requirement to show sufficient cause pursuant to (b) above, provided the Employer pays to the Employee an amount as required by the *Employment Standards Act* 2000 or other such legislation as may be in effect at the time of termination. This payment shall constitute the Employee's entire entitlement arising from said termination.
- [31] A resolution of the board approving and authorizing the contracts was not produced at trial.

## C. ANALYSIS

(i) *Is the employment contract enforceable?*

**(a) Was consideration provided by the plaintiff for the benefits conferred by the contract?**

- [32] It is a general principle of contract law that new or additional consideration is required to support a variation of an existing agreement. This principle has been explicitly recognized in the context of an employment relationship.<sup>4</sup> A change in a term of a notice provision requires consideration. Continued employment is not sufficient consideration.<sup>5</sup>
- [33] Where there is an absence of fresh consideration in a continuing employment relationship, the contract will be held to be unenforceable.<sup>6</sup>
- [34] Job security was of particular importance given the plaintiff's prior termination, demotion and suspension. The plaintiff would have been acutely aware when he was hired into the most senior management position in the company in September 2011 that a change in the complement of the board of directors made the tenure of his employment tenuous at best.

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<sup>4</sup> *Stott v. Merit Investment Corp.* [1988] O.J. No. 134 (C.A.) at paras. 38-42.

<sup>5</sup> *Francis v. Canadian Imperial Bank of Commerce*, [1994] O.J. No. 2657 (C.A.) at paras. 22-24.

<sup>6</sup> See *Baker v. British Columbia Insurance Co.*, [1992] B.C.J. No. 315 at paras. 35-37, aff'd [1993] B.C.J. No. 487 (C.A.).

Despite this awareness, the plaintiff did not demand as a condition of his acceptance a fixed term contract guaranteeing his employment.

- [35] During cross-examination, the plaintiff admitted that at the time the contract was signed in January 2013, his position and duties as general manager did not change, he did not receive a promotion and he did not receive a reduction or increase in salary.
- [36] The plaintiff submits that he gave up the right to reasonable notice upon expiration of the seven-year term and that this constitutes adequate consideration for the additional benefits conferred by the contract. This argument defies logic. The contract provides the plaintiff with reasonable notice of termination – seven years’ notice.
- [37] I find there was no fresh consideration given by the plaintiff to support the seven-year employment guarantee provided by the contract.

**(b) Is the contract void on the basis the parties signing the contract failed to comply with section 132 of the Ontario *Business Corporations Act*?**

- [38] An employee handbook governed all terms of the plaintiff’s employment. This handbook contains a section dealing with conflicts of interest. Specifically it states that “an employee of Paradise Bingo shall not place himself/herself in a position to derive any direct or indirect benefit or interest from any Hall contracts where the employee can influence decisions.” The handbook was in existence during 2012/13 and the provision dealing with conflicts was at all times in effect during the plaintiff’s tenure with Paradise Bingo.
- [39] In addition to the policies implemented by Paradise Bingo, the plaintiff was subject to statutory duties as general manager of the defendant. Part I of the *Ontario Business Corporations Act*<sup>7</sup> (“*OBCA*”) defines “officer” as including, among other individuals, the chair of the board of directors, a vice-chair of the board of directors, the president, a vice-president, the secretary, an assistant secretary, the treasurer, and assistant treasurer and the general manager of a corporation (emphasis added).
- [40] Section 132 of the *OBCA* provides:

(1) **Disclosure: conflict of interest.**—A director or officer of a corporation who,

(a) is a party to a material contract or transaction or proposed material contract or transaction with the corporation; or

is a director or an officer of, or has a material interest in, any person who is a party to a material contract or transaction or proposed material contract or transaction with the corporation,

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<sup>7</sup> R.S.O. 1990, c. B-16.

shall disclose in writing to the corporation or request to have entered in the minutes of meetings of directors the nature and extent of his or her interest...

- (2) **by officer.** -- The disclosure required by subsection 1 shall be made, in the case of an officer who is not a director,
- (a) forthwith after the officer becomes aware that the contract or transaction or proposed contract or transaction is to be considered or has been considered at a meeting of directors...
- (9) **Court setting aside contract.**-- Subject to subsection (7) and (8), where a director or officer of a corporation fails to disclose his or her interest in a material contract or transaction in accordance with this section or otherwise fails to comply with this section, the corporation or a shareholder of the corporation, or, in the case of an offering corporation, the Commission may apply to the court for an order setting aside the contract or transaction and directing that the director or officer account to the Corporation for any profit or gain realized and upon such application the court may so order or make such other orders as it thinks fit.

