Mastering Termination Clauses: Navigating Ontario's Employment Legal Maze

Under Ontario's *Employment Standards Act, 2000 ("ESA")*, employment contracts must comply with certain minimum standards regarding termination, including notice of termination or pay in lieu of notice. However, beyond these basic requirements, employers and employees have the flexibility to negotiate additional terms related to termination, provided they meet or exceed the minimum standards set by the ESA. Or, at least, that is the thought.

Recent Ontario cases have highlighted the difficulties in drafting termination provisions and the need for clarity and compliance in their drafting. It appears that trend is continuing. In the Ontario Superior Court of Justice ("ONSC") decision, *Dufault v The Corporation of the Township of Ignace* ("*Dufault*"), Justice H. M. Pierce was presented with the question of whether employers have unrestricted authority to terminate employment "at any time" and in their "sole discretion". For those who provide advice to employers and employees, these phrases will be very familiar. They are ubiquitous in employment contracts in Ontario. That is why *Dufault* has the potential to have a massive impact on employment litigation in the years ahead.

FACTS

The plaintiff brought a wrongful dismissal action against her former employer after she was terminated without cause. The Township provided her with two weeks of notice in reliance on the without cause termination provision in the employment contract.

THE PROVISIONS

The termination clauses granted the Township the ability to terminate the agreement and the employee's employment either with or without cause.

Article 4.01 allowed the Township to terminate the agreement and the employee's employment "at any time and without notice or pay in lieu of notice for cause." The definition of "cause" included various scenarios, such as failure to perform assigned duties or acts of willful negligence.

Article 4.02 allowed the Township to terminate the agreement and the employee's employment "at its sole discretion and without cause" upon providing written notice.

WHAT'S THE ISSUE?

The plaintiff argued that these termination clauses were illegal and unenforceable for several reasons, including violations of the ESA, misinterpretation of termination standards, and misrepresentation of entitlements.

THE DECISION

The novel part of the *Dufault* decision was the court's treatment of the words "sole discretion" and "at any time" – words that are found in many employment contracts throughout Ontario. Justice Pierce addressed the misconception which allegedly exists that employers have absolute discretion to terminate employment at any time. She held that the use of the words **"its sole discretion"** and **"at any time"** invalidated the termination provision because there are situations within the *ESA* where an employer is prohibited from terminating an employee outright, and the language used attempted to override those provisions. Examples of such provisions include those prohibiting termination during certain leave periods or as retaliation for exercising rights under the *ESA*.

In both above examples, the *ESA* prevents an employer from terminating "at any time" it chooses and the choice to terminate is not in its "sole discretion."

WHAT ABOUT *HENDERSON V SLAVKIN*, 2022 ONSC 2964?

The ONSC dealt with a similar issue where an employment agreement included the following termination clause:

13. Your employment may be terminated without cause for **any reason** upon the provision of notice equal to the minimum notice or pay in lieu of notice and any other benefits required to be paid under the terms of the *Employment Standards Act,* if any. By signing below, you agree that upon receipt of your entitlement under the *Employment Standards Act*, no further amount shall be due and payable to you, whether under the *Employment Standards Act*,any other statute or common law.

Similar to *Dufault,* the plaintiff also argued that an employer cannot terminate an employee for any reason. However, in this case, Justice Carole Brown **upheld** the termination provision, finding that:

When considering the wording of the clause in issue and the intent of the parties demonstrated in the wording of the clause, **indicating compliance with the requirements of the ESA**, I cannot conclude that the clause could or should be interpreted as contrary to or inconsistent with the provisions of the ESA. I do not find anything which would suggest that the termination clause should be interpreted as contrary to the ESA.

How does this square with *Dufault?*

The *Dufault* termination provision in Article 4.02 did not include similar language explicitly indicating compliance with *ESA* requirements. The defendant in *Dufault* attempted to argue that the plaintiff's guaranteed rights under the ESA are protected when Article 4.02 is read in its entirety. However, Justice Pierce held that the absence of protections available under the ESA would not be specifically apparent to the employee as the agreement is drafted. The language must be explicit.

PRACTICAL THOUGHTS

What can employers take away from this ruling? For employers, this is but the most recent decision in a long line of cases that have taken a very strict interpretation of termination clauses when determining if they violate the *ESA*. In any case, employers are encouraged to take time to review and, if necessary, revise your existing employment contracts to ensure compliance with applicable legislation. If your termination provisions contain the words “at any time” or “sole discretion”, you should seek out legal advice. Seeking legal advice now can help mitigate the risk of costly disputes down the line.

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