Employers Rejoice: Court Upholds ESA-Minimum Termination Clause

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Bottom Line

A series of recent Ontario cases confirm that an employment agreement's termination clause is entirely unenforceable if any part of the clause is found to breach the *ESA*. These illustrate what employers should not do but offer little guidance on what courts consider to be an enforceable ESA-minimum termination clause.

The recent case of *Bertsch v DatastealthInc.*, 2024 ONSC 5593 provides welcome clarity for employers regarding the enforceability of termination clauses. In this case, the Ontario Superior Court of Justice (the "Court") concluded that an employment agreement's termination clause clearly and unambiguously limited the employee's entitlement upon termination to the minimum amounts under the *Employment Standards Act, 2000* (the "*ESA*"). This case provides welcome direction for employers.

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

Facts

The plaintiff had been employed for approximately eight and a half months prior to his termination in June 2024. His written employment agreement contained a clause that limited entitlements upon termination to only the minimum amounts that the employee provided by the *ESA*.

Specifically, the termination clause in question read:

> 5. Termination of Employment by the Company: If your employment is terminated with or without cause, you will be provided with only the minimum payments and entitlements, if any, owed to you under the [ESA] and its Regulations,…including but not limited to outstanding wages, vacation pay, and any minimum entitlement to notice of termination (or termination pay), severance pay (if applicable) and benefit continuation. You understand and agree that, in accordance with the ESA, there are circumstances in which you would have no entitlement to notice of termination, termination pay, severance pay or benefit continuation.
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> You understand and agree that compliance with the minimum requirements of the ESA satisfies any common law or contractual entitlement you may have to notice of termination of your employment, or pay in lieu thereof. You further understand and agree that this provision shall apply to you throughout your employment with the Company, regardless of its duration or any changes to your position or compensation."

The employment agreement also contained the following "failsafe" clause, dealing with the potential for any invalidity of the agreement:

> 11.(a) If any of your entitlements under this Agreement are, or could be, less than your minimum entitlements owning under the [ESA] …you shall instead receive your minimum entitlements under the [ESA]…
>
> (h) This Agreement constitutes the complete understanding between you and the Company with respect to your employment, and no statement, representation, warranty or covenant have been made by you or the Company with respect to this Agreement except as expressly set forth herein. The parties have expressly contemplated whether there are any additional implied duties owed by the Company to you, at common law or otherwise, outside the written terms of the Agreement or under statute and confirm that there are no such obligations. This Agreement shall not be altered, modified, amended or terminated unless evidenced in writing by the Company."
>
> (k)… The invalidity, for any reason, of any term of this Agreement shall not in any manner invalidate or cause the invalidation of any other term thereof…"

Upon termination, the employer provided the plaintiff with four (4) weeks of pay in lieu of notice – more than the one (1) week of pay in lieu of notice to which he was entitled under the *ESA*.

The plaintiff brought a wrongful dismissal claim alleging that the employment agreement provisions were unenforceable, because they did not reference the statutory exemptions to notice of termination outlined in *O. Reg. 288/01: Termination and Severance of Employment* under the *ESA* ("Regulation"). Under the Regulation, an employee will not be entitled to any notice of termination under the *ESA* if they are "guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer." Employees who are terminated for misconduct that does not rise to this level are still entitled to notice of termination pursuant to the *ESA*. (We previously wrote about this distinction here.)

Prior to this case, it was not clear whether a termination clause needed to specifically reference this Regulation in order for the clause to be enforceable.

The employer brought a motion under Rule 21.01(1) of the *Rules of Civil Procedure*, seeking to have the case dismissed if the Court found that the termination clause did not breach the *ESA* or the Regulation.

The Decision

The Court held that a Rule 21 motion was appropriate in this case as the interpretation of the enforceability of the employment agreement provisions prior to a trial would be "useful, efficient and just" (at paragraph 17). The Court noted that if the provisions at issue were found to be valid and enforceable, the claim could be disposed of in its entirety.

Which is exactly what occurred: the Court found that, while the contractual terms were admittedly "not simple," they were clear and unambiguous. Therefore, the Court stated, there was no reasonable alternative interpretation that could result in the provisions violating the *ESA* or the Regulation. Having concluded that the provisions validly limited the plaintiff's entitlements upon termination, and that the plaintiff had no claim to common law notice, the Court dismissed the claim.

Takeaways

This case provides welcome clarity and guidance for employers in drafting termination clauses that effectively limit employees' entitlements upon termination. This case also shows that termination clauses can be valid and enforceable even if they do not specifically reference the "wilful misconduct, disobedience or wilful neglect of duty" standard in the Regulation. Further, the Court effectively confirms that termination clause terms need not be overly simple in order to be enforceable, so long as they are clear and unambiguous.

Prudent employers may wish to review their termination clauses in light of this case. Our experienced legal team is available to assist and advise.

Need More Information?

For more information or assistance with drafting and reviewing employment agreements, contact Aileen Gardiner at AGardiner@filion.on.ca or your regular lawyer at the firm.

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