

Member's Quarterly

Summer 2026 Edition

Feature

AN UPDATE on the "ANY TIME" BUT NOT ANY WHERE DEBATE - Part II

The debate continues to evolve

Introduction

What started in 2024 as one of the most notable employment law case threads continued strong through 2025 – this so-called "any time" debate continues to evolve in real time in Ontario case law.

In 2024, *Dufault v The Corporation of the Township of Ignace*, 2024 ONSC 1029 ("**Dufault**") made its way up to the Court of Appeal - 2024 ONCA 915, and left open whether the use of the words "any time" or "sole discretion" in termination clauses will automatically render an otherwise valid termination provision unenforceable for failing to comply with Ontario's Employment Standards Act, 2000 ("ESA"). Then in *Baker v. Van Dolder's Home Team Inc.*, 2025 ONSC 952 the court held it was bound to follow *Dufault* and thus confirmed the inclusion of the words "at any time" in a termination clause were enough to void the clause. Notably, in *Baker*, the impugned clause did not refer to the employer's "sole discretion."

Now, three more recent decisions from the Ontario Superior Court of Justice have added to this evolving discussion.

***Jones v. Strides Toronto*, 2025 ONSC 2482 ("**Jones**")**

Employers were then given new hope with *Jones v. Strides Toronto*, 2025 ONSC 2482, wherein the court distinguished the prior case line by holding that the presence of the words "at any time" in a termination clause, in the absence of the words "sole discretion," do not contract out of the ESA. However, that court held the termination clause at issue was unenforceable for other reasons. Once again, the debate was back on.

***Li v. Wayfair Canada ULC.*, 2025 ONSC 2959 ("**Li**")**

Then came more promising decisions for employers. In the summary judgement decision by Justice Dow, the termination provisions in the plaintiff's employment agreement, which provided Wayfair with the ability to terminate the plaintiff's employment "at any time", were found to be enforceable. More specifically, the employment agreement provided that Wayfair could terminate the plaintiff's employment "at any time and for any reason," subject to the plaintiff being provided with only his minimum statutory entitlements in accordance with the ESA.

Arguing against the termination clause's enforceability, the plaintiff relied on *Dufault*, arguing once more that the termination clause was unenforceable because it provided for termination at "any time" and therefore could not comply with Ontario's ESA. However, Justice Dow disagreed and distinguished *Dufault*. Justice Dow found that, when read as a whole, the wording of the employment contract in *Li*, particularly the express requirement of compliance with the ESA, materially differed from the clause at issue in *Dufault*. Justice Dow noted that *Dufault*'s definition of "cause", unlike *Li*'s, failed to refer to the applicable



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ESA standard or provide for payment of all types of wages to be payable over the minimum statutory notice period. As a result, Justice Dow concluded that, under the circumstances in *Li*, the inclusion of phrases such as "at any time" was not, in itself, fatal to the enforceability of the termination clause. This case has since been appealed to the Court of Appeal, and a decision is still pending.

Chan v. NYX Capital Corp., 2025 ONSC 4561 ("Chan")

Then the Ontario Superior Court released its decision in *Chan* on August 6, 2025, adding more confusion in this case thread. In *Chan*, Justice Paraghi followed a very narrow interpretation of *Dufault*, finding that the impugned "at any time" language was offside the ESA on the basis that an employer "does not have an absolute right to dismiss an employee." However, despite having been heard around the same time as *Li* and *Jones* (and having been released after each of these

two decisions), the Court did not draw any reference to or otherwise distinguish them. Rather, in *Chan*, Justice Paraghi concluded that the termination provision in the plaintiff's employment agreement was void and unenforceable because:

- the employment agreement purported to have the plaintiff contract out of their rights for certain unwaivable claims arising from the termination of their employment;
- the employment agreement improperly attempted to contract out of the ESA by granting the employer the authority to terminate the plaintiff "at any time for cause", without notice or severance pay, in circumstances that exceed those permitted under subsections 2(1)(3) and 9(1)(6) of Termination and Severance of Employment, O. Reg. 288/01; and
- the employment agreement incorporated contractual language such as "at any time and for any reason" and "at any time without cause", which Justice Paraghi noted were found contrary to the ESA in both *Dufault* and *Baker*.

This decision has thus drawn attention from the employment law bar, as it serves as a continuation of the inconsistent jurisprudence surrounding the enforceability of termination clauses through the ongoing "any time" debate.

Take Aways for Employers

After *Dufault* and *Baker* declared "any time" contrary to the ESA, out came *Li* and *Jones* offering a welcome shift back to a more balanced and holistic approach to the interpretation of Ontario employment contracts. That said, there remains an abundance of seemingly inconsistent case law on the issue, leaving the debate ongoing. Thankfully, clarity may be on its way as the the Court of Appeal for Ontario has decided to hear the appeals in *Li* and *Baker* together in 2026. For now, the debate continues.

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