Watch Your Language: Two-letter Word Renders Entire Termination Notice Limits Clause Unenforceable

Termination without cause may cost your company a fortune, especially if the employee sues for wrongful dismissal. To avoid these costs, many employers insert language into the employment contract stating that they only have to pay the employee the minimum notice required by employment standards laws in the event of termination without cause. While these clauses are perfectly legal, they also raise suspicions that the employer is taking advantage of the employee. Consequently, courts scrutinize termination limits clauses very strictly against the employer and won't enforce them if the provision can be interpreted in any way as taking away the employee's rights and entitlements under the employment standards law. Exhibit A is a recent case from the Ontario Court of Appeal, the province's highest court, striking down a termination notice limits clause based on the inclusion of one tiny word – "or."

The *De Castro* Case

The case began when a homebuilding company terminated an employee without cause after 4 years and 9 months of service and paid her 4 weeks' salary in lieu, the minimum notice required by the Ontario *Employment Standards Act* (ESA). The employee's contract contained a clause limiting her termination notice to the ESA minimum. The provision covered both termination without cause and termination with cause. The employee sued for wrongful dismissal claiming that the clause was unenforceable because the "for cause" provision violated the ESA. Specifically, the provision stated:

"If you are terminated for Cause or you have been guilty of wilful misconduct, disobedience, breach of Employment Agreement, **or** wilful neglect of duty that is not trivial and has not been condoned by ARISTA, then ARISTA will be under no further obligation to provide you with pay in lieu of reasonable notice or severance pay whether under statute or common law" (emphasis added).

The problem is that the grounds listed after the word "or," that is, "wilful neglect of duty that is not trivial and" not condoned by the employer, isn't grounds for termination without cause under the ESA.

This might have been a moot point since the employee in this was fired **without** cause.

But the word “or” brought both parts of the termination notice limits clause into question. According to the Court’s interpretation, by linking the phrases with “or,” the company was saying that it could limit termination notice if **either** it terminated the employee with cause **or** it terminated the employee without cause for grounds not permissible under the ESA. As a result, the entire clause was unenforceable [*De Castro v. Arista Homes Limited*, 2025 ONCA 260 (CanLII), April 3, 2025].

Takeaway

The *De Castro* ruling is the most recent case in which a court seized upon a seemingly tiny flaw in the drafting to invalidate a termination notice limits clause. So, any company that includes such a provision in its employment contracts needs to studiously avoid using any language that could be interpreted as allowing for a termination without notice in circumstances where notice would be required under their province’s employment standards law. They should also recognize that courts will do to them what the Ontario high court did to the employer in *De Castro*, namely, seize on any ambiguity in the language to interpret the clause in the employee’s favour. **Bottom Line:** The court will find the clause unenforceable and allow the employee to collect common law notice, punitive and other damages for wrongful dismissal.