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Feature

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Two Rare Employer Wins in Ontario Courts

Enforceable ESA-Only termination clauses and valid layoff provision

In employment law, Ontario courts are known to be "employee friendly" given the unequal bargaining power between the parties as the courts are rightfully protective of more vulnerable parties. Accordingly, employers are often fighting intense uphill battles to have their employment contracts, especially ESA-only terminations clauses, upheld as enforceable in Ontario courts. However, two key decisions recently provided rare employer wins that confirm such common law limiting clauses, when done right, will still be found to be enforceable.

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Enforceable termination clauses do exist where they can be reasonably interpreted

In *Bertsch v. Datastealth Inc.*, 2025 ONCA 379, the Ontario Court of Appeal confirmed that properly drafted termination clauses can limit employees to only their statutory minimum entitlements under the *Employment Standards Act, 2000* ("ESA") upon termination. The termination clause at issue was as follows:

> 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 *Ontario Employment Standards Act, 2000* and its Regulations, as may be amended from time to time (the "ESA"), 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.
>
> 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.

In the lower court, Justice Stevenson found the provision to be clear and unambiguous and consequently struck the employee's claim. The employee appealed to the Court of Appeal, reiterating the clause was ambiguous because an ordinary person not trained in law might believe they could be terminated for cause without notice, for conduct such as negligence, rendering the wording unenforceable.

The Court unanimously dismissed the appeal. In doing so, the Court was clear that the termination provision at issue was clear and unambiguous when *reasonably* interpreted. They confirmed the question was not if an ordinary person may have an incorrect interpretation, but how the agreement could be *reasonably* interpreted. Adopting the employee's proposed interpretation would ignore the words "with or without cause". Rather, when reasonably interpreted, the termination provision did not contravene the ESA's minimum standards. What matters is reason.

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Interestingly, this decision also confirmed employers may use Rule 21 of the *Rules of Civil Procedure* as a mechanism to have the court determine the enforceability of a termination provision at the outset of litigation. Further, the Court also reiterated that while ambiguous termination clauses should be interpreted to favour employees, a finding of ambiguity requires **"something more than the mere existence of competing interpretations"**, the principle previously applied in *Amberber v. IBM Canada Ltd.*, 2018 ONCA 571.

Validly drafted temporary layoff provisions are not terminations

Similarly, in *Taylor v. Salytics Inc.,* 2025 ONSC 3461, the Ontario Superior Court affirmed a validly drafted temporary layoff provision is not a termination provision, even if tucked into a termination section of an employment agreement that is itself unenforceable. The Court found that the assessment must be of the substance of the provision, and not where it is located in the employment agreement.

In *Taylor*, the employee was temporarily laid off, pursuant to a layoff provision in the employment agreement. While the employee was ultimately recalled and did return to work, the employee nonetheless took the position that his layoff was a constructive dismissal because his employment agreement contained an express layoff provision in the termination section, which was itself not *Waksdale* compliant. The employee argued that accordingly, the entire termination section including the temporary layoff clause, must be struck, leaving the employer without a valid layoff provision to rely on. The employer did not dispute that the for cause termination provision was unenforceable, but argued that the temporary layoff provision was not a termination provision.

The Court agreed with the employer, and specifically confirmed that the placement of the layoff provision under a termination heading cannot be determinative. The Court affirmed the principle noted in *Waksdale*, that the characterization of a provision does not depend on its placement or form, but on its substance. The Court explained the issue is not where in the employment contract the provision is found, but whether it is, in substance, a termination provision. The Court acknowledged a layoff is a termination when there is no clause in the employment agreement permitting the employer to lay off the employee, but when there is such a clause, the layoff is not a constructive dismissal, and therefore not a termination. What matters is substance.

Take Aways for Employers:

Pay attention to reason and substance. When assessing the enforceability of termination clauses, it is not about whether there are possible differing interpretations of the wording but how the agreement could be reasonably interpreted. Similarly, when looking at a layoff provision, if it is validly drafted, it cannot be conflated with termination provisions.

What matters is quality and current drafting by professionals keeping up with the current state of the law. Please make sure you have all your employment agreements reviewed formally on a regular 3-to-5-year basis. Where changes are needed, ensure you are updating them not only for new hires, but also for existing employees as continuing employment agreements, to keep terms of employment clear and enforceable.

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