

## Member's Quarterly

## Spring 2026 Edition

### Feature

# Ontario Court Confirms Enforceability of ESA-Only Termination Provision

*Clarity and compliance are crucial*

Employers and employees in Ontario have long been permitted to contract out of common law notice entitlements, provided their agreements meet or exceed statutory minimums under the Employment Standards Act, 2000 (ESA). However, in recent years, courts have closely scrutinized termination provisions, leading to increased uncertainty for employers.

The recent Ontario Superior Court of Justice decision in *Bertsch v. Datastealth Inc.*, 2024 ONSC 5593, provides welcome clarity, reaffirming that properly drafted termination provisions will be enforced - even when they limit an employee's entitlements to ESA minimums. The decision also demonstrates how employers can use procedural tools like Rule 21 motions to resolve contractual interpretation disputes efficiently.

### The Legal Context of Termination Clauses

Termination clauses in employment agreements determine the notice period or pay-in-lieu employees receive upon termination. Without a valid termination clause, employees can claim common law "reasonable notice," which can range from a few weeks to two years or more.

To be enforceable, termination clauses must: comply with ESA minimum requirements; be clear and unambiguous to avoid misinterpretation; and exclude language that could lead to outcomes contravening the ESA.

The *Bertsch* decision underscores these principles and highlights how employers can mitigate legal risks through precise contractual drafting.

In *Bertsch v. Datastealth Inc.*, the plaintiff, Gavin Bertsch, was terminated without cause after 8.5 months of service with the defendant, Datastealth Inc. His employment contract limited his termination entitlements to ESA statutory minimums and explicitly excluded common law reasonable notice. Upon termination, he received four (4) weeks' pay in lieu of notice - exceeding ESA requirements. Nonetheless, Mr. Bertsch argued that the termination clause was unenforceable and sought twelve months' notice, totaling approximately \$300,000.

His employment contract stated that termination entitlements would meet or exceed ESA minimums, including notice, severance and benefits; any ambiguity would default to compliance with ESA standards; and the agreement satisfied all common law notice obligations. Mr. Bertsch claimed the clause was ambiguous because it did not explicitly reference ESA Regulation 288/01 exemptions and allowed termination for cause without notice in cases that did not meet the ESA's "willful misconduct, disobedience, or neglect of duty" standard. Datastealth Inc. filed a Rule 21 motion, seeking a legal determination of the termination clause's enforceability. The employer argued that the provision was clear, compliant with the ESA and did not require perfection to be valid. The court ruled in favor of Datastealth Inc., finding the termination clause enforceable.



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#### Key takeaways from the decision include:

- **Clarity and Compliance:** The clause was unambiguous and met ESA requirements. Courts will not invalidate a clause based on speculative interpretations that could lead to illegal outcomes.
- **Appropriate Use of Rule 21:** The motion resolved a contractual dispute early in litigation, saving time and costs.
- **Employment Law Considerations:** The court acknowledged the inherent power imbalance in employment relationships but found this irrelevant when a contract's language was sufficiently clear.

The court dismissed Mr. Bertsch's claim, upholding the employer's reliance on the termination clause.

#### Lessons for Employers

The Bertsch decision reinforces critical best practices for employers when drafting and enforcing termination clauses:

- **Clarity is Key:** Termination provisions must be explicit and free from ambiguity.
- **Failsafe Language is Beneficial:** Including "failsafe" provisions that default to ESA compliance can safeguard against potential drafting errors.
- **Leverage Procedural Tools:** Rule 21 motions can efficiently resolve contractual interpretation disputes, minimizing litigation costs.
- **Regular Reviews are Essential:** Given evolving case law, employers should periodically review employment agreements to ensure continued compliance.

While Bertsch provides reassurance for employers, Ontario courts continue to scrutinize termination clauses closely. This decision confirms that perfection in drafting is not required—what matters most is clarity and legal compliance. To minimize risk, employers should proactively assess their termination provisions, ensuring they are: clear and unambiguous to prevent disputes; compliant with the ESA and its regulations; and explicit in stating that ESA compliance satisfies any common law notice or pay-in-lieu entitlements.

Although this ruling is favorable to employers, Ontario courts will continue to assess termination provisions closely and critically. Employers should regularly review employment agreements to confirm enforceability in light of legal developments.

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