Caution to Employers Drafting Employment Contracts: Words Matter

Recent cases over the first half of 2025 are providing a valuable lesson for employers and employees – more of a caution to employers – when interpreting employment contracts during a dispute, including the enforceability of termination clauses. These notable rulings send a clear message to employers that words in employment contracts matter. The wording must be precise when drafting an employment contract to ensure that a termination provision does not violate employment standards legislation such as the *Employment Standards Act, 2000*, S.O. 2000 (the "*ESA*") in Ontario.

Post Waksdale

Following *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391, 446 D.L.R. (4th) 725, a number of decisions have been made with respect to termination clauses in employment contracts – specifically, when they are found to be non-compliant with the *ESA*.

Dufault v. Ignace (Township)

In *Dufault v. Ignace (Township),* 2024 ONCA 915 (CanLII), the appellant employer appealed the order of the motion judge that granted the respondent employee's summary judgment motion and ordered the appellant to pay the respondent $157,071.57 in damages for wrongful dismissal.

The primary issue on the summary judgment motion was whether the termination clauses in the employment contract complied with minimum standards provided for in the *ESA*. The respondent argued before the motion judge that both the "for cause" and "without cause" termination clauses in the employment contract were illegal and unenforceable, as they purported to contract out of the minimum standards set by the *ESA*. The appellant argued that the wording of the contract complied with the *ESA* and that the respondent had been paid the damages she was entitled to under the *ESA*.

The motion judge found that both the "for cause" and "without cause" termination clauses were unenforceable on the basis that they did not comply with the minimum standards set out in the *ESA*. As a result, the clauses were unenforceable. On appeal, the appellant renewed the argument that both termination clauses were consistent with the minimum standards set by the *ESA*.

The appellant also argued that "in the event this court concludes that the 'for cause' termination clause is void for non-compliance with the *ESA* minimum standards, but the 'without cause' clause does not contravene the *ESA* minimum standards, the 'for cause' clause should be severed and the 'without cause' clause preserved." There was no dispute that the respondent's termination was on a "without cause" basis. The Court stated that "in making the argument that the 'for cause' termination clause can be severed, the appellant submits that we should reconsider and decline to follow our court's prior decision in *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391, 446 D.L.R. (4th) 725…where this court held that the termination provisions in an employment contract must be read as a whole, with the result that illegality in one termination provision for failing to meet *ESA* minimum standards invalidates all of the termination provisions."

The Court of Appeal decided the appeal solely on the basis of one aspect of the "for cause" termination clause and agreed with the motion judge's finding that the clause purported to allow the appellant to terminate the respondent for "cause", without notice or pay instead of notice, and defined "cause" more broadly than the narrow exception in the *ESA* which allows for termination without notice or pay instead of notice for "wilful misconduct." The Court found that the clause failed to comply with the minimum standards set by the *ESA*.

The "for cause" termination clause in this case provided as follows:

4.01 The Township may terminate this Agreement and terminate the Employee's employment **at any time and without notice or pay in lieu of notice for cause. If this Agreement and the Employee's employment is terminated with cause, no further payments of any nature, including but not limited to, damages are payable to the Employee**, except as otherwise specifically provided for herein and the Township's obligations under this agreement shall cease at that time. **For the purposes of this agreement, "cause" shall include but is not limited to the following:**

(ii) **upon the failure of the Employee to perform the services as hereinbefore specified without written approval of Municipal Council and such failure shall be considered cause and this Agreement and the Employee's employment terminates immediately**;

(ii) in the event of acts of wilful negligence or disobedience by the Employee not condoned by the Township or resulting in injury or damages to the Township, such acts shall be considered cause and this Agreement and the Employee's employment terminates immediately without further notice. [Emphasis added.]

The Court cited Section 55 of the *ESA* and s. 2(1)3 of the regulation on *Termination and Severance of Employment*, O. Reg. 288/01 (the "*Regulation*"), which create an exception to the requirement under the *ESA* that an employer must provide notice prior to the termination of an employee, or pay instead of notice. The exception allows for termination without notice or pay instead of notice in circumstances of employee misconduct, defined as follows: "Any employee who has been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer."

