

Sooner the Better: Employers in Canada Should Really Review Their Termination of Employment Clauses

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A recent Ontario Court of Appeal (“ONCA”) decision signals a pressing need for Canadian employers to review and consider updating their contractual termination of employment provisions. Otherwise, employers are at risk of incurring higher than expected liabilities.

The last few years saw significant legal developments on this issue, driven largely by the ONCA’s decision in *Waksdale v. Swegon North America Inc.* ([2020 ONCA 391](#)). There, the Court held that a single termination provision’s failure to comply with the Ontario *Employment Standards Act, 2000* (“ESA”) may invalidate all of the contract’s termination provisions, even if the employer did not rely on the noncompliant provision to terminate the employee’s employment. You can read our previous commentary on that Court decision [here](#).

Following the *Waksdale* decision, it has become more difficult for employers to successfully enforce their contracts. This saga recently continued in the Ontario Superior Court of Justice’s (“ONSC”) holding in *Dufault v. The Corporation of the Township of Ignace*, ([2024 ONSC 1029](#)), the substantive components of which the ONCA declined to revisit with its December 2024 *Dufault v. Ignace (Township)*, ([2024 ONCA 915](#)) decision.

Background

In *Dufault*, the employer invoked the without cause employment termination provision and, consistent with that provision, provided the employee with their statutory ESA minimum entitlements. The employee challenged that provision as unenforceable.

The Trial Court Decision

The ONSC agreed with the employee, holding that the provision contravened the ESA in several respects, as follows:

1. the expansive language of the *separate and not utilized* “for cause” termination provision went beyond the ESA criteria for dismissal without notice. Instead, the Court found it referred to the common law concept of “for cause” rather than the ESA’s narrower threshold of “wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer”;
2. the language of the “without cause” termination provision restricted the calculation of entitlements to the “employee’s base salary”, whereas the ESA provides that the employee is entitled to receive all “regular wages”, including other entitlements such as vacation pay; and
3. the expansive language of the “without cause” termination provision used in the contract gave the employer “sole discretion” to terminate the employee’s employment at “any time”, effectively carving out certain protective sections of the ESA such as those preventing the employer from terminating an employee upon return from leave or in reprisal for attempting to exercise a right under the ESA. Thus, the Court concluded that the right of the employer to dismiss is not absolute and cannot be at

its “sole discretion” or at “any time”.

The Court’s first two reasons for voiding the termination provision are based in established precedent; the third reason is novel.

The Court of Appeal Decision

On appeal, the ONCA declined to revisit the substantive components of the lower court’s decision, and instead upheld its precedent in *Waksdale* by reiterating that if one termination provision in an employment contract violates the ESA, all termination provisions in the contract may be invalid.

Next Steps

Employers across Canada would be wise to review their existing employment contracts, as well as their templates for future hires, to correct any inconsistencies with this recent jurisprudence. Deficient contracts with existing employees can typically be amended by providing fresh consideration (e.g., a signing bonus, increase in pay, or some other benefit). Otherwise, employers may unexpectedly find themselves liable for termination entitlements that they did not bargain for, including common law reasonable notice entitlements which, in some circumstances, can be significantly greater than what the ESA requires.

Contact Mintz’s Canadian Employment Practice if you require assistance reviewing and updating your business’ termination of employment clauses.

Authors



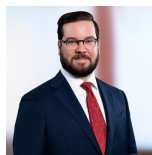
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