British Columbia And Ontario: Two Diverging Approaches To Interpreting Termination Provisions

Overview

Employers increasingly face challenges regarding whether termination provisions in their employment agreements will be determined to be enforceable if challenged in court. As we continue to see increasing court challenges to these provisions, various provinces appear to be taking different judicial approaches.

Over the last year, two decisions, *Dufault v. The Corporation of the Town of Ignace* (*Dufault)*and *Egan v. Harbour Air Seaplanes LLP* (*Egan),*have highlighted Canadian courts' divergent approaches to interpreting termination provisions in employment agreements.*Dufault*exemplifies Ontario courts' employee-friendly, detail-oriented approach to interpreting termination provisions. Conversely, *Egan* reaffirms British Columbia courts' more employer-friendly, practical approach to interpreting termination provisions.

Appeals for both cases were recently released, with the Ontario Court of Appeal releasing *Dufault v. Ignace (Township)* on December 19, 2024, and the Supreme Court of Canada denying leave to appeal for *Egan* on March 6, 2025. These decisions (and lack of additional guidance from Canada's top court so far) highlight the need for Canadian employers to be aware of the different requirements in each province when drafting enforceable termination provisions while remaining conscious that a termination clause used in one province may be subject to heightened challenges in another.

The Cases

Dufault

In *Dufault,* the Ontario Superior Court of Justice (ONSC) considered the enforceability of a without-cause termination provision. The provision stated:

4.02 The Township may at its sole discretion and without cause, terminate this Agreement and the Employee's employment thereunder at any time upon giving to the Employee written notice as follows.

The ONSC found that the entire termination provision was unenforceable because:

1. The for-cause termination provision was not compliant with the Ontario *Employment Standards Act*(Act) as its definition of "cause" was too broad and permitted the employer to terminate employment without providing statutory notice of termination or severance pay in circumstances where the Act required such notice or pay.
2. The without-cause termination provision was not compliant with the Act as it stated that the employer had "sole discretion" to terminate employment "at any time." The court found that the Act explicitly prohibits an employer from terminating employment under certain circumstances (e.g., when an employee is on a job-protected leave).

However, for reasons that remain unexplained, the court did not acknowledge or even refer to the exceptions under the Act that expressly permit termination of employment during a leave where the employment ends for reasons unrelated to the leave (s. 53(2)). The Act prohibits termination of employment for certain reasons, but does not expressly prohibit termination of employment based on timing. This is an important distinction.

On appeal, the ONCA affirmed the lower court's decision and held that the for-cause termination provision did not comply with the Act, as its definition of "cause" permitted the employer to terminate employment without providing statutory notice of termination or severance pay when the Act required such notice or pay. As a result, the ONCA found the entire termination provision (including the without-cause section) unenforceable.

Regrettably, however, because the ONCA found the entire termination provision unenforceable as a result of the just-cause provision, the ONCA declined to determine the enforceability of the without-cause provision. The decision was disappointing for employers seeking clarity about whether the "at any time" language is enforceable in a without-cause termination provision.

The *Dufault* decision has also recently been followed in *Baker v. Van Dolder's Home Team Inc.* (*Baker*), where the ONSC found that it must apply the reasoning established in *Dufault* and concluded that the without-cause termination provision was unenforceable due to its inclusion of "at any time" language. Again, the decision contains no consideration of the Act's exceptions and the distinction between timing and reasons for termination.

Egan

In contrast to *Dufault*, the British Columbia Court of Appeal (BCCA) in *Egan* considered a similar without-cause termination provision and found the provision to be enforceable. *Egan* was a wrongful dismissal case where the plaintiff argued the termination provision in his employment agreement was either ambiguous and therefore unenforceable or, if the provision was enforceable, it did not sufficiently limit the plaintiff's entitlements to common law reasonable notice. The termination provision stated:

The Harbour Air group may terminate your employment at any time without cause so long as it provides appropriate notice and severance in accordance with the requirements of the *Canada Labour Code*.

Unlike the ONSC's reasoning in *Dufault*, the BCCA did not focus on the specific phrase

"at any time" and instead assessed the overall intentions behind the provision. The BCCA's analysis seemed to be, in part, a response to Ontario decisions (like *Dufault*) that dissected each individual word in a termination provision to find the provision unenforceable. In fact, the BCCA stated that proper contractual interpretation of termination provisions could not be accomplished "by disaggregating the words in a termination clause looking for ambiguity as a means to find the clause unenforceable."

The BCCA held that the termination provision at issue:

1. Demonstrated a clear intention to limit the employee's entitlements to the minimum amounts outlined in the *Canada Labour Code.*
2. Displaced the employee's entitlements to common law notice.

Further, and encouraging for employers trying to enforce termination provisions, the BCCA held that:

1. It is not necessary for a termination provision to explicitly "convert a statutory floor to a contractual ceiling" to rebut the presumption of common law notice.
2. Specific words or phrases are not required to limit common law entitlements.
3. Courts should use a common sense approach when interpreting termination provisions.
4. If a termination provision outlines a clear intention to incorporate applicable employment standards legislation into a contract, such an intention is sufficient to displace the presumption of common law reasonable notice.

Conclusion

Dufault and *Egan* provide clear examples of the employee-friendly approach to interpreting termination provisions in Ontario and the more employer-friendly approach in British Columbia. The cases highlight that:

1. British Columbia will continue to employ a "practical, common-sense approach" to interpreting employment agreements. This approach is welcome news for employers.
2. Employers should not assume that specific words or phrases will automatically result in the unenforceability of a termination provision.
3. Employers with employees across several provinces should consult regional specialists to ensure employment agreements are sensitive to jurisdictional differences.
4. Employers should be conservative when drafting termination provisions and use clear and simple language. Until we have a fuller consideration of phrases like "at any time," such phrases should be avoided.
5. It remains to be seen whether courts in other provinces will follow the more technical approach in *Dufault* or the more practical approach in *Egan*.

Finally, of note, the Township of Ignace filed for leave to appeal *Dufault* to the Supreme Court of Canada on March 12, 2025. The Supreme Court of Canada's decision to deny leave to appeal for *Egan* may be a signal that, at this time, Canada's top court is not interested in resolving the divergent approaches to interpreting termination provisions.

matter. Specialist advice should be sought about your specific circumstances.

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