The Court noted that a high level of employee misconduct is required to fall within the exception in s. 2(1)(3) of the *Regulation* – more than is required for just cause dismissal at common law. The Court stated that "the impact of the notice and termination pay provisions of the *ESA* and the limited exception in s. 2(1)3 of the *Regulation* is that where some form of common law or contractually defined cause for termination exists, but which falls short of the high level of misconduct required to come within the scope of s. 2(1)3 of the *Regulation*, a terminated

employee is entitled either to notice or pay instead of notice as required by the *ESA*."

The Court found that the "for cause" termination clause purported to allow the appellant to terminate the respondent's employment without notice or pay in lieu of notice in circumstances that are broader than the exception in s. 2(1)3 of the *Regulation*.

The Court saw no error in the motion judge's finding that the "for cause" termination clause provides for a lower standard of employee misconduct than that set out in s. 2(1)3 of the *Regulation*. The Court noted that the "for cause" termination clause purports to deny notice or pay instead of notice where the grounds for termination do not meet the high standard of wilful misconduct required under s. 2(1)3 of the *Regulation*. The Court concluded that the "for cause" termination clause in the employment contract failed to meet the minimum standard provided for in the *ESA*.

Finally, the Court reiterated their decision in *Waksdale*, where it was held that the termination provisions in an employment contract must be read as a whole. If one termination provision in an employment contract violates the *ESA* minimum standards, all termination provisions in the contract are invalid. This holding in *Waksdale* was followed in *Rahman v. Cannon Design Architecture Inc.*, 2022 ONCA 451 (CanLII).

The Court concluded that the termination clauses were unenforceable, and the motion judge was correct in finding that the respondent was entitled to damages based on the end date of the fixed-term employment contract.

The appeal was dismissed.

Termination Clauses in Employment Contracts Found Non-Compliant with *ESA*

De Castro v. Arista Homes Limited

The recent Court of Appeal decision in *De Castro v. Arista Homes Limited*, 2025 ONCA 260 (CanLII) is another example of a case post-*Waksdale* where the court ruled the termination provisions in the employment contract were unenforceable for contravening the *ESA*. The Court of Appeal upheld an award of damages to the employee that was much greater than the compensation set by the employment contract. This is a caution to employers of the significant liabilities they may face in a wrongful dismissal lawsuit if their employment contracts are not carefully drafted and not up to date.

The respondent, Ellen De Castro, was employed by the appellant, Arista Homes Limited ("Arista"), for four years and nine months. The appellant dismissed the respondent without cause. Relying on the provision in the employment contract for termination without cause, the appellant paid the respondent four weeks' salary in lieu of notice under the *ESA*.

The respondent rejected the termination offer and sued the appellant for damages for failure to provide reasonable notice and brought a motion for summary judgment.

Before the summary judgment judge, the respondent relied on the governing authority of *Waksdale* to argue that the termination provisions in the employment contract were unenforceable and she was entitled to common law damages. The appellant conceded that if the termination for cause provision in the employment contract fell afoul of the *ESA*, the termination without cause provision must also be struck out, however, the appellant argued that the contract, properly construed, did comply with the *ESA*. The motion judge disagreed with the appellant and awarded damages reflecting eight months' salary in lieu of notice.

The termination for cause provision in the employment contract read as follows:

If you are terminated for Cause or you have been guilty of wilful misconduct, disobedience, breach of Employment Agreement or wilful neglect of duty that is not trivial and has not been condoned by ARISTA, then ARISTA will be under no further obligation to provide you with pay in lieu of reasonable notice or severance pay whether under statute or common law.

Immediately afterward, it provides the following definition of "Cause":

For the purposes of this Agreement "Cause" shall include your involvement in any act or omission which would in law permit ARISTA to, without notice or payment in lieu of notice, terminate your employment.

The motion judge found that the contract defined "cause" more broadly than did the *ESA*, and so permitted termination without notice in circumstances where the *ESA* would prohibit it. He therefore concluded that it breached the *ESA*. The Court of Appeal concluded:

We see no error in the motion judge's approach. It was rooted in the plain grammatical meaning of the words in the agreement and reflected the application of established principles governing employment contracts.

The Court found that the impugned clause contemplates termination for acts and omissions that would not justify termination under the *ESA*. For example, the motion judge concluded, the contract contemplates termination for cause based on "a breach of [the] Employment Agreement" and does not require that any such breach be either wilful or serious, which is in contravention of the *ESA*.

