

Recent Wrongful Dismissal Case Highlights Termination Risks and Lingering Pandemic Impacts

written by Tina Tsonis | July 8, 2022



Employers considering separating with employees on a for cause or without cause basis should be on alert in the wake of challenging new case law developments.

In *Gracias v. Dr. Walt Dentistry*, [\[1\]](#) the Ontario Superior Court of Justice addressed a number of hot-button wrongful dismissal issues that have vexed (and often perplexed) employers throughout the COVID-19 pandemic.

The Court found against the employer in *Gracias* on most material issues in the case, except the impact of the COVID-19 pandemic on the employee's reasonable notice period. Employers should take note of the following dispositions in *Gracias*:

1. Termination Clause & Contractual Enforceability

The employee in *Gracias* was terminated without cause. Her employment agreement contained a termination clause which limited her entitlements in a termination without cause to the minimum entitlements required by the Ontario *Employment Standards Act, 2000* (the “ESA”). [\[2\]](#)

The employment agreement also contained a provision stipulating that the employee could be terminated for just cause without notice or compensation in lieu thereof. The Court in *Gracias* found that this “for cause” termination provision contravened the ESA because it did not distinguish between just cause at common law and the higher statutory standard of “willful misconduct, disobedience or willful neglect of duty that is not trivial and has not been condoned by the employer,” [\[3\]](#) which must be met in order to disqualify an employee from their minimum statutory termination entitlements under the ESA.

Notwithstanding the apparent validity of the termination without cause provision that was directly at issue in *Gracias*, the Court held that the invalidity of the “for cause” provision rendered the termination without cause provision, and the contract as a whole, unenforceable. As a result, the employee in *Gracias* was not limited to her contractual entitlements in relation to the termination without cause, and was instead entitled to the considerably greater benefit of common law reasonable notice.

The decision in *Gracias* followed the earlier precedent set in *Waksdale v. Swegon North America*, [\[4\]](#) a case we previously wrote about in our bulletins titled [“Ontario Court of Appeal Casts Doubt on Enforceability of Majority of Termination Provisions”](#) and [“Ontario Decision: Important Reminder to Review and Update Termination Provisions”](#). The outcome was the same in *Rahman v. Cannon Design Architecture Inc.*, [\[5\]](#) another recent decision that followed *Waksdale*.

2. CERB Deductibility from Wrongful Dismissal Damages

The employee in *Gracias* was let go in March 2020, at the onset of the COVID-19 pandemic. She received \$16,000 in Canada Emergency Response Benefits (“CERB”) following the loss of her employment.

The Court in *Gracias* found that CERB was not deductible from the wrongful dismissal damages owed by the employer. As a result, the employee received undiscounted reasonable notice damages in respect of the same loss of employment for which she was compensated by CERB. Following *Gracias*, it remains an open question whether, and in what circumstances, CERB benefits may reduce wrongful dismissal damages. Courts in Ontario and other provinces have rendered inconsistent decisions about whether CERB may be credited towards mitigation, often with sparse reasons in support of their respective decisions either way.

3. Impact of the COVID-19 Pandemic on Notice Periods

The Court in *Gracias* rejected the notion that the COVID-19 pandemic invariably justifies a longer common law reasonable notice period.

The Court noted that the impact of the COVID-19 pandemic on particular sectors of the labour market was not uniform. It is therefore a matter of evidence in any given case whether the pandemic harmed any particular job market.

Ultimately, the Court accepted the employer’s evidence that there was a robust job market in the employee’s profession, which did not warrant a longer notice period in *Gracias*.

For further reading on how courts have weighed the impact of the pandemic on notice periods, see our earlier posts on the topic [“The Impact of the Pandemic on Notice Periods for Terminated Employees”](#) and [“Ontario Court Again Considers the Impact of the Pandemic on Notice Periods for Terminated Employees”](#).

In light of these wrongful dismissal case law developments, we strongly urge employers to:

- Review their employment contracts and termination clauses with legal counsel to promote legal compliance and enforceability; and
- Consult with legal counsel before proceeding with employment terminations, whether for cause or without cause.

Please feel free to reach out to the author or your regular Fasken lawyer if you have any questions or require support with termination of employment matters.

[\[1\]](#) 2022 ONSC 2967

[\[2\]](#) *Employment Standards Act, 2000*, SO 2000, c 41

[\[3\]](#) *Termination and Severance of Employment*, O. Reg. 288/01, under the ESA

[\[4\]](#) 2020 ONCA 391

[\[5\]](#) 2022 ONCA 451