ONTARIO EMPLOYERS BEWARE: COMMON TERMINATION LANGUAGE HELD UNENFORCEABLE

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In recent years, termination clauses seeking to limit employees’ entitlements have come under increasing scrutiny from Ontario courts, culminating in the *Waksdale* decision that heavily upset the apple cart.

While the decision in *Dufault v The Corporation of the Township of Ignace* is not as impactful as that in *Waksdale*, it is another ruling that requires employers to revisit their template employment contracts and offer letters.

In *Dufault*, the Ontario Superior Court of Justice found that a termination clause was contrary to the *Employment Standards Act, 2000* (“ESA”) and unenforceable, in part because it gave the employer “sole discretion” to terminate the employee's employment “at any time”.

**Background**

In November 2022, Ms. Dufault entered into a fixed term employment agreement with the Township of Ignace for a term ending on December 31, 2024.

The Township terminated Ms. Dufault on a without cause basis on January 26, 2023, nearly two years prior to the end of the fixed term. Upon her dismissal, the Township gave two weeks’ pay in lieu of notice in accordance with the “without cause” termination provision within the employment agreement.

**The Decision**

After Ms. Dufault sued for wrongful dismissal, seeking payment of the full fixed-term, the Court found that the termination clause in Ms. Dufault's employment agreement was unenforceable because it contravened the ESA. The Court awarded Ms. Dufault damages for 101 weeks' salary and benefits, less amounts already paid, representing the balance owing for the remainder of the fixed term.

The Court found the termination clause was unenforceable because it:

1. Referenced termination “for cause”, which is a broader standard than is found in the ESA or its regulations, and suggests a common law approach to wrongful dismissal;
2. Limited payment upon dismissal “without cause” to base salary, whereas the ESA provides that an employee is entitled to the more expansive definition of “regular wages”, which includes vacation pay; and

3. Included language giving the employer “sole discretion” to terminate the employee’s employment “at any time”.

The third point is likely to be the most impactful. The Court found that a statement that an employer may terminate “at any time” contravenes the ESA because the right of an employer to dismiss is not absolute. The court noted, for example, that the ESA prohibits an employer from terminating an employee on the conclusion of an employee’s leave (section 53) or in reprisal for attempting to exercise a right under the ESA (section 74).

**Takeaways For Employers**

Employers should be reviewing their template employment contracts and offer letters in response to the Dufault decision. Language suggesting an employer can terminate an employee without cause at the employer’s “sole discretion” or “at any time” is commonly included in termination clauses and should be adjusted. Such language increases the risk that an employer will be liable for providing an employee common law damages upon termination, which is typically a much higher amount than the minimum entitlements set out in the ESA.

Additionally, this case is a reminder of the inherent risks associated with fixed term employment agreements (especially fixed term agreements with lengthy durations). Where a termination clause within a fixed term agreement is found to be unenforceable, then the employer is generally liable to pay damages equivalent to the balance owing under the contract.

To learn more or for assistance with your employment agreements, contact a member of McMillan’s Employment and Labour Relations Group.


by Ricki-Lee Williams and Kyle Lambert

**A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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