



What's New in HR Law

Contract Permitting Termination in an Employer's "Sole Discretion... at Any Time" Unenforceable

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Bottom Line

In a decision dated February 16, 2024, the Ontario Superior Court of Justice struck down a termination provision that stated the employer could terminate an employee's employment in its "sole discretion... at any time". The judge held that this, among other components of the provision, violated the *Employment Standards Act, 2000* ("ESA"), and that the employer could not rely on it to limit the employee's entitlement to termination notice.

The Court's decision will have significant impact on existing employment agreements. Employers ought to review their existing employment agreements with this decision in mind.

The Plaintiff's Contract of Employment

In *Dufault v. The Corporation of the Township of Ignace*, 2024 ONSC 1029 ("Dufault"), the Plaintiff employee was employed as a Youth Engagement Coordinator pursuant to a fixed-term employment agreement for just over two years (the "Agreement"). However, approximately two months into the Agreement, the Plaintiff's employment was terminated by the Defendant employer on a without cause basis.

This article is for the purposes of only general information and does not constitute legal advice or opinion.

The Agreement included comprehensive termination provisions that ostensibly permitted the Defendant to terminate the Plaintiff's employment without notice, or with minimum notice (collectively referred to as the "Termination Provisions"):

4.01 The Township may terminate this Agreement and terminate the Employee's employment at any time and without notice or pay in lieu of notice for cause. If this Agreement and the Employee's employment is terminated with cause, no further payments of any nature, including but not limited to, damages are payable to the Employee, except as otherwise specifically provided for herein and the Township's obligations under this agreement shall cease at that time. For the purposes of this Agreement, "cause" shall include but is not limited to the following:

(i) upon the failure of the Employee to perform the services as hereinbefore specified without written approval of Municipal Council and such failure shall be considered cause and this Agreement and the Employee's employment terminates immediately;

(ii) in the event of acts of willful negligence or disobedience by the Employee not condoned by the Township or resulting in injury or damages to the Township, such acts shall be considered cause and this Agreement and the Employee's employment terminates immediately without further notice.

[...]

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*.

[...]

[Emphasis added]

The Plaintiff asserted that the Termination Provisions violated *ESA* and were unenforceable on, essentially, three grounds:

1. the "for cause" portion of the Termination Provisions purported to allow the Defendant to terminate the Plaintiff's employment without notice without meeting the statutorily required standard;
2. the Agreement purported to only provide the Plaintiff with their entitlements based on their "base salary"; and
3. the Agreement purported to allow the Defendant to terminate the Plaintiff's employment in its "sole discretion...at any time".

In contrast, the Defendant maintained that the Termination Provisions, when read in their entirety, complied with the *ESA* and were enforceable.

The Court Rules – Provision Permitting Termination "At Any Time" Not Enforceable

The Court ruled that the Termination Provisions were unenforceable. The Plaintiff was therefore entitled to significantly greater termination notice than that set out in the Agreement.

The Termination Provisions ostensibly allowed the Defendant to terminate the Plaintiff's employment without notice at a lower standard than required by the *ESA*. As determined by the Court of Appeal for Ontario in their decision of *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391, such termination provisions contravene the *ESA* and are therefore unenforceable. Similarly, the Termination Provisions contravened the *ESA* by requiring the Defendant to provide

termination notice based only the Plaintiff's "base salary" rather than based on "wages". As the meaning of "wages" under the *ESA* captures broader forms of compensation beyond an employee's salary, the entitlements provided by the Termination Provisions were therefore insufficient.

Most notably, the Court ruled that the Termination Provisions were unenforceable because they purported to permit the Defendant to terminate the Plaintiff's employment in its "sole discretion... at any time". By permitting the termination of the Plaintiff's employment at any time, the Court ruled that the Termination Provisions contravened the job protections provided by the *ESA*, specifically on the conclusion of an employee's statutory leave of absence, or in reprisal for attempting to exercise a right under the *ESA*.

In the result, the Court awarded the Plaintiff with the remainder of their fixed-term Agreement (i.e., nearly two years) as notice for the termination of their employment.

Takeaway – Employers May Want to Revisit Their Contracts Once Again

The Court's decision to render termination provisions unenforceable on the basis that it permitted an employer to terminate an employee's employment at its "sole discretion...at any time" is a new development in the ever-evolving employment contractual interpretation case law. Employment agreements with similar language that were previously arguably enforceable may be called into greater question as a result of the reasoning in *Dufault*. It is prudent for employers to review their existing employment agreements (particularly if they have not done so for an extended period of time) to ensure they reflect current law and remain enforceable.

Need More Information?

For more information or assistance with employment agreements, contact [Clifton Yiu](mailto:cyyu@filion.on.ca) at cyyu@filion.on.ca or your [regular lawyer](#) at the firm.



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