Member's Quarterly
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Feature

"ANY TIME" BUT MAYBE NOT ANY WHERE

Your termination clauses could be challenged

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Introduction

In 2024, one of the most notable employment law cases was *Dufault v The Corporation of the Township of Ignace*, 2024 ONSC 1029 ("**Dufault**"). This case, within the year it was first heard, made its way up to the Court of Appeal - 2024 ONCA 915, and presently leaves open whether the use of the words "any time" or "sole discretion" in termination clauses renders termination provisions invalid. The Township of Ignace has now confirmed that it has applied for leave to appeal to the Supreme Court of Canada, meaning Dufault will continue to be watched closely in 2025.

The Summary Judgement – February 16, 2024

In the summary judgement decision by Justice Pierce, the termination provisions of the fixed-term employment contract were found to be in breach of Ontario's *Employment Standards Act, 2000* ("**ESA**") because:

1. the contract incorporated only the common law concept of termination "for cause" rather than the ESA's higher threshold of "wilful misconduct" which requires intentional wrongdoing;
2. the employer calculated the employee's termination entitlements using only base salary instead of the broader concept of "regular wages" as required by the ESA; and most importantly,
3. the contract's "without cause" clause permitted the employer to end the worker's employment "at any time" and at its "sole discretion".

While the first two points were routine, the entire employment law bar took note of this last point, as it was indeed novel to find that wording such as "at any time" and at an employer's "sole discretion" were breaches of the ESA. In her decision, Justice Pierce noted such wording failed to account for those circumstances when termination would be prohibited by the ESA (for example, in the case of reprisal). Consequently, she found that the early termination provisions were unenforceable and the plaintiff, Ms. Dufault, was awarded extensive damages equivalent to the balance owing under her contract.

The decision was appealed to the Court of Appeal.

In the interim, employers began receiving demand letters stating their termination clauses could be challenged due to the inclusion of *"at any time"* and *"sole discretion"* language.

Court of Appeal's Decision - December 19, 2024

The appeal was then dismissed in its entirety and costs in the amount of $15,000.00 were awarded to Ms. Dufault. The Court's analysis dealt only with the first point of Justice Pierce's decision, affirming

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that, as in *Waksdale v Swegon North America,* 2020 ONCA 391, since the employment contract's definition of "for cause" violated the ESA by not meeting the higher ESA standard of wilful misconduct, all termination provisions were invalid. As the termination clauses were invalid, the Court affirmed Ms. Dufault's entitlement to damages were correctly based on the balance of the term of her fixed-term employment contract.

The Court expressly declined to comment on whether the words "sole discretion" or "at any time" were problematic:

> […]
> Given our conclusion that the "for cause" termination clause of the employment contract is unenforceable as contrary to the ESA and that, pursuant to *Waksdale*, this renders all of the termination provisions unenforceable… (in) our view, resolution of the issues the appellant raises regarding the "without cause" termination clause should be left to an appeal where it would directly affect the outcome.

Since this decision, the Township of Ignace has confirmed that it has applied for leave to appeal to the Supreme Court of Canada.

While most of these kinds of applications to the Supreme Court are dismissed, there is a British Columbia Court of Appeal ("BCCA") decision in *Egan v Harbour Air Seaplanes LLP* ("*Egan*") that has also applied for leave dealing with similar issues. In *Egan*, the BCCA upheld the termination of an employee under similar discretionary "any time" language. Given the *Egan* clause was found to be enforceable and the *Dufault* clause was not, in light of the divergent provincial approaches, it is possible the Supreme Court may take this opportunity to weigh in.

Take Aways for Employers

The employment bar continues to watch *Dufault* with keen interest for good reason; the outcome of this application could have significant implications on the interpretation of termination provisions in employment agreements. For now, it remains critical that employers review their existing employment agreements for legal enforceability for both new and existing hires, including both indefinite and fixed-term contracts. *Dufault* also serves as another important reminder to employers of how risky fixed-term agreements can be, unless very carefully drafted.

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