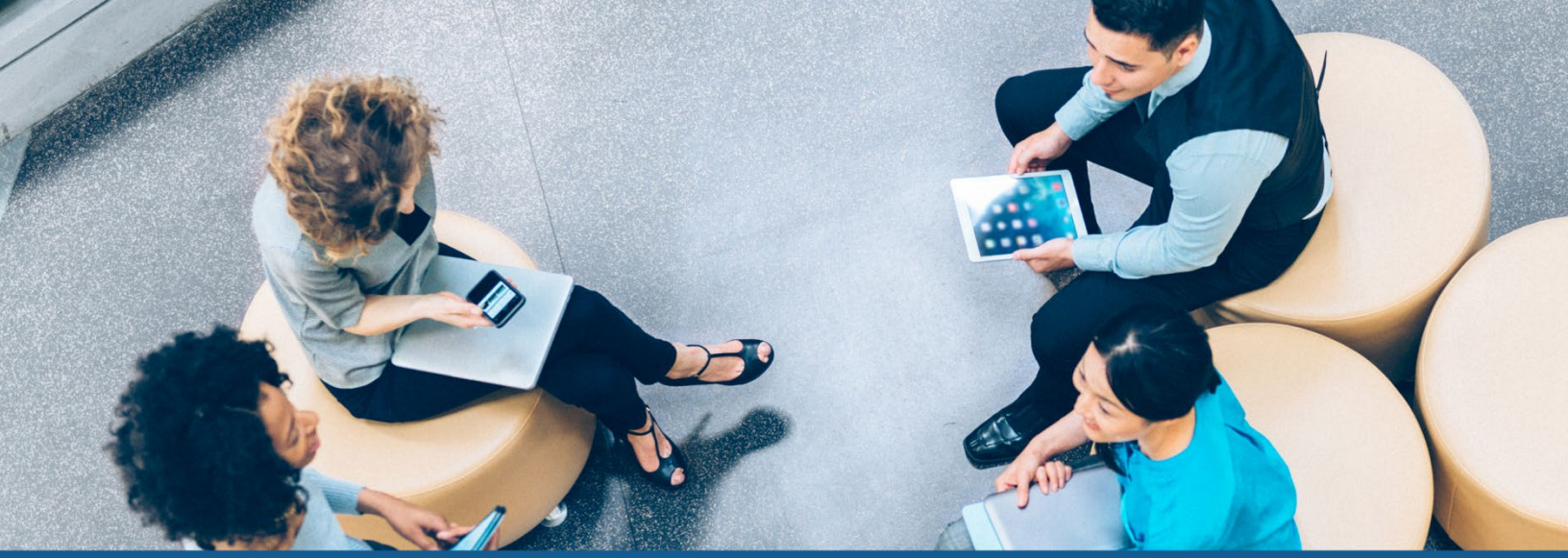

What's New in HR Law

Dufault v. Ignace (Township): The "Sole Discretion… at Any Time" Saga Continues

January 29, 2025| By Alyssa Johnson

Bottom Line

The Ontario Court of Appeal ("ONCA") recently issued *Dufault v. Ignace (Township)*, the latest in a series of decisions affirming that contractual termination provisions which are non-compliant with the *Employment Standards Act, 2000* (the "*ESA*") will be invalid. The ONCA found that the language in the "for cause" termination clause which provided that an employer could terminate employment without providing any notice or payment in lieu of same in conditions breached the *ESA*. This followed the Court's earlier decision in *Waksdale v. Swegon North America Inc* ("*Waksdale*").

The Employer has filed an application for leave for appeal to the Supreme Court of Canada. There has also been a leave application raising similar issues from British Columbia. If either or both are granted, the Supreme Court of Canada could provide welcome clarity regarding the interpretation of employment contracts across Canada.

Background Facts

The Employee was employed as a Youth Engagement Coordinator pursuant to a fixed-term employment agreement for just over two years (the "Agreement"). Approximately two months into the Agreement, the Plaintiff's employment was terminated by the Employer on a without cause basis. The Plaintiff alleged that the termination provisions in the Agreement contravened the *ESA*, such that she was wrongfully dismissed.

The Ontario Superior Court upheld the claim on the basis that language permitting the Employer to terminate the Plaintiff's employment at its "sole discretion… at any time" 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*. For a full discussion of the Superior Court decision, see our previous Insight.

Ontario Court of Appeal Decision

At the ONCA, the Employer argued that both the "for cause" and "without cause" clauses were compliant with the *ESA*. In the alternative, the Employer argued that if the "for cause" clause was contrary to the *ESA*, it should be severed and the "without cause" clause preserved, providing the ONCA with an opportunity to revisit its decision in *Waksdale*.

The ONCA dismissed the appeal "solely on the basis of one aspect of the 'for cause' termination clause" and declined to consider the Employer's alternative arguments, including declining to revisit *Waksdale*.

The ONCA affirmed that the following language may result in a termination clause being found unenforceable:

1. The language "*cause shall include but is not limited to the following*" did not clearly limit "for cause" terminations to only actions meeting the wilful misconduct standard.

2. The language "*the failure of the Employee to perform the services as hereinbefore specified*" was not conduct that amounted to wilful misconduct and was therefore improperly included under the contractual definition of "cause".

The ONCA expressly declined to revisit the lower court's findings on the "sole discretion… at any time" language. As such, employment contracts which permit employers to terminate "in their sole discretion… at any" time may be unenforceable as a result of the lower court's decision in *Dufault*.

Employer Seeking Leave to Appeal to the Supreme Court of Canada

The Town of Ignace has confirmed that it has applied for leave to appeal to the Supreme Court of Canada. The vast majority of such applications are dismissed. However, there is a British Columbia Court of Appeal decision in *Egan v. Harbour Air Seaplanes LLP* ("*Egan*") that is the subject of an application before the Supreme Court which deals with some similar issues.

In *Egan,* the BC Court of Appeal upheld the termination of an employee under similar discretionary language: "The Harbour Air group may terminate your employment at any time without cause so long as it provides appropriate notice and severance in accordance with the requirements of the *Canada Labour Code*." Given that this clause was found to be enforceable and in light of the divergent approaches between BC and Ontario, the Supreme Court of Canada may take this opportunity to opine on the issue of enforceability of termination clauses.

Takeaways

Employment contracts in Ontario must be drafted in compliance with the principles in both *Waksdale* and *Dufault*; in BC, the principles in *Egan* apply. 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 the most recent changes to the law.

We will continue to monitor the status of these leave applications and provide updates on further developments.

Need More Information?

For more information or assistance related to employment contracts and employee terminations, contact Alyssa Johnson at ajohnson@filion.on.ca or your regular lawyer at the firm.

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