

Dufault Is Not Default: Ontario Court Upholds “At Any Time” Termination Language



The Ontario Superior Court of Justice has released its ruling in *Li v. Wayfair Canada Inc.*, [currently unreported – contact me for a copy of the decision], an employment law decision that helpfully reins in what appeared to be a general over-enthusiasm for, and perhaps a misunderstanding of, the real point of its earlier decision in *Dufault v. Town of Ignace*. As dedicated Employers’ Edge blog readers will know, the *Dufault* decision struck down the termination language in an employment agreement because it asserted that the employer could terminate the employee “at any time” subject to conditions. The Court voided the termination provisions in that case because the “at any time” language did not preserve the employee’s rights under the *Employment Standards Act, 2000*, such as for job-protected leaves of absence and anti-reprisal rights. However, in *Wayfair*, the Court was explicit in distinguishing the language and interpretation of the impugned termination provision.

The Contract

The employee in this case signed off on an employment contract with the following termination language:

The Company may terminate your employment at any time for Cause without notice, pay in lieu of notice, severance, benefits continuance or other compensation or damages of any kind, unless expressly required by the ESA in which case only the minimum statutory entitlements will be provided.

After your probationary period concludes, in the absence of Cause, the Company may terminate your employment at any time and for any reasons by providing you with only the minimum statutory amount of written notice required by the ESA or by paying you the minimal amount of statutory termination pay in lieu of notice required by the ESA, or a combination of both, as well as paying statutory severance pay required by the ESA, providing benefits continuance for the requisite minimum statutory period under the ESA and all other outstanding entitlements, if any, owing under the ESA.

The contract went further, including an express definition of “Cause” being “any willful misconduct, disobedience, or willful neglect of duty that is not trivial and has not been condoned by the company that constitutes ‘Cause’ under the ESA.”

Distinguishing from *Dufault*

Where the *Dufault* court criticized and struck down the termination language for being inconsistent with the *ESA*, the *Wayfair* court approved the contract. The Court noted:

- The employment agreement as a whole only limited the employer's obligations to the provisions of the *ESA*;
- The termination with cause wording limited severance payments "unless expressly required by the *ESA* in which case only the minimum statutory entitlements will be provided";
- The without cause termination provision clearly and repeatedly indicated that payments would be made as "required by" or "under" the *ESA*.

The clear and consistent reference to and inclusion of *ESA* entitlements in the contract distinguished it from previous cases where the limited termination entitlement language was struck down and full common law notice was owed. In this case, *Wayfair* was only on the hook to pay the employee their minimum statutory entitlement of one week's pay in lieu of notice of termination.

Takeaways for Employers

Stop me if you've heard this before, but a properly drafted employment contract is the best way for an employer to limit its legal liability when it has to dismiss an employee. The courts have not made it easy for employers to enforce their contracts, and to be certain, employees should be protected from unfair or ambiguous contracts that might take away their statutory rights. But a contract that preserves an employee's legally required entitlements in a clear way that can be easily understood and explicitly agreed to by the employee, should be able to stand on its own merits. The *Wayfair* decision supports this principle.

Perhaps most importantly, this decision is a clear rejection of the notion that just because a contract says the employer can terminate "at any time" it must be unenforceable.

The [**Lawyers for Employers**](#) at CCPartners routinely draft employment contracts keeping the latest legal updates and court decisions in mind. Reach out to any of our team members if you have questions or if your standard contracts have not been reviewed recently.

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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