An “Exacting Standard”: The Enforceability Of Termination Clauses And The “At Any Time” Conundrum

Baker v Van Dolder’s Home Team Inc.[1] (*Baker*) is the latest decision in Ontario to conclude that a termination provision permitting an employer to terminate, without cause, “at any time” is contrary to the *Employment Standards Act, 2000* (ESA) and therefore unenforceable.

While the *Baker* decision follows closely on the heels of another Ontario Superior Court decision impugning the use of “at any time” language in without cause provisions, it contradicts at least one other Ontario Superior Court decision where “at any time” language was endorsed by the Court.[2] The issue of “at any time” language has not yet been directly addressed by the Court of Appeal for Ontario.

Key Takeaways

- Termination provisions purporting to allow an employer to terminate an employee “at any time” may be unenforceable. For example, as the Court in *Baker* noted (following the analysis in *Dufault v The Corporation of the Township of Ignace*[3] (*Dufault*)), employers are not permitted to terminate employees upon the conclusion of a protected leave or in response to an employee’s attempt to exercise a right protected under the ESA.
- Employers should review their employment agreements to ensure conformity with the ESA and the latest case law. Given the trend of employee-friendly decisions from the Ontario courts in recent years along with increased judicial scrutiny of employment agreements (and employers’ actions surrounding termination generally), employers should ensure their agreements are updated to align with best-practices.

The Decision

The Court first analyzed the “without cause” provision and summarily applied the reasoning from *Dufault* to determine that the “without cause” provision was unenforceable.

While the Court’s commentary in *Dufault* regarding the “at any time” language has been regularly cited by employees attempting to avoid the implications of the termination provisions in their employment agreements, it is arguable that its analysis is not

the law because it was merely *obiter* commentary. As noted, no appellate authority has weighed in squarely on the issue.

When *Dufault* was appealed, the Court of Appeal expressly did not rule on the "at any time" language issue given that the "with cause" provision was unenforceable rendering the entire termination provision unenforceable.[4] It noted that resolution of the issues regarding the "without cause" provision should be left to an appeal where it would directly affect the outcome.[5]

On finding that it was bound by *Dufault* and the entire termination provision was unenforceable, the Court in *Baker* also considered the "with cause" provision for the "sake of completeness". The "with cause" provision provided that Mr. Baker could be terminated without notice or pay in lieu of notice for "just cause". Though the provision contained certain "savings" language, the Court found the language was insufficient to save the otherwise unenforceable provision.

In closing, the Court in *Baker* acknowledged that employers in Ontario continue to be faced with an "exacting standard" for drafting termination provisions that has been difficult to attain.

What Happens Next?

The *Baker* decision raises questions about how the "at any time" language will be treated in future cases and whether the Court of Appeal will ultimately weigh in on the issue in the near term given its commentary in *Dufault*, leaving the door open for further consideration.

Elsewhere in Canada, the British Columbia Court of Appeal recently upheld a termination provision that permitted termination by the employer without cause "at any time".[6] While enforceability of the "at any time" language was not directly in issue in *Egan*, the Court emphasized a practical, common-sense approach to interpreting employment agreements, noting that "disaggregating the words in a termination clause looking for ambiguity as a means to find the clause unenforceable" is not the correct approach to interpreting employment agreements.[7]

In Ontario, the courts continue to scrutinize employment agreements for strict compliance with the ESA. To reduce the risk that an employment agreement is found to be offside the ESA and otherwise unenforceable, employers should regularly review the terms of their employment agreements with experienced employment counsel.

Footnotes

1. 2025 ONSC 952.

2. See *Bergeron v. Movati Athletic (Group) Inc.*, 2018 ONSC 885 at para 23.

3. 2024 ONSC 1029 [*Dufault ONSC*], aff'd 2024 ONCA 915 [*Dufault ONCA*].

4. *Dufault ONCA*, para 25.

5. *Dufault ONCA*, para 25.

6. *Egan v Harbour Air Seaplanes LLP*, 2024 BCCA 222 [*Egan*].

7. *Egan*, para 47.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

Authors: David Cassin, Adam Walji, Thurka Brabaharan

Bennett Jones