The Courts In Ontario Continue To Find Common Language In Termination Clauses Unenforceable



Both employers and employees often do not understand the significance of enforceable termination clauses in employment contracts. If an employee is terminated without cause and they do not have enforceable termination provisions in their employment contract, an employer can find themselves paying that employee many months of notice or pay in lieu thereof, far more than the weeks of notice they would otherwise be required to provide.

The Ontario *Employment Standards Act* states that if an employee is terminated without cause, they are entitled to a minimum of one week of notice for every year of service with their employer, to a maximum of 8 weeks. Notice can be provided as 'working notice' or 'pay in lieu of notice'. Working notice is where the employee continues to work for the employer through the notice period after they have been informed of their forthcoming termination date. Most employers chose to provide terminated employees with pay in lieu of notice, where the employer immediately pays the employee the value of what they would have earned during the applicable notice period. The notice period pursuant to the *Employment Standards Act* is known as "statutory notice".

In addition to notice or pay in lieu of notice, the *Employment Standards Act* requires employers with a payroll in excess of $2.5 million per year to pay their employee severance pay if that employee has been working for them for 5 years or more. Employees are entitled to 1 week of severance pay for every year of service with the employer, to a maximum of 26 weeks.

What many employees and employers do not know is that if the termination clause in their employment contracts is not enforceable, the employee is not restricted to the statutory notice and severance pay under the *Employment Standards Act* and they can claim that they are entitled to, what is normally a far greater amount of common law notice.

Over the last few years, the courts in Ontario have consistently come out with new rulings that have taken issue with the wording of termination clauses thereby limiting their enforceability. Most employment contracts have both a 'for cause' and a 'without cause' termination clause. If many employees and employers were to look at their employment contract right now, they will likely see two termination clauses,

and those clauses will likely say something along the lines of:

Your employment may be terminated for cause without notice, pay in lieu of notice, termination pay, or severance pay.

Your employment can be terminated by the employer without cause upon providing you with your minimum notice or pay in lieu of notice and any other payments required by the Employment Standards Act.

Unfortunately for employers and fortunately for employees, the Courts in Ontario have ruled that clauses such as these are now void and unenforceable. Even if you have a "without cause" termination provision that is when considered alone enforceable, if your "for cause" termination provision is unenforceable, then all termination provisions in the contract will be found to be void and unenforceable.

If an employment contract contains a termination clause that is unenforceable, or if there is no termination clause at all, that employee is entitled to common law notice.

"Common law" is a term that means judge-made law that is developed over time through decisions in court cases. Common law notice, also known as the "reasonable notice period", can be thought of as the 'default' that applies if there is no other amount that validly prescribed what is owing to the employee in the event of the termination of their employment. The reasonable notice period that an employee is entitled to is 'calculated' by considering various factors such as the employee's age, length of service, the character of their employment, and the availability of comparable employment. Since the Courts typically do not award more than 24 months of common law notice, this is considered to be the 'ceiling' of reasonable notice.

Calculating the reasonable notice period is done on a case-by-case basis. Generally speaking, high-level or senior employees, those with very significant compensation packages or those employees that are older will be found to be entitled to a longer reasonable notice period. If the employee has a low prospect of finding comparable employment in their geographic area, this may also militate towards a higher reasonable notice period. Because the reasonable notice period that an employee is entitled to is not set in stone, employers can spend significant time and money on legal fees arguing over the applicable reasonable notice period.

Many employers may think that because they have had their employment contracts reviewed by a lawyer in the last few years, their employment contracts are probably still enforceable. In reality, the rulings from the Ontario courts over the last few years have repeatedly found that most 'standard' termination clauses are now no longer valid and enforceable.

For example, the Ontario Superior Court ruling in *Dufault v. The Corporation of the Township of Ignace* 2024 ONSC 1029, that was released in February 2024, is the newest case that has caused employment lawyers across the province to scramble to review the language of their termination clauses. Most 'without cause' termination provisions state that an employer can terminate the employee 'at its sole discretion' or 'at any time'. However, the Court found that this language rendered the termination clause void and unenforceable, by stating that there are some circumstances where an employee cannot actually be terminated, such as after returning from a leave or as reprisal for exercising a right under the *Act*, and as such, the employer cannot in fact terminate the employee 'at any time'. As a result, many employees who may previously have been limited to the statutory notice owing under the *Act,* are now entitled to the far greater amount of common law notice.

If you are an employee, it is worth contacting an employment lawyer to inquire about the enforceability of your employment contract prior to signing any termination offer made to you by your employer. For example, if you were an employee for 30 years and were terminated without cause, your statutory notice period would only be 8 weeks (this notice period does not including statutory severance pay, if applicable) while your common law reasonable notice period could be as high as 20-24 months.

If you are an employer, the cost of ensuring you have enforceable termination clauses in your employment contracts could save you tens of thousands of dollars, or more in the long run. It is possible to have existing employees sign a new employment contract with enforceable termination clauses but there are crucial steps that must be followed to ensure that those new employment contracts are valid and enforceable. It is therefore important to contact an employment lawyer that can assist you in ensuring that your termination clauses are enforceable and who can guide you through the process of updating your contracts.

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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