

Employers Cannot Terminate Employment “At Any Time”: Ontario Court



Bottom Line

The Ontario Superior Court of Justice (the “Court”) recently issued *Baker v. Van Dolder’s Home Team Inc.*, affirming that contractual termination provisions which say employers can terminate employment on a without cause basis “at any time” are non-compliant with the *Employment Standards Act, 2000* (the “ESA”) and therefore invalidate the entire contract.

The Court highlighted that it could only depart from its own decisions, specifically *Dufault v The Corporation of the Township of Ignace* (“*Dufault*”) and *Perretta v Rand A Technology Corporation* (“*Perretta*”) in certain limited circumstances, which were not applicable in this case.

Facts

The plaintiff was terminated on a without cause basis by the employer. The plaintiff was employed pursuant to a written employment agreement, which contained a termination clause limiting the plaintiff’s entitlements upon termination. Specifically, the relevant portions of the termination clause in question read:

[...] 2. 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.

3. 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.

The parties agreed to proceed with the wrongful dismissal claim by way of summary judgment.

The Decision

The Without Cause Provision

The Court considered that the trial judgement in the case of *Dufault*, see our previous Insight [here](#), was decided at its own level, meaning that it is not technically "binding" on the Court. However, the Court concluded that, as set out in the case of *Re Hansard Spruce Mills Ltd* (approved by the Supreme Court of Canada), it may only depart from its own caselaw in the following situations:

1. where the validity of the judgment has been affected by subsequent decisions;
2. where the judge overlooked binding case law or a relevant statute; or
3. where the decision was otherwise made without full consideration.

As none of these situations were present, the Court applying *Dufault*, finding that the "without cause" provision was unenforceable because it stated that the employer could terminate the plaintiff "at any time," which is not permitted by the *ESA*. The Court also followed existing case law to find that this violation of the *ESA* could not be saved by the general language within the provision stating that the employer would comply with the *ESA*.

The With Cause Provision

The Court was not required to deal with the enforceability of the "with cause," given the finding in the Ontario Court of Appeal case of *Waksdale v Swegon North America*, see our previous Insight [here](#), ("Waksdale"). That case held that if any portion of a termination provision is unenforceable, then the entire termination provision is unenforceable. However, the Court decided to consider this provision nonetheless and found that it also breached the *ESA*.

The Court held that even though the language in the "with cause" provision alerted the employee "to the fact that the *ESA* may provide for something other than what is provided for in the contract," this was not sufficient to make the clause enforceable. The Court also noted that the language in this case was different from that in *Bertsch v Datastealth*, see our previous Insight [here](#), in which the Court upheld the termination clause.

The Court followed its earlier decision in *Perretta* in holding that employees "cannot be expected to appreciate" that there are differences in entitlements for employees who are terminated for "just cause" at common law versus employees who are terminated for "wilful misconduct, disobedience or wilful neglect of duty" under the *ESA*. This clause was problematic partly because it contained a detailed description of conduct that might ground a "just cause" termination at common law, but did not reference

the *ESA*'s "wilful misconduct" standard. Ontario employers can only terminate employment without giving notice (or pay in lieu) if the employee has done something that meets the "wilful misconduct" standard. The Court held that this omission in this clause could result in employees incorrectly concluding that they had no entitlements if their employment was terminated for just cause at common law. That such a reading was possible fatally flawed this provision, meaning it also could not be enforceable.

Takeaways

Employment contracts must be drafted in compliance with the principles in *Waksdale*, *Dufault*, and *Perretta*. As we have recommended before, it is prudent for employers again to review their existing employment agreements to ensure they reflect the most recent changes to the law.

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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