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Employers: Are Your Employment Agreements Enforceable? The Court of Appeal Upholds Dufault

January 28, 2025

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In February of 2024 the Ontario Superior Court of Justice released its decision *Dufault v The Corporation of the Township of Ignace,* 2024 ONSC 1029, which had implications for Ontario employers. In *Dufault*, the Court held that language commonly included in the termination provisions of employment agreements that allowed employers to terminate employment "at any time" may be contrary to the *Employment Standards Act, 2000* ("ESA") thereby rendering the termination provisions unenforceable. The decision was appealed by the employer, The Corporation of the Township of Ignace ("the Township"). Recently, in *Dufault v. Ignace (Township)* 2024 ONCA 915, the Court of Appeal for Ontario released its decision dismissing the appeal and upholding the invalidity of the termination provision.

Background of the Case

The basic facts of the decision in *Dufault* are as follows. Ms. Dufault was an employee of the Township subject to a two-year fixed-term contract (the "Contract"). The Township terminated the Contract prior to the expiry of the fixed term, with 101 weeks remaining on the term. The Township, relying on a termination provision in the Contract, provided Ms. Dufault with her statutory minimum entitlement to termination pay. Ms. Dufault then brought an action against the Township for wrongful dismissal, claiming the termination provisions were invalid and seeking the balance of the fixed term on the Contract as damages (see our article on *Dufault* here).

On a motion for summary judgment, the court held for Ms. Dufault, awarding her damages for wages she would have earned for the balance of the two-year term of the Contract. The court held that the Contract's terminations provisions failed to comply with the ESA and were therefore void and unenforceable to limit Ms. Dufault's termination entitlements for three reasons:

1. The "for cause" termination provision in the Contract was void because it permitted dismissal without termination entitlements for reasons broader than permitted under the ESA. This reasoning followed *Waksdale v. Swegon North America Inc.,* 2020 ONCA 391, a 2020 decision that held that any "for cause" provision that allows dismissal without provision of ESA termination entitlements for reasons beyond wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer is contrary to the ESA and voids all termination provisions in the agreement (see our article on *Waksdale*).

2. The "without cause" provision in the Contract was void because it stated that The Township would only continue to pay Ms. Dufault's base salary, as opposed to all potential wages throughout the termination notice period. The court held that this language violated the ESA because an employee is entitled to "regular wages" during the statutory notice period as defined by the ESA, which includes more than just base salary, such as commissions, vacation pay, bonus and other incentive payments.

3. The "without cause" provision of the Contract was further voided because it stated that the Township could terminate Ms. Dufault's employment without cause at "its sole discretion" and "at any time." The court found that this wording violated the ESAas

there are circumstances in which an employer is prohibited from terminating employment, such as upon the conclusion of a statutory leave or as a reprisal for attempting to exercise a right under the ESA.

The Court of Appeal Decision

The Court of Appeal upheld the lower court's decision that the termination provisions violated the ESA and Ms. Dufault was wrongfully dismissed. The Court focused on the "for cause" provision and agreed that the provision permitted dismissal without termination entitlements for reasons that did not meet the required threshold under the ESA. The Court held that because the "for cause" provision violated the ESA, in accordance with *Waksdale,* all termination provisions in the Contract were void. The Court specifically noted that it could not reconsider the principles of *Waksdale,* as it was a three-judge panel, and only a five-judge panel would have that authority.

Given that the court found the "for cause" termination provision unenforceable it did not comment on the enforceability of the "without cause" termination provision or the lower court's finding that it was unenforceable due to the "sole discretion" and "at any time" language. As such, this leaves interested parties without the Court of Appeal's views on this language and the consequence of it rendering termination provisions unenforceable.

Key Takeaways

The Court of Appeal's decision in *Dufault* serves as a further reminder for Ontario employers of the importance of drafting employment agreements carefully and to seek advice from legal counsel where appropriate. . As noted in our earlier articles on the *Waksdale* and *Dufault* decisions, other key takeaways for employers are to review your existing employment agreement templates with legal counsel on a regular basis and seek legal advice prior to any termination of employment to avoid pitfalls relating to the termination.

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