

Another Reason for Employers to Review the Termination Provisions in Employment Agreements: *Dufault v. The Corporation Of The Township Of Ignace*

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A recent decision at the Ontario Superior Court of Justice has become a hot topic for employers and their employment agreements with employees. In *Dufault v. The Corporation of the Township of Ignace*, 2024 ONSC 1029, the court found the termination provisions of a fixed-term contract unenforceable due to seemingly innocuous and commonly-used terms that could affect the way employment agreements are drafted going forward.

The key facts of *Dufault* are as follows: Ms. Dufault was an employee of the Corporation of the Township of Ignace under a fixed-term contract. With 101 weeks remaining in the contractual term, she was terminated without cause. The Township paid Ms. Dufault two weeks' termination pay and continued her benefits per the employment agreement. Ms. Dufault brought a claim alleging wrongful dismissal and that the termination provisions in her agreement were unenforceable.

The relevant termination provisions in Ms. Dufault's employment agreement were as follows:

4.01 The Township may terminate this Agreement and terminate the Employee's employment at any time and without notice or pay in lieu of notice **for cause**. If this Agreement and the Employee's employment is terminated with cause, no further payments of any nature, including but not limited to, damages are payable to the Employee, except as otherwise specifically provided for herein and the Township's obligations under this agreement shall cease at that time. For the purposes of this Agreement, "cause" shall include but is not limited to the following:

(i) upon the failure of the Employee to perform the services as hereinbefore specified without written approval of Municipal Council and such failure shall be considered cause and this Agreement and the Employee's employment terminates immediately;

(ii) in the event of acts of willful negligence or disobedience by the Employee not condoned by the Township or resulting in injury or damages to the Township, such acts shall be considered cause and this Agreement and the Employee's employment terminates immediately without further notice. [Emphasis added]

4.02 The Township may **at its sole discretion and without cause**, terminate this Agreement and the Employee's employment thereunder at any time upon giving to the Employee written notice as follows:

(i) the Township will continue to pay the Employee's **base salary** for a period of two (2) weeks per full year of service to a maximum payment of four (4) months or the period required by the Employment Standards Act, 2000 whichever is greater. This payment in lieu of notice will be made from the date of termination, payable in bi-weekly installments on the normal payroll day or on a lump sum basis at the discretion of the Township, subject at all times to the provisions of the Employment Standards Act, 2000.

(ii) with the exception of short-term and long-term disability benefits, the Township will continue the Employee's employment benefits throughout the notice period in which the Township continues to pay the Employee's salary. The Township will continue the Employee's short-term and long-term disability benefits during the period required by the Employment Standards Act, 2000 and will pay all other required accrued benefits or payments required by that Act. [Emphasis added]

The court found the termination provisions unenforceable for three separate reasons. The first reason was a defect in the "for cause" provision. The court followed *Waksdale*, which held that any "for cause" provision permitting summary dismissal without termination entitlements for reasons broader than *wilful misconduct*, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer is contrary to the *Employment Standards Act, 2000* ("ESA") and voids all termination provisions in the agreement ([see our article on Waksdale](#)). The court held that the insertion of a "for cause" standard that permitted the Township to withhold termination pay and severance pay that did not appear in the *ESA*, the Township had conflated grounds for termination without notice or pay in lieu of notice under the *ESA* with a common law standard not found in the *ESA*, thereby rendering the termination provisions unenforceable.

The second reason was that the "without cause" provision stated that the Township would only continue to pay Ms. Dufault's base salary, as opposed to all potential wages, throughout the contractual notice period. The court held that this language violated the *ESA* because an employee is entitled to "regular wages" during the statutory notice period, which can include more than just base salary, such as commissions, vacation pay, bonus and other incentive payments.

The most noteworthy reason that the court found the termination provisions unenforceable was the language in the "without cause" provision stating that the Township could terminate without cause at "its sole discretion" and "at any time." The court found that this wording violated the *ESA* as there are periods when an employer is prohibited from terminating an employee, such as upon the conclusion of a statutory leave or as a reprisal for attempting to exercise a right under the *ESA*.

Ultimately the court found that Ms. Dufault was wrongfully dismissed, and in the absence of an enforceable termination clause, she was awarded damages based on the remaining 101 weeks of the term of her contract.

Key Takeaway for Employers

While *Dufault* presents a new potential challenge to the enforceability of termination provisions in employment agreements that state employees may be terminated without cause "at any time" or at the employer's "discretion", such provisions may still be enforceable if accompanied by additional contractual language expressing a clear intent to comply with the *ESA*.

The Township has sought leave from the Court of Appeal for Ontario to appeal the decision of the Ontario Superior Court of Justice, so it remains to be seen whether *Dufault* will continue to be followed by the courts. At the very least, *Dufault* serves as a reminder to employers of the importance of drafting employment agreements carefully, particularly the termination provisions therein, and the benefit of having experienced employment counsel assist with the review or drafting of employment agreements.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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