The appellant disagreed with the motion judge's interpretation. It argued that there is only one way to construe the clause, namely, that it is in compliance with the *ESA*. The appellant maintained that the word wilful must be seen to qualify the reference to breach of the employment contract and that breach of the employment contract must be qualified by the final words: "that is not trivial and has not been condoned by Arista." It argued that the words "shall include" do not necessarily signal a non-exhaustive definition. It contrasted the language with that used in *Dufault*, where the offending language was "shall include but is not limited to."

The Court of Appeal disagreed with the appellant's interpretation. The Court stated:

The issue is not whether the contract purports to comply with the law; it is whether the language in the contract actually does comply with the law. If the language of the agreement violates the law, it is no answer for the employer to say that it did not intend this result. Were it otherwise, it would be an easy matter for an employer, by asserting such intention, to inoculate a contract from judicial review.

Finally, the Court found that the motion judge's approach reflected a careful application of established principles governing the interpretation of employment contracts. The Court reiterated that employment contracts are interpreted differently from other commercial agreements to protect employees, who generally have less bargaining power and familiarity with the *ESA*. Ambiguities are resolved in favour of the employee, and the *ESA*'s remedial purpose requires interpretations that encourage compliance and extend protections to employees. The Court concluded that the motion judge's reasoning was consistent with established principles and that there was no palpable and overriding error in the decision.

Key Takeaway

Unless your agreement contains a valid and enforceable termination provision that explicitly limits your entitlements to your statutory notice period, you are entitled to notice at common law.

Baker v. Van Dolder's Home Team Inc.

The decision in *Baker v. Van Dolder's Home Team Inc.*, 2025 ONSC 952 (CanLII) continues a pattern of employee-friendly decisions following the decision in *Dufault*. Below, we examine the Court's reasoning surrounding the termination provisions and outline key takeaways for employers.

Background

The plaintiff was terminated without cause on May 24, 2023 and brought an action for wrongful dismissal. A motion was brought by the defendant for summary judgment to determine the enforceability of the "with cause" and "without cause" termination provisions in the plaintiff's employment contract. The employment contract included provisions for resignation, termination without cause, and termination with cause. The central issue was the enforceability of the "with cause" termination provision.

The plaintiff, the responding party to the motion, cited the *Dufault* decision, which addressed the enforceability of a "without cause" provision. Justice Sproat asked for further oral submissions as the Plaintiff's factum did not address the "without cause" provision.

In *Waksdale v. Swegon North America*, 2020 ONCA 391, the court determined that if a portion of a termination provision is unenforceable, it renders the entire termination provision unenforceable. The Court stated that to ascertain if the "with cause" provision is unenforceable, it is necessary to consider:

a) whether the "with cause" provision is unenforceable by reason of its wording; and

b) whether the "without cause" termination provision is unenforceable, thereby also rendering the "with cause" provision unenforceable.

The plaintiff argued that the "without cause" termination provision was unenforceable because it allowed the employer to terminate employment "at any time," which contradicted the *Employment Standards* Act. The plaintiff cited *Dufault*, which held that such provisions were unenforceable. The defendant countered by referencing *Bertsch v. Datastealth Inc.* (discussed below), where a similar provision was deemed enforceable. However, the court found *Bertsch* distinguishable because it did not involve a conflicting "with cause" provision.

Employment Contract

The plaintiff's employment contract provided in relevant parts as follows:

Resignation: you may resign from your employment by providing us with at least 14 days' prior written notice, specifying the effective date of resignation. We may, at our sole discretion, waive in whole or in part such notice by paying you your base salary and benefits (and any entitlements under the *Employment Standards Act*, if applicable) until the effective date of your resignation.

Termination without cause: 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.

Termination with cause: 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:

a) Poor performance, after having been notified in writing of the required standard;

b) Dishonesty relevant to your employment (such as misleading statements, falsifying documents and misrepresenting your qualifications for the position you were hired for);

c) Theft, misappropriation or improper use of the company's property;

d) Violent or harassing conduct towards other employees or customers;

e) Intentional or grossly negligent disclosure of privileged or confidential information about the company;

f) Any conduct which would constitute just cause under the common law or statute.

Is the "Without Cause" Termination Provision Enforceable?

