Employment Update: Enforceability Of Termination Clauses In Ontario: The Saga Continues

Employment law is evolving at a rapid pace. Termination clauses that were once considered enforceable may no longer survive judicial scrutiny. Ontario Courts have recently highlighted new defects in termination clauses that may render them unenforceable and expose employers to lengthy notice periods. The following decisions serve as an important reminder to employers to draft termination clauses in an employment contract very carefully.

I. An Employee Cannot be Dismissed "At Any Time"

Questions about the enforceability of "at any time" language began last year with the Ontario Court's decision in *Dufault v. The Corporation of the Township of Ignace*, 2024 ONSC 1029. In *Dufault*, the termination clause provided that the employer "may at its sole discretion and without cause, terminate this Agreement and the Employee's employment thereunder at any time…" [Emphasis added]. The Court held that this clause was unenforceable because the right of an employer to dismiss is not absolute. In fact, there are several reasons under the *Employment Standards Act, 2000* (the "*ESA*") for which it would be a violation to dismiss an employee (in retaliation for an employee asserting their rights under the *ESA*, for example).

Following *Dufault*, a common opinion among the Ontario employment law bar was that reference to an employer's "sole discretion, rather than the "at any time" language, was the problematic portion of the termination clause. The rationale was that the *ESA* provides employees with protection regarding the reasons for and circumstances surrounding a dismissal, rather than strictly the timing of dismissal.

However, another judge of the Ontario Court recently determined in *Baker v. Van Dolder's Home Team Inc*., 2025 ONSC 952 that using "at any time" language on its own violates the *ESA* and is sufficient to render the entire termination clause unenforceable. Accordingly, Ontario employers should review the language in their termination provisions for use of the "at any time" language and assess the impact of these recent cases.

II. References to the Common Law Standard for "Just Cause" in the

Termination Clause Must Unequivocally Comply with the ESA

The Court in the above-noted decision in *Baker* also found that the "just cause" provision of the termination clause was unenforceable. The just cause termination clause in *Baker* stated:

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*** [Emphasis added]. 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 statutory threshold for just cause termination "without notice or compensation in lieu of notice" under the *ESA* is "wilful misconduct, disobedience or wilful neglect of duty that is not trivial." This threshold is higher than the common law standard and cannot be contracted out of or lowered. The Court held that the various forms of misconduct set out in the termination clause were an attempt to lower the statutory threshold.

Notably, the Court stated that the employer's attempt to incorporate the *ESA* standard as a guaranteed minimum did not render the clause enforceable. The reason was that, without a meaningful explanation of the differing standards, employees cannot be expected to understand the difference between the common law standard for just cause and the higher *ESA* standard. Therefore, an employee's rights upon dismissal as set out in a termination clause must be abundantly clear and complaint with the *ESA* in order to be enforced.

III. A Failure to Provide All Contractual Guarantees Will Repudiate the Entire Termination Clause

In the recent decision of the Ontario Court in *Timmins v. Artisan Cells*, 2025 CanLII 2387, an employee was dismissed after 3.5 years of service. The termination clause stated that the employer could dismiss the employee without cause by providing the greater of (i) his minimum entitlements under the *ESA*, and (ii) 3 months' notice or pay in lieu of notice. Based on the employee's length of service, 3 months was greater. However, upon termination, the employer only provided the employee with his *ESA* minimums and requested a full and final release in exchange for the full 3 months of pay.

The Court held that the employer's decision not to provide the employee with his full entitlement upon termination as set out in the termination clause repudiated the entire employment agreement, as the employer's conduct evidenced an intention to no longer be bound by its terms and conditions. Therefore, the termination clause could not be relied upon, and the employee received a hefty award of $456,908.82, which was equal to 9 months' reasonable notice at common law.

The following are key takeaways that Ontario employers should consider in light of

this case:

1. All entitlements owed under an employment contract to an employee upon the termination of their employment must be paid without requesting any additional consideration in return, unless the consideration at issue was expressly provided for in the employment contract.
2. When drafting a termination clause in an employment contract that provides an employee with a greater entitlement than the minimum standards set out in the *ESA*, the clause should specifically state that all amounts above and beyond the *ESA* minimums will only be paid upon the execution of a full and final release.

Employer Takeaways

Given these recent developments, employers should pay extra attention to the termination clauses in their employment contracts and review them regularly to ensure they contain enforceable language and comply with the *ESA*. Termination clauses are a critical part of any employment contract and getting them right can save employers from costly disputes and significant damages awards.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be ought about your specific circumstances.

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