Termination Clauses Under The Microscope And Other Cautions

In 2011, Justice Wailan Low famously commented that there should be “no particular difficulty” in drafting an enforceable termination clause that restricts an employee’s entitlements upon termination to the statutory minimums. Sadly, notwithstanding Justice Low’s estimation, developments in 2024 demonstrate that this remains a Sisyphean task and will likely continue to be one in the future.

Recent jurisprudence has revealed a troubling convergence of trends in employment law. In particular,courts are increasingly unwilling to enforce contractual termination clauses, particularly in Ontario.This trend, combined with the apparent willingness of courts to find that employers have repudiated employment agreements, as well as the inflation of common law notice periods, is creating a significantly more challenging and expensive environment for employers. We anticipate that employee litigants will continue to be emboldened by these trends in bringing forward wrongful dismissal claims.

These recent developments serve as a reminder that Canada is not an at-will employment jurisdiction. Accordingly, to reduce the risk of employment litigation and mitigate potential settlement payouts, employers should conduct regular audits of their employment contracts and HR policies and practices to keep up with shifting judicial guidance.

Judicial hostility to enforcing termination clauses continues

Ontario courts, in particular, are continuing to take an increasingly hostile approach to enforcing termination clauses. The Ontario Superior Court of Justice decision in *Dufault v. The Corporation of the Township of Ignace* has become the latest favourite of employee-side counsel.

In *Dufault*, the ruling was partly based on the fact that the Ontario *Employment Standards Act, 2000* (the ESA) prohibits employers from terminating employees in certain specific situations, including at the end of statutorily protected leaves of absence, or in reprisal for exercising a right under the statute. This trial court decision concluded that a termination clause which contained language purporting to grant unchecked discretionary authority to the employer to terminate the employment relationship and, in particular, relatively standard contract language referring to termination in the employer’s “sole discretion”, “at any time”, was an overreaching attempt to contract out of the minimum requirements of the ESA. Accordingly, the

termination clause was found not to be enforceable.

Not long after *Dufault,* in *De Castro v. Arista Homes Limited*, the Ontario Superior Court of Justice found that the phrase "cause shall include", as used in the termination clause of an employment contact, was contrary to the ESA. The Court held that such language, which listed certain events that would constitute cause for termination, impermissibly broadened the circumstances in which the employer could terminate an employee without notice, or payment in lieu of notice, beyond those permitted circumstances in the applicable ESA regulations.

The critical takeaway from these cases is employers must take a very defensive approach when drafting termination clauses, recognizing that this exercise is becoming increasingly nuanced and technical.

Interestingly, the courts in British Columbia, as contrasted with Ontario, seem to be prepared to be significantly more purposive and practical in their assessment of termination provisions. This difference in approach is evidenced by the appellate decision in *Egan v. Harbour Air*. In *Egan*, the employer was successful in defending its termination clause. In its reasons, the Court of Appeal observed that the trier of fact "should seek to determine the true intentions of the parties and should not search for ambiguity to render the clause unenforceable." Unlike in *Dufault* and *De Castro*, the Court in *Egan* was willing to conclude that, if the language of the termination clause clearly intended to incorporate the notice provisions under applicable employment standards legislation, the common law presumption of reasonable notice is rebutted.

In a rare glimmer of hope, more recently, the Ontario Superior Court of Justice released its decision in *Bertsch v. Datastealth Inc.*, [PDF]. In that case, a wrongful dismissal claim by an employee was dismissed on the basis that a plain reading of the termination clause did not result in a breach of the ESA, and was clear and unambiguous in its intent to exclude common law notice upon termination. Given the overarching trend towards invalidating termination clauses, it may be too soon to construe this decision as a "win" for employers that could signal more favourable decisions in the long-term, even assuming this decision is not successfully appealed.

