

Termination Provisions Scrutinized In Dufault Case



A recent decision of our Superior Court out of Thunder Bay has caught our attention (and the attention of most employment lawyers) as another example of the court broadening the application of the Ontario Court of Appeal's 2020 *Waksdale* case.

In *Dufault v. The Corporation of the Township of Ignace*, 2024 ONSC 1029, the Court invalidated a termination clause in a fixed term contract because the clause violated the *Employment Standards Act, 2000* ("ESA") on three grounds plaintiff's counsel put forth:

- First, the "for cause" clause, which attempted to define "cause" at common law, did not specifically mention the only exception which would deprive an employee of their minimum statutory entitlements under the ESA namely, for "wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer." We are not surprised by this finding.
- Second, the employer contravened the ESA by only referencing base salary in their without notice termination clause. The clause provided for a greater than formula of base salary times a number of weeks to a cap or the period required by the ESA. The Court concluded that based on reviewing this employee's employment agreement, the company paid the employee more than base salary which would comprise this employee's "regular wages." The Court cited s. 60 of the ESA which says that an employee's wages may not be reduced during the notice period when the employee is entitled to receive all regular wages. Put another way, the employee has to be kept whole on all fronts of compensation that they regularly enjoy as part of their employment. The judge does not stop there but goes on to state that the salary continuance proposed in the without notice cause also violates s. 61 of the ESA which requires the employer to pay a lump sum equal to the amount that would have been paid if working notice of termination and been pursuant to s. 60 of the ESA.
- Third (and perhaps the most stunning ground), **the Court agreed with plaintiff's counsel that the use of the phrases "sole discretion" and "at any time" referencing when an employer can terminate an employee's employment is not absolute and violates times when the ESA prohibits an employer from terminating an employee.** For example, on the conclusion of an employee's leave (s. 53) or in reprisal for attempting to exercise a right under the Act (s. 74). These are hypothetical arguments to find violations of the ESA, which bear no reality to

what happened in the case. We refer to this as the “Waksdale effect.” This is having a profound impact on the enforceability of termination clauses, particularly those that purport to limit termination entitlements to the minimum amounts under the ESA.

It is worth reproducing the without cause termination clause that was attacked to understand how plaintiff’s counsel made these arguments and how the court reached its conclusions:

4.02 The Township may at its sole discretion and without cause, terminate this Agreement and the Employee’s employment thereunder at any time upon giving to the Employee written notice as follows:

(i) the Township will continue to pay the Employee’s base salary for a period of two (2) weeks per full year of service to a maximum payment of four (4) months or the period required by the Employment Standards Act, 2000 whichever is greater. This payment in lieu of notice will be made from the date of termination, payable in bi-weekly installments on the normal payroll day or on a lump sum basis at the discretion of the Township, subject at all times to the provisions of the Employment Standards Act, 2000.

(ii) with the exception of short-term and long-term disability benefits, the Township will continue the Employee’s employment benefits throughout the notice period in which the Township continues to pay the Employee’s salary. The Township will continue the Employee’s short-term and long-term disability benefits during the period required by the Employment Standards Act, 2000 and will pay all other required accrued benefits or payments required by that Act.0

(iii) all payments provided under this paragraph will be subject to all deductions required under the Township’s policies and by-laws.

(iv) any further entitlements to salary continuation terminate immediately upon the death of the Employee.

(v) such payment and benefits contributions will be calculated on the basis of the Employee’s salary and benefits at the time of their termination.

Key Takeaway

Has the judge in this case gone too far in parsing the without cause termination clause? We think so. The judge is also silent about the fact the clause itself is subject to the ESA. The judge’s finding with respect to the for cause termination clause was enough to strike the entire termination clause relying on the well known and well established *Waksdale* decision. The judge has now made it easier for plaintiff’s counsel to attack termination clauses if the severance payment is set up as a salary continuance, the without notice clause does not deal with every benefit of employment (i.e. commissions, vacation pay, paid sick days, benefits etc.) in the clause, or if the clause includes the phrases “at its sole discretion” or “at any time”, designed to provide the employer with absolute ability to control the timing of the separation. In our view, this is problematic on a number of fronts.

Hopefully, the employer will appeal this case. However, in the meantime, employers need to deal with this case and how it may affect termination provisions both past and present.

We encourage employers to review existing employment agreements.

Originally published 4 March, 2024.

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.

30 April 2024

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