

Game-Changer for Employers: Ontario Court of Appeal Backs ESA-Only Termination Clause

May 27, 2025

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In a favourable decision for employers, *Bertsch v Datastealth Inc.*, 2025 ONCA 379, the Court of Appeal for Ontario upheld the decision of the Ontario Superior Court of Justice that a termination clause in an employee's agreement was enforceable, thereby limiting the employee's termination entitlements to the statutory minimums under the *Employment Standards Act, 2000* ("ESA"). This is a significant win for employers; in recent years the Ontario courts have found many termination provisions unenforceable, resulting in wrongful dismissal awards far in excess of what was contemplated in the employment agreement between the parties.

Facts of the Decision

The plaintiff, Bertsch, was employed by Datastealth as a vice president for 8.5 months and earned a base salary of \$300,000 per year. Datastealth terminated Bertsch's employment without cause and paid him 4 weeks' pay in lieu of notice. In response, Bertsch commenced an action seeking damages equal to 12 months of common law reasonable notice damages on the premise that the termination provision in his employment agreement was unenforceable.

The termination provision in Bertsch's employment agreement read as follows:

Termination of Employment by the Company: If your employment is terminated with or without cause, you will be provided with only the minimum payments and entitlements, if any, owed to you under the Ontario Employment Standards Act, 2000 and its Regulations, as may be amended from time to time (the "ESA"), including but not limited to outstanding wages, vacation pay, and any minimum entitlement to notice of termination (or termination pay), severance pay (if applicable) and benefit continuation. You understand and agree that, in accordance with the ESA, there are circumstances in which you would have no entitlement to notice of termination, termination pay, severance pay or benefit continuation.

You understand and agree that compliance with the minimum requirements of the ESA satisfies any common law or contractual entitlement you may have to notice of termination of your employment, or pay in lieu thereof. You further understand and agree that this provision shall apply to you throughout your employment with the Company, regardless of its duration or any changes to your position or compensation.

Datastealth brought a motion under Rule 21.01 asking the Court to interpret the termination provision in the employment agreement and to strike or dismiss Bertsch's claim as disclosing no tenable cause of action.

Lower Court Decision

The motion judge rejected Bertsch's argument that the termination provision was unenforceable because it attempted to allow termination of employment without termination notice or severance pay that was short of the ESA threshold of "wilful misconduct,

disobedience or wilful neglect of duty". The motion judge stated that there was "no reasonable interpretation [of the relevant provisions] which would be contrary to the minimum requirements of the ESA and regulations." The motion judge held that the termination provision was compliant with the ESA and therefore legally enforceable. As a result, the Court dismissed Bertsch's claim.

The Court of Appeal Ruling

Bertsch appealed the motion judge's decision to the Court of Appeal arguing that the termination provision was ambiguous. He argued that because the termination provision stated merely that "*there are circumstances in which you would have no entitlement to [ESA termination entitlements]*", an ordinary person might interpret the termination provision to mean that their employment may be terminated without notice for more reasons than permitted under the ESA.

The Court of Appeal found no error in the motion judge's reasoning and upheld the lower decision. The Court of Appeal stated that an ordinary person would have to read the provision incorrectly, ignoring the words "with or without cause" in order to believe they could be terminated for cause for any reason without payment. Further, the Court of Appeal stated that "the issue is not whether an ordinary person might arrive at an incorrect interpretation of the termination provisions of the employment agreement, but how the agreement can be reasonably interpreted."

Key Takeaway for Employers

The termination provision discussed and held as enforceable in *Bertsch v Datastealth Inc.* serves as an example for employers of a provision that successfully limits an employee's entitlements upon termination to the statutory minimums in the ESA.

Employers should look to include similar language in employees' employment agreements to maximize the likelihood that the termination provision will be enforceable. However, employers should continue to monitor the case law for further developments regarding termination provisions so that the termination provision it uses in employment agreement remains consistent with the case law. Furthermore, as an "ESA-only" termination provision is only one example of a contractual termination provision that rebuts the presumption of an employee's entitlement to common law reasonable notice, employers should seek legal advice when including a contractual termination provision in an employment agreement that provides more than the statutory minimums.

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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