[41] Section 134 of the *OBCA* provides for the standard of care required of officers and directors of a corporation. The statute mandates that “every director and officer of a corporation in exercising his or her powers and discharging his or her duties to the corporation shall, act honestly and in good faith with a view to the best interests of the Corporation and exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.”

[42] Grace J. in *969625 Ontario Limited et al. v. Goldstone Resources Inc.*<sup>8</sup> summarized the caselaw developed around an officer’s standard of care as follows:

[11] The purpose and consequence of the standard officers and directors must meet were explained in *Re Unique Broadband Systems, Inc.*, 2014 ONCA 538 (“*USB*”). At paras. 45 and 46 Hourigan J.A. wrote in part:

The imposition of fiduciary duties on directors and officers of the Corporation is consistent with the origins of the doctrine in trust law. A director or senior officer of a corporation is in a position of trust. He or she is charged with managing the assets of a corporation honestly and in a manner that is consistent with the objects of a corporation. Courts will be loath to interfere with the legitimate exercise of corporate duties, but they will intervene where a fiduciary breaches the trust reposed in him or her.

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<sup>8</sup> 2017 ONSC 879 at paras. 11-13.

[The officer's] fiduciary duties included an obligation to act in good faith and in the best interests of the Corporation. He had a specific obligation to scrupulously avoid conflicts of interest with the corporation and not to abuse his position for personal gain...[Citations omitted]

[12] In *Rooney v. Cree Lake Resources Corp.*, 1988 CarswellOnt 3059 (Gen. Div.) at para. 52, Dilks J. concluded it is an officer and director's fiduciary duty which requires the contract under consideration to be fair and reasonable to the corporation. The plaintiffs accept that principle subject to their argument that *Goldstone* affirmed and therefore cannot challenge the 2008 MCA.

[13] A contract flowing from a breach of the required standard may be set aside by the court in whole or in part: *Rooney v. Cree Lake Resources Corp.*, *supra.* at para. 57; *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.* (2002), 27 B.L.R. (3d) 43 (Ont. S.C.J.) at para. 213; *aff'd* (2004), 42 B.L.R. (3d) 34 (Ont.C.A.) ("*UPM*").

- [43] The plaintiff's contract was the only contract which did not provide the defendant with a right to terminate employment of the employee without cause upon payment of the statutory minimum. The plaintiff testified he was unaware that the termination provisions contained in his contract did not mirror the termination provisions contained in all other employment contracts. This evidence is not credible. During cross-examination, the plaintiff could not explain the reason these same terms were not included in his own contract and admitted that he did not bring this material difference to the attention of the board.
- [44] Velma who was a board member during the period March 2011 through March 2013, testified that she attended all of the board meetings during this time although acknowledged she was late to approximately 6 of the 26 meetings held during her time on the board. That being the case, she would review the minutes of all meetings. At the time of her appointment to the board, she held the position of vice-president and was a signing authority. Velma recalls raising the issue of conflict with Jody but he dismissed her concerns. Because it was a small reserve and no one else wanted Jody's position as president, the issue was not pursued.
- [45] The minutes of the board meetings held in late 2012 and the first few months of 2013 are conspicuously absent from the evidentiary record. Notwithstanding that the plaintiff claims he brought the contracts to the attention of the board, there is no independent evidence of this. In fact, Velma testified the contracts were never disclosed to the board let alone authorized and approved by the board.
- [46] The emails of August 26, 2012 are particularly illuminating. They evidence a growing animus between the plaintiff and his father, on the one hand, and band Council on the other. The initial email of Jody to Chief and band council, members of the board and the

operational managers and copied to his son, refers to allegations of conflict raised by band council and band council's concerns regarding the plaintiff's performance of his duties as general manager. The plaintiff's subsequent email challenges the hiring of Walter Kornas as a consultant, complains about his salary relative to other employees of Paradise Bingo, and comments on threats to his job security. It is clear, the plaintiff and his father are on the defensive as their tenure as general manager and president of the board, respectively, are being threatened.