Citing *Dufault*, the plaintiff submitted that the "without cause" provision is unenforceable, as it states that the defendant is entitled to terminate employment "at any time". Further, the plaintiff submitted that Article 4.02 of the employment agreement misstates the *ESA* when it gives the employer "sole discretion" to terminate the employee's employment at any time. Justice Sproat agreed and noted that "the *Act* prohibits the employer from terminating an employee on the conclusion of an employee's leave (s. 53) or in reprisal for attempting to exercise a right under the *Act* (s. 74). Thus, the right of the employer to dismiss is not absolute."

Under *Dufault*, the plaintiff's "without cause" termination provision is unenforceable, as the *ESA* does not permit an employer to terminate employment "at any time". Justice Sproat stated that "[a]n incorrect statement as to the *ESA* is not saved by general language stating that the employer will comply with the *ESA*.

At the hearing, the defendant cited *Bertsch v. Datastealth Inc.*, 2024 ONSC 5593. That decision concluded that a "without cause" termination provision was enforceable. However, Justice Sproat stated that *Bertsch* is distinguishable in that there was no "with cause" provision that conflicted with the *ESA*. The contract in *Bertsch* simply stated, correctly, that under the *ESA*, "there are circumstances in which you would have no entitlement to notice of termination, termination pay, severance pay or benefit continuation."

Is the "With Cause" Termination Provision Enforceable?

Justice Sproat addressed whether the "with cause" provision was itself unenforceable, such that it would also operate to render the "without cause" provision unenforceable. The plaintiff submitted that the provision was unenforceable because it stated that the plaintiff has no entitlement in the event of a "just cause" termination which is defined to be a less stringent standard than the "wilful misconduct" standard required to disentitle an employee to *ESA* entitlements.

The plaintiff cited *Perretta v. Rand A Technology Corporation*, 2021 ONSC 2111, which had the following Termination with Cause provision in the 2018 Employment Contract:

Termination With Cause – We may terminate your employment for just cause at any time without notice, pay in lieu of notice, severance pay, or other liability, subject to the ESA. For the purposes of this Agreement, "just cause" means just cause as that term is understood under the common law and includes, but is not limited to: [list of eleven Categories of Just Cause]

Justice Sproat noted three of the eleven Categories of Just Cause are as follows: (i) "a material breach of this Agreement or our employment policies"; (ii) unacceptable performance standards"; (iii) "repeated, unwarranted lateness, absenteeism or failure to report for work". The plaintiff submitted that these three Categories of Just Cause, and perhaps others, fall short of the statutory exemption set out in *Termination and Severance of Employment*, O. Reg. 288/01, passed under the *ESA*, which provides, in sections 2(1)3 and 9(1)6, that an employee is not entitled to notice of termination or termination pay or severance pay under the *ESA* where the employee "has been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer."

In the end, Justice Sproat found that the three Categories of Just Cause emphasized by the plaintiff, and quoted in the previous paragraph, fail to rise to the statutory threshold set out in O. Reg. 288/01 and thereby breach the *ESA*. Accordingly, Justice Sproat ruled the Termination with Cause provision unenforceable.

Finally, the Court noted that employment contracts were treated differently from commercial contracts, and employees could not be expected to understand the distinctions between contractual and statutory standards. As a result, the Court dismissed the Defendant's motion for summary judgment.

Takeaways for Employers

Employers are well advised to avoid using "at any time" and "sole discretion" wording when drafting or updating employment contracts. Employers are wise to redraft their without cause termination provisions to ensure they do not purport to allow them to terminate employment "at any time" and/or in the company's "sole discretion."

Employers are strongly advised to stay informed of legal developments in this area of law and regularly review their termination provisions to ensure compliance. Using words like "sole discretion," "at any time," "for any reason," can potentially invalidate an otherwise enforceable provision.

Termination Clause in Employment Contract Found in Compliance with *ESA*

Bertsch v. Datastealth Inc.

In *Bertsch v. Datastealth Inc.,* 2025 ONCA 379, the Court of Appeal for Ontario upheld the decision of the Ontario Superior Court of Justice which found a termination clause in an employee's agreement was enforceable, thereby limiting the employee's termination entitlements to the statutory minimums under the *Employment Standards Act, 2000* ("*ESA*"). This is an important development for employers given that in recent years the courts have found many termination provisions unenforceable, resulting in wrongful dismissal awards far in excess of what was contemplated in the employment agreement between the parties.

Reasons of the Court of Appeal

The appellant's employment with the respondent was terminated after 8.5 months of service. He had been hired as a vice-president, earning a base salary of $300,000 per year. On the termination of his employment without cause the appellant received four weeks' pay in lieu of notice. He commenced an action seeking common law damages for wrongful dismissal.