Increased findings of employer repudiation of contracts

Another judicial trend of potential concern to employers is the explosion of claims by employees that employers have repudiated the employment contract. Courts are increasingly prepared to strictly examine the employer's words and conduct not just at the contract formation stage, but also at the point of termination.

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There are several cases finding that, under certain circumstances, the employer has repudiated the underlying employment contract and can no longer rely on its terms, regardless of whether the termination clause would otherwise be enforceable. Bases for potential repudiation claims include simple errors where the employer miscalculates a statutory requirement or contractual entitlement, or where the employer erroneously requires an employee to sign a release in exchange for an unconditional contractual entitlement.

For example, in *Perretta v. Rand A Technology Corporation*, the employer mistakenly withheld the employee's contractual severance payment on the condition that she sign

a full and final release. The Court found that, in doing so, the employer no longer intended to be bound by the employment contract. Therefore, the employee was entitled to reasonable notice of termination at common law instead of notice pursuant to the termination clause, which sought to limit the employee's entitlements upon termination to the employee's minimum entitlements pursuant to the ESA.

Recently, in *Klyn v. Pentax Canada Inc.*, the British Columbia Superior Court followed a similar approach in finding that the employer had repudiated the employment agreement by failing to pay out the commission payments owed to the employee as part of his severance. Notably, the Court also awarded $25,000 in punitive damages to the employee on the basis that the employer had "reprehensibl[y]" withheld payments to which he was legally entitled.

Lengthening notice periods

A further judicial trend is the inflation of common law reasonable notice periods in situations where there was no termination clause, or where the clause was found to be unenforceable. There is no absolute upper limit on the length of the time period that will constitute reasonable notice for termination of employment at common law. At the same time, established appellate precedent had indicated that, generally, only "exceptional circumstances" will support a notice period in excess of 24 months.

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However, recent decisions from the Ontario Court of Appeal have broken this presumptive ceiling. In *Lynch v. Avaya Canada Corporation*, an employee was awarded a 30-month notice period. The Court identified certain factors such as the employee's age, unique position, contributions to the employer, and his notable performance as an employee as constituting the exceptional circumstances required to break the previously established ceiling. Similarly, in *Currie v. Nylene Canada Inc.*, the court awarded the employee 26 months of reasonable notice at common law.

Notably, in these cases, the employees' ages and years of service seem to have been the basis for the exceedingly high common law notice periods — not "exceptional circumstances" by any means. In both cases, the employees were close to retirement age and had worked with their respective employers for more than 35 years. The lack of an objective legal test for "exceptional circumstances" and a precedent of a high 30-month ceiling provides more latitude for courts to justify granting such notice periods in the future.

Outlook for 2025 and beyond

Despite the helpful decision in *Bertsch,* the general pattern in the case law suggests employees are unlikely to shy away from litigating or threatening to litigate dismissals, including the enforceability of employment contracts. The unfortunate reality is employment law is becoming increasingly technical and complicated. We are already seeing that the courts are willing to accept new and innovative arguments in an apparent effort to find termination clauses unenforceable, despite their plain language. There is also a continued risk of novel "back-door" attacks on other parts of the employment contract. For example, employees are raising arguments based on the drafting of ancillary documents, such as equity or bonus plans, workplace policies, or benefits documents.

It remains crucial for employers to seek expert employment advice with respect to the drafting of both the employment contract and the termination paperwork. A misstep at

either the inception of the employment relationship, or at the time of its termination, could greatly increase the risk of liability for the employer. Organizations are therefore well advised to adopt a high degree of vigilance. A "hands-on" approach by human resource teams, in conjunction with internal legal departments and external advisors, is warranted when documenting terms and conditions of the employment relationship, addressing ongoing employment issues, and making and executing on personnel decisions. Employers are also encouraged to review their current form agreements with a view to ensuring the form remains appropriate for new employees and are warned against using AI-generated or fresh-off-the-internet stock employment forms. Employers should look for opportunities to update forms that would no longer withstand judicial scrutiny.

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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