

Hard Lessons For Employers In Beginning (And Ending) The Employment Relationship



We have [previously written](#) about the impact that an employer's conduct can have on their ability to rely on the termination provisions in their employment contracts. *Wilds v. 1959612 Ontario Inc.*, [2024 ONSC 3452](#), released on June 14, 2024, continues this trend of cases and provides additional "do's and don'ts" for employers when drafting employment contracts and planning for terminations of employment.

What Happened?

The employee was an executive assistant for a building supplies provider whose employment was terminated without cause after 4.5 months of employment.

Her employment contract included a provision that limited her entitlements upon a termination without cause to her minimum entitlements under the *Employment Standards Act, 2000* (the "ESA"), plus an additional two weeks of notice or pay in lieu of notice. The provision required the employee to sign a release in favour of the employer to receive any of these amounts.

The contract also included a termination with cause provision that allowed the employer to terminate without notice in nearly a dozen prescribed circumstances, subject to any notice, pay in lieu of notice, or severance that may be required by the ESA.

Finally, the contract included a "savings" provision, which provided that if the employee's statutory entitlements exceeded her contractual entitlements, the ESA would override the contract.

In October 2020, the employer terminated the employee's employment on a without cause basis. On termination, the employer offered to pay the employee her contractual amounts in exchange for a signed release. When she did not do so, the employer did not pay her any amounts following her last day of work – including her minimum entitlements under the ESA (which, in the circumstances, was one week of notice or pay in lieu of notice).

Following her termination, the employer also:

- refused to reimburse the employee for legitimate business expenses she had

- incurred during her employment;
- issued the employee's Record of Employment ("ROE") a month late; and
 - refused to provide the employee with a reference or employment confirmation letter.

What Did the Court Decide?

On summary judgment, Justice Vermette made several key findings:

1. **Termination Provisions Violate ESA:** The court found that both the termination without cause and with cause provisions in the employment contract violated the ESA:
 - The termination with cause provision did not contemplate notice or pay in lieu of notice to include vacation pay, bonus, or the full suite of benefits to which the employee was entitled. The provision also required a release, which conflicted with the ESA.
 - The termination with cause provision contained circumstances amounting to "cause" that fell short of the higher ESA standard of "wilful misconduct, wilful disobedience, or wilful neglect of duty that is not trivial and has not been condoned" by the employer.
2. **Savings Provision Does Not Cure Violations:** The court reaffirmed that the savings provision contained in the employment contract did not cure the parts of the termination provisions that were in direct conflict with the ESA. The savings language did not demonstrate that the employer intended to comply with the ESA – rather, it simply created ambiguity.
3. **Post-Termination Conduct Can Lead to Punitive Damages:** The court awarded \$10,000 in punitive damages to the employee, finding that the employer's conduct in failing to pay ESA entitlements, failing to reimburse legitimate expenses, issuing a late ROE, and repeatedly failing to correct these issues even after being notified by the employee's lawyer, was a marked departure from the ordinary standards of decent behavior. Justice Vermette specifically noted that the award was intended to deter the employer, and other employers, from similar conduct.

Takeaways

This case reiterates the importance of drafting termination provisions that strictly comply with the ESA. Employers must ensure that employment contracts clearly and unambiguously set out all employee entitlements, including all benefits and vacation pay, without imposing conditions that conflict with the ESA.

This case also highlights that employers' conduct during and after a termination of employment will be heavily scrutinized by the courts in any eventual litigation. On the one hand, this means that even administrative mistakes – if not dealt with in a reasonable manner – could lead to increased liability. On the other hand, this also means that employers have the ability to materially reduce this liability by taking appropriate caution when ending an employment relationship.

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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