- [47] The plaintiff drafted the template contract and finalized each contract as to term, title, duties and compensation. I find that the plaintiff intentionally removed these subparagraphs from his contract to ensure that his income was guaranteed, regardless of his job performance and regardless of the financial stability of the bingo hall, for a period of seven years commencing January 1, 2013. This was a benefit only he enjoyed. There is no evidence that the obvious conflict of interest arising from the plaintiff drafting and signing the contract was disclosed to the board.
- [48] A mere two months after the employment contracts were signed, the board members (Jody, Carmen and Lee) were ousted. Not a word was mentioned by the plaintiff to the new board members and the new chief regarding the existence of the newly-signed employment contracts. The plaintiff's silence is telling and bespeaks of an agenda to secure his job tenure at all costs including at a significant expense to Paradise Bingo which according to the plaintiff's own evidence was teetering on insolvency. I do not agree with the plaintiff's position that the new board members had a duty to investigate the existence of contracts when those same contracts were never approved and authorized by the predecessor board.
- [49] At trial, the plaintiff denied having any affirmative duty to advise the Board (despite the clear language of s. 132 of the *OBCA*) and asserted the new board members had a positive duty to educate themselves as to the existence of any employment contracts. The plaintiff also could not perceive a conflict of interest existed in circumstances where the termination provision of his employment contract was far more favourable to him (and conversely far more onerous to Paradise Bingo) than the termination provision contained in any of the other employment contracts he drafted.
- [50] Against this backdrop and under a veil of secrecy, the plaintiff drafted his employment contract removing terms from the template which protected the interests of the defendant, and enlisted his father, his father's close friend and his father's employee to execute the contract on behalf of Paradise Bingo. The remaining board member, Velma, who was the vice president and a signing authority, was unaware of the existence of the contract and did not sign the contract. To suggest the circumstances surrounding the execution of the contract have a strong odour of collusion would be an understatement – they reek of collusion.
- [51] It is difficult to imagine a greater situation of conflict than the one created by the plaintiff when he drafted and executed his own employment contract with his father, his father's friend and his father's employee executing the contract on behalf of the defendant. The

contract provided that upon termination without cause the plaintiff was entitled to his wages for the balance of the term. By comparison, his fellow employees were entitled only to the minimum statutory requirement.

[52] I find that that the plaintiff breached his fiduciary duty to the defendant in failing to disclose his conflict of interest to the board and band council in contravention of the *OBCA*. I further find that the deemed admissions by the third-party defendants support a finding that they were in breach of their common law and statutory duties owed to the defendant when they purported to enter into the contract with the plaintiff. In addition, the third-party defendants lacked the authority to enter into the employment contract with the plaintiff as it was not in the best interests of Paradise Bingo and therefore a breach of their fiduciary duty. Moreover, the board and band council did not authorize the contract nor approve and ratify the contract after it was signed. Last, the terms of contract were grossly unfair and unreasonable to Paradise Bingo.

[53] In all of these circumstances, the contract cannot stand. I find that the contract is unenforceable.

*(ii) Was there cause for the plaintiff's termination?*

[54] Having found that the contract is not enforceable for want of consideration, breach of fiduciary duty and want of authority, I must consider whether the defendant is obligated to pay damages to the plaintiff for wrongful dismissal or whether the plaintiff's conduct was such that the defendant had cause to terminate his employment without notice or payment in lieu of notice.

[55] After his re-hire in 2011, the next general election was in March 2013 at which time all of the board members and the chief were replaced. Following the appointment of the new board, concerns began to be raised by the board with respect the plaintiff's job performance.

[56] These concerns related to the following:

- (a) complaints were received by patrons that the plaintiff was rude to them;
- (b) absenteeism;
- (c) running up his cell phone bill;
- (d) the plaintiff routinely failed to provide the book keeper with timely information including invoices, daily activities, sales figures and payroll schedules.
- (e) the plaintiff refused to use Brinks and insisted on driving cash deposits to the bank nightly;

- (f) on one occasion the nightly deposit was left in a locked drawer in the plaintiff's desk instead of the safe which was against company policy;
- (g) failing to pay invoices in a timely manner. Laura testified that often the bingo hall would incur late charges because invoices were not paid on time. Eventually she directed suppliers to send invoices directly to her attention; and
- (h) failing to clean the glass enclosing the smoking section as directed.

[57] Maxine, a current member of the board appointed in September 2014, was also a board member before Jody was president. She recalls that initially she worked well with the plaintiff but in December 2014 his performance deteriorated – he was often late to work, refused to take direction from the board and failed to report daily to the bookkeeper. She could recall that he was disciplined on two occasions.

[58] While the new board had hoped the plaintiff would learn and succeed in his role as general manager, by the summer of 2015, the board members had lost all trust in him and the unanimous decision was made to terminate the plaintiff's employment. Despite the concerns with his job performance, the board decided that the plaintiff would be terminated without cause.

[59] Paradise Bingo had a Progressive Discipline Policy. This Policy required that an employee be given four opportunities to correct problematic behaviour. The Policy suggested discipline progressing through the following steps:

- (a) coaching – informal;
- (b) verbal warning – formal;
- (c) written warning – formal;
- (d) final written warning with possible suspension – formal; and
- (e) termination.

[60] Forms were prescribed for documenting and recording disciplinary steps taken by Paradise Bingo. These forms described the performance issues, confirmed the recommendations made to correct the performance issues and required the employee to acknowledge same by signing the form. It is noted that the Policy did provide that Paradise Bingo reserved the right to skip the three-step disciplinary process and move straight to termination where necessary.

