# Termination Clauses In Ontario: Why So Many Fail And What Makes One Work

For Ontario employers, a well-drafted termination clause is one of the most valuable tools in an employment contract. Without one, a terminated employee is entitled to "reasonable notice" pay at common law—potentially up to 24 months of their regular pay depending on factors such as length of service, age, and the nature of the role.

However, with a written employment contract, this amount can be reduced through a "termination clause." This clause in the contract reduces the amount payable upon termination of employment to the minimum "termination pay" level established by the *Employment Standards Act* (which is only 1-8 *weeks* of the employee's pay, depending on the length of employment).

When drafted correctly, a termination clause can significantly reduce the amount of pay due to an employee. However, drafting these clauses is a technically demanding exercise, and courts apply strict rules when scrutinizing them. If a termination clause is struck down, the employer loses its protection entirely, and the employee becomes entitled to their full reasonable notice pay.

The following is an overview of some principles Ontario courts have recently applied in termination clause cases.

### The Court Will Look at the Whole Clause

Termination clauses usually have two parts: "without cause" and "for cause." The "without cause" provision deals with ordinary terminations, where reasonable notice pay (or termination pay under the *Employment Standards Act*) is appropriate. The "for cause" provision usually applies to employees who are fired for misconduct; generally, the employer does not need to provide additional pay to these employees.

Naturally, the employer usually relies on one part of the termination clause at a time (i.e., the employee is either terminated for cause *or* without cause). However, the Court of Appeal has confirmed that if there is a problem with *either* part of the termination clause, the *whole* clause must be struck down. Therefore, if there is a legal problem with the "for cause" provision, and an employee is fired "without cause," that employee is still entitled to their full "reasonable notice" pay (up to 24 months).

## "Just Cause" Provisions Must Reflect the "Wilful Misconduct" Standard

As mentioned above, termination clauses often state that an employee will not receive "reasonable notice" pay if terminated for "just cause." However, the *Employment Standards Act* sets a very high bar for employers who want to avoid paying the 1-8 weeks of termination pay required under that law. The employee must have committed "wilful misconduct, disobedience or wilful neglect of duty." Sometimes, the courts describe this "wilful misconduct" standard as "being bad on purpose."

The Courts are very wary of employers trying to lower that standard through the employment contract. For example, if a termination clause specifies that the employee can be terminated for cause based on a "breach of [the] employment agreement," it may be struck down—not every breach of the agreement will be serious enough to be "wilful misconduct." If the "for cause" termination provision is too broad, then the termination clause is invalid, and the employee is entitled to "reasonable notice" pay.

## "Base Salary" vs. Total Pay

For many Ontario employees, their base salary is only the starting point of their total compensation; they may also receive benefits or regular non-discretionary bonuses from their employer. These benefits and bonuses are generally considered when calculating the payment owed upon termination, as essential components of the employee's overall compensation.

Accordingly, the termination clause may be invalid if it only promises a continuation of the employee's "base salary." The courts may view this as an attempt by the employer to escape liability for benefit contributions and bonuses, which could render the entire termination clause invalid. This is a common drafting error, particularly in contracts for employees with variable compensation, commissions, or group benefits. Employers should ensure that termination clauses explicitly address all components of an employee's compensation package, or use language that captures total compensation rather than base salary alone.

## Failure to Honour the Clause May Invalidate It

If the employer wishes to rely on a termination clause in court to reduce their liability, they must abide by it themselves. In a recent Ontario case, the termination clause promised the employee the greater of two amounts: A) their minimum termination pay under the *Employment Standards Act*, or B) three months of pay.

However, when the employer terminated the employee, they only provided the lesser amount (A) and withheld the greater amount (B) until the employee signed a release. The Court found that, by doing so, the employer reneged on the contract and could not rely on the termination clause. The employee was accordingly entitled to their full reasonable notice—in this case, 9 months' pay.

## A Model of What Works

In the face of all these possible pitfalls, a recent Court of Appeal decision provides a useful illustration of what a properly drafted termination clause looks like in practice.

The clause applied to terminations "with or without cause" and stated plainly that the employee would receive only the minimum entitlements under the *Employment Standards Act*. It included a "failsafe" provision confirming that the statute would govern if any part of the clause conflicted with it and explicitly stated that

statutory compliance would satisfy any entitlement to common law reasonable notice.

When the employee argued that the clause was ambiguous, the Court of Appeal rejected that argument—confirming that the test is not whether someone might arrive at an incorrect reading, but how the clause can be reasonably interpreted. Because the agreement, when reasonably interpreted, was compliant with the Employment Standards Act, it was upheld.

**The lessons for employers are practical:**

- Use plain language that references the statute directly
- Cover both ‘with cause’ and ‘without cause’ terminations
- Include a failsafe
- State clearly that the clause displaces any entitlement to common law reasonable notice

A clause that does all of these things consistently gives an employer the best chance of having it enforced.

## The Bottom Line

Where termination clauses are concerned, the jurisprudence in Ontario continues to trend strongly in favour of employees. Boilerplate language is unlikely to hold up in court, and the cost of a poorly drafted clause—potentially months of additional notice pay—far exceeds the cost of getting it right.

*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.*

Authors: Joshua D. Lerner, Gareth Thorlakson

Lerners LLP