

## Member's Quarterly

## Winter 2026 Edition

### Feature

## Termination Clauses

*Drafted right, but ruined by repudiation*

In the ever-evolving legal landscape regarding the enforceability of severance-limiting termination provisions, it is already difficult enough trying to get the legal drafting right. When it comes to proper drafting, courts continue to heavily scrutinize every aspect of an employee's termination clause. Due to such scrutiny, regularly reviewing the language utilized in your standard employment contracts is very important. However, even when employers take every possible precaution to ensure their template termination provisions are properly drafted, we are now seeing courts focus in on an additional consideration that some employers are failing to make - namely, being mindful of their conduct when terminating an employee.

The trend we are seeing in recent case law is that judges appear to be more willing to rule that an employer's pre - or post - termination conduct amounted to a repudiation of the employment contract. Repudiation in this context arises where the employer is substantially failing to meet their obligations under contract (which includes an implied duty of good faith), giving the employee the ability to terminate the contract. Further, when a court finds that the employer repudiated the contract, it can legally preclude the employer from relying on a severance-limiting termination clause contained within the contract. This means that even a properly drafted termination provision may be rendered unenforceable if a court finds that the employer's actions amounted to a repudiation of the employment agreement.

It has been held by the courts that the test for repudiation of an employment agreement requires looking at whether the conduct of the employer shows "clear intentions to no longer be bound by the terms of the employment agreement." Some recent examples of employer-conduct that have been found to amount to repudiation include:

- An employer subjected an employee to a toxic work environment, set the employee up to fail, and embarrassed the employee in front of colleague and clients, prior to the employee's termination. Upon termination, the employer drastically exaggerated the employee's performance issues, alleging cause for termination when it knew or should have known it did not have cause. According to the judge, this conduct as a whole demonstrated an intention on behalf of the employer to not be bound by the employment agreement.
- After the employer terminated an employee, the employer failed to make commission payments properly owed to the employee pursuant to the employment contract upon termination. The employer disagreed with the total amount owed to the employee, but admitted that it withheld payments that it knew the employee was entitled to. In addition to failing to make those payments, the employer demanded the employee sign a "full and final release" which wrongfully implied that entitlements under the contract



**Kyle Allen**  
J.D.  
Partner,  
Brownlee LLP



**Jack Holan**  
J.D.  
Partner,  
Brownlee LLP

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were contingent on signing the release.

A key takeaway for employers is that the obligations owed towards an employee do not end upon termination. To take full advantage of the benefits of a properly worded severance-limiting termination clause, the employer must at all times be mindful of their conduct towards the employee.

Practical examples or steps that the employer should follow during the period of employment and during/after termination include:

- Ensuring the employee is provided all statutory termination notice, or pay in lieu thereof, entitlements upon termination;
- Ensuring the employee is paid all salary, commission, wages or other amounts owing to the employee up to the date of termination;
- Only seeking a release of liability when offering a payment greater than the minimum entitlement to severance pay provided for by Employment Standards legislation;
- Do not allege termination for cause in bad faith or where it is clear that the employer does not have cause; and
- Being mindful of conduct demonstrated to the employee at all times during the employment relationship and specifically in the lead-up to, and after, termination.

Now, you might be asking – what happens when an employer is found to repudiate the employment agreement and can no longer rely on a severance-limiting termination clause? In these circumstances, the employee's entitlement to notice upon termination would be determined by the court's assessment of "reasonable" notice. This involves an assessment by the courts which traditionally considers factors such as age, position, years of service with the employer and availability of similar employment. The period of reasonable notice will be assessed in light of each individual employee's circumstances. For reasons twofold, more often than not, this is detrimental to the employer:

- First, the reasonable notice assessment by a court, in most cases, provides for a much greater entitlement (i.e. severance payment owed) relative to what is set out in the termination clause. This can easily be a difference of tens, or sometimes hundreds, of thousands of dollars
- Second, it creates a significant amount of uncertainty for the employer in determining the severance pay obligations owed to an employee upon termination, as opposed to a formulaic severance-limiting termination clause. Essentially, where the employer and employee cannot agree on the applicable reasonable notice period, it is left up to the court to assess.

Repudiation can turn a seemingly bulletproof contract into a blank cheque.

*Kyle Allen is a Partner in Employment and Labour Law with Brownlee LLP in Edmonton. He can be reached via email at [kallen@brownleelaw.com](mailto:kallen@brownleelaw.com).*

*Jack Holan is an Associate in Employment and Labour Law with Brownlee LLP in Edmonton and can be reached via email at [jholan@brownleelaw.com](mailto:jholan@brownleelaw.com).*