[61] In the case of the plaintiff's performance on the job, the Policy was not followed. Despite numerous concerns with the plaintiff's performance, warnings were not given in accordance with the Policy and in some instances not at all. The evidence confirmed that the extent of the warnings given to the plaintiff was as follows:

- (a) on June 5, 2015, a verbal warning was given regarding the bank deposit held in the plaintiff's desk rather than the safe and a letter was delivered to the plaintiff describing the performance issue and confirmed the verbal warning given;
- (b) on June 22, 2015, the board issued a further letter to the plaintiff demanding that he provide the bookkeeper with the mandatory documents listed therein nightly;
- (c) on July 19, 2015, the board issued a letter to the plaintiff in identical form demanding that he provide the bookkeeper with the mandatory documents listed therein nightly,<sup>9</sup> and
- (d) Leroy expressed his concern to the plaintiff regarding his treatment of customers.

[62] The defendant failed to follow its own Progressive Discipline Policy. The plaintiff was not provided with an opportunity to correct any ongoing performance issues once notified of the Board's concerns and he therefore assumed he was performing satisfactorily in his role as general manager.

[63] In some instances, the plaintiff was not provided with notice of his problematic behaviour and, therefore, not given a reasonable opportunity to improve his problematic behaviour. Proper warnings were not given and recorded in his employee file. The ROE, completed by the defendant, does not indicate the plaintiff was terminated for cause. Last, the board did not authorize that the plaintiff be terminated for cause and instead expressly authorized that he be paid in accordance with the *Employment Standards Act 2000*.

[64] The evidence does not support a finding that the defendant had cause to terminate the plaintiff's employment.

#### **D. SUMMARY**

[65] I find that the contract is unenforceable for the following reasons:

- (a) a lack of consideration;
- (b) the plaintiff failed to comply with his statutory and fiduciary obligations as an officer of the defendant to disclose the contract and his position of conflict to the board;
- (c) the individuals signing the contract breached their respective fiduciary and statutory obligations by signing the contract; and

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<sup>9</sup> The plaintiff denies receiving this letter.

(d) the contract was not authorized and approved by the board and band council.

- [66] Having found the contract to be unenforceable and of no force and effect, it is unnecessary to consider the issues raised in the case law relied on by the plaintiff dealing with the effect of a fixed term contract on an employee's obligation to mitigate and the length of the notice period upon termination without cause where not expressly dealt with in the contract. Similarly, it is unnecessary to deal with the issues raised in the case law relied on by the defendant relating to the doctrine of unconscionability and ambiguity of contractual terms.
- [67] Every employment agreement contains an implied term that an employer must provide reasonable notice to an employee prior to the termination of employment.”<sup>10</sup> Accordingly, the defendant was obligated to provide the plaintiff with reasonable notice upon his termination without cause effective September 5, 2015.
- [68] What then is reasonable notice in this case? The ROE states that the plaintiff's employment with the defendant commenced March 1, 2009 and ended September 5, 2015 – a period of 6.5 years. He was provided with eight weeks' (two months) termination pay being the maximum amount to which an employee is entitled in accordance with the ESA.
- [69] Based on the plaintiff's period of employment with the defendant of 6.5 years, I find that the plaintiff is entitled to 6.5 months' pay in lieu of notice. Mitigation is not an issue since he did not acquire employment until the eighth month following termination (April 2016). The plaintiff received two months' wages on termination and is therefore entitled to an additional 4.5 months' pay in lieu of notice at a rate of \$1,000 per week. This amount is \$18,000.
- [70] Judgment shall issue in favour of the plaintiff in the amount of \$18,000.
- [71] If costs of the action cannot be agreed upon by the parties, I will receive written cost submissions as follows:
- (a) the defendant shall serve and file its written costs submissions not exceeding 5 pages in length (exclusive of time dockets, costs outline and case law) within 15 days;
  - (b) the plaintiff shall serve and file his written costs submissions not exceeding 5 pages in length (exclusive of time dockets, costs outline and case law) within 15 days thereafter; and
  - (c) any reply submissions not exceeding 2 pages in length shall be served and filed 7 days thereafter.

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<sup>10</sup> *Ibid*, at para. 23.

*“Justice A.K. Mitchell”*  
Justice A.K. Mitchell

**Released:** January 18, 2018

**CITATION:** Waddilove v. 1748960 Ontario Limited, 2018 ONSC 448  
**COURT FILE NO.:** 2366/15  
**DATE:** 20180118

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

Tyler Waddilove

Plaintiff

– and –

1748960 Ontario Limited

Defendant

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**REASONS FOR JUDGMENT**

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Mitchell J.

**Released:** January 18, 2016