The respondent brought a motion under r. 21.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, for the interpretation of the termination provision in the appellant's employment agreement, and to strike or dismiss the appellant's claim as disclosing no tenable cause of action.

The termination provision of the employment agreement provided as follows:

Termination of Employment by the Company: If your employment is terminated with or without cause, you will be provided with only the minimum payments and entitlements, if any, owed to you under the Ontario *Employment Standards Act, 2000* and its Regulations, as may be amended from time to time, including but not limited to outstanding wages, vacation pay, and any minimum entitlement to notice of termination (or termination pay), severance pay (if applicable) and benefit continuation. You understand and agree that, in accordance with the ESA, there are circumstances in which you would have no entitlement to notice of termination, termination pay, severance pay or benefit continuation.

You understand and agree that compliance with the minimum requirements of the ESA satisfies any common law or contractual entitlement you may have to notice of termination of your employment, or pay in lieu thereof. You further understand and agree that this provision shall apply to you throughout your employment with the Company, regardless of its duration or any changes to your position or compensation.

Section 11(a), contained in the "General" provisions of the employment agreement, also provided:

If any of your entitlements under this Agreement are, or could be, less than your minimum entitlements owing under the Ontario *Employment Standards Act, 2000*, as amended from time to time, you shall instead receive your minimum entitlements owing under the Ontario *Employment Standards Act, 2000*, as amended from time to time.

The appellant argued that he was entitled to common law damages for wrongful dismissal because the termination provision of the employment agreement was void and unenforceable, and violated the *Employment Standards Act*. The *ESA* provides, among other things, that an employee is entitled to statutory notice or termination pay and severance pay (where applicable) unless they fall under various exceptions set out in the regulations to the *ESA*. One such exception (under O. Reg. 288/01) is for employees who have "been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer."

The motion judge rejected the appellant's argument that the termination provision in the employment agreement would permit the employer to terminate employment for cause short of "wilful misconduct, disobedience or wilful neglect of duty," without payment. He concluded that the termination provision effectively excluded any claim for common law wrongful dismissal damages beyond what was provided under the *ESA*. The motion judge stated that there was "no reasonable interpretation [of the relevant provisions] which would be contrary to the minimum requirements of the *ESA* and regulations." The motion judge concluded that the exclusion of common law notice under the appellant's employment agreement was enforceable.

The appellant submitted that the motion judge erred when he refused to find that the termination clause was ambiguous. He asserted that, while a person trained in the law might find the clause unambiguous, an ordinary person might understand, incorrectly, that they could be terminated from their employment without notice for conduct such as negligence.

The Court found no error in the motion judge's ruling, citing *Amberber v. IBM Canada Ltd.*, 2018 ONCA 571, 424 D.L.R. (4th) 169, where the Court stated that "[w]here a termination clause can reasonably be interpreted in more than one way, the interpretation that favours the employee should be preferred." A finding of ambiguity, however, means "something more than the mere existence of competing interpretations."

The issue for the Court is not whether an ordinary person might arrive at an incorrect interpretation of the termination provisions of the employment agreement, but how the agreement can be reasonably interpreted. The termination provision specifically states that an employee who is terminated "with or without cause" will receive the minimum payments and entitlements under the *ESA* and its regulations. The Court found no error in the motion judge's conclusion. The termination provision in the employment agreement was unambiguous, and did not depart from the minimum standards guaranteed by the *ESA*.

The Court dismissed the appeal. Costs of $10,000 were awarded to the respondent.

Key Takeaway

When a termination provision is found to be enforceable, it will preclude an employee from claiming common law damages for wrongful dismissal. Employers would be wise to write their employment agreements that contain similar language to *Bertsch* to increase the likelihood that the termination provisions will be enforceable.

Final thoughts

Dufault, Baker, and *De Castro* confirm that Ontario courts remain hyper-vigilant in policing termination provisions, sometimes striking language that some practitioners may have considered benign less than a year ago. Notwithstanding *Bertsch*, the practical message for employers is clear: Words in employment contracts matter. The wording must be precise when drafting an employment contract to ensure that a termination provision does not violate employment standards legislation. Human resources professionals and employers are strongly advised to retain an employment lawyer to draft or proactively update employment agreements to minimize their exposure to potential large liabilities.

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.

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