

Another Day Another Unenforceable Termination Provision



In the recent Superior Court decision of [Baker v. Van Dolder's Home Team Inc.](#), 2025 ONSC 952 (CanLII), Justice Sproat found that the termination provision in the employment agreement was, yet again, unenforceable.

The Employment Agreement

The employment agreement in this case included both a with-cause and a without-cause termination clause.

The with-cause clause provided:

We may terminate your employment at any time for just cause, without prior notice or compensation of any kind, except any minimum compensation or entitlements prescribed by the *Employment Standards Act*. Just cause includes the following conduct:

1. Poor performance, after having been notified in writing of the required standard;
2. Dishonesty relevant to your employment (such as misleading statements, falsifying documents and misrepresenting your qualifications for the position you were hired for);
3. Theft, misappropriation or improper use of the company's property;
4. Violent or harassing conduct towards other employees or customers;
5. Intentional or grossly negligent disclosure of privileged or confidential information about the company;
6. Any conduct which would constitute just cause under the common law or statute.

The without-cause clause provided:

We may terminate your employment **at any time**, without just cause, upon providing you with only the minimum notice, or payment in lieu of notice and, if applicable, severance pay, required by the *Employment Standards Act*. If any additional payments or entitlements, including but not limited to making contributions to maintain your benefits plan, are prescribed by the minimum standards of the *Employment Standards Act* at the time of your termination, we will pay same. The provisions of this paragraph will apply in circumstances which would constitute constructive dismissal.

The Decision

The Court relying on the decision in *Dufault* found that the without-cause clause was unenforceable as the *ESA* does not permit an employer to terminate employment “at any time”.

The Court also found the with-cause clause to be unenforceable given the clause’s failure to distinguish between just cause and wilful misconduct.

Analysis

Justice Sproat’s decision on the with-cause clause should not come as a surprise to anyone practicing employment law. However, the big takeaway from this decision is that unlike the decision in *Dufault*, which included both “at the sole discretion [of the employer]” and “at any time”, the Court in this case found that the inclusion of the words “at any time” on their own was sufficient to render the without-cause clause unenforceable.

It would appear that until this issue is addressed at the appellate level, trial justices in Ontario may continue to find that because the *ESA* does not permit an employer to terminate an employee “at any time” language to this effect in a termination provision will be struck down, regardless of other language in the contract supporting an intent to comply with the *ESA*. Equally troubling, earlier appellate authority requiring a trial court to review the termination provisions as a whole to determine whether the intent of the parties entering the agreement was compliance with the *ESA* seems to have given way to an overly technical approach to contract interpretation. In fact, Justice Sproat mused in his decision that he had “no doubt” that the employer thought it was complying with the *ESA* when drafting the termination provision in question.

Takeaways for Employers

Now more than ever, employers must carefully draft their employment agreements (and specifically their termination provisions) to ensure compliance with the *ESA* in every possible respect. There is simply no room for any ambiguity and it would appear that trial courts will strain to find a provision offside the *ESA* to invalidate an employment agreement in favour of common law entitlements.

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.

Author: [Jawdat Saleh](#)

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