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Feature

Termination Clauses in Ontario Take Another (new) Hit

Don't contravene ESA

Dan Palayew
LL.B.
Partner,
Borden Ladner Gervais LLP

Odessa O'Dell
J.D.
Partner,
Borden Ladner Gervais LLP

Introduction

The power imbalance between employer and employee has often been a factor taken into consideration by courts when interpreting employment contracts. *Dufault v The Corporation of the Township of Ignace,* 2024 ONSC 1029 ("Dufault"), is no exception. In that case, the Ontario Superior Court of Justice held that the termination clause in the employment contract was unenforceable because it contravened several ESA minimum standards, most notably for the use of "at any time" and "sole discretion".

Background

Ms. Dufault was employed as a Youth Engage-ment Coordinator when she was terminated without cause after 15 months of employment with The Corporation of the Township of Ignace ("the Township"). At the time of her termination, Ms. Dufault's salary was $75,000 as well as employee benefits and participation in a pension plan.

On or about November 24, 2022, Ms. Dufault signed an agreement with the Township where it was agreed that Ms. Dufault's employment would continue for a fixed duration ending on December 31, 2024. On January 26, 2023, Ms. Dufault was terminated on a without cause basis effective immediately. The Township paid Ms. Dufault's two weeks' termination pay and continued her benefits for two weeks.

Ms. Dufault moved for summary judgment for wrongful dismissal and damages in the amount of 101 weeks' base salary and benefits, less the damages already paid. Ms. Dufault argued that the termination clause in her employment contract was illegal and unenforceable.

The Decision

The judge concluded that the termination clause in the employment contract was not enforceable. The judge noted that appellate jurisprudence on employment contract interpretation had demanded increasingly stricter standards for employers to comply with the *Employment Standards Act* ("ESA"). The judge restated the law in employment contract, i.e., an employer is not allowed to contract out of, or waive, an employment standard when drafting the contract. To determine the enforceability of a termination clause, a court must therefore examine and evaluate the wording of the employment contract when it is entered into; the employer's conduct upon termination being irrelevant. Based on this approach, the judge concluded that the termination provisions in the contract contravened the ESA in several aspects.

First, in line with the infamous *Waksdale v Swegon North America Inc.*, 2020 ONCA 291 decision from the Court of Appeal, the judge found that Ms. Dufault's contract mistakenly referred to the common law concept of "just cause" dismissal, rather than the higher test found in the ESA, where the conduct must be serious and intentional. Indeed, under the ESA, an employee will be refused notice of termination or termination pay only if it is guilty of "wilful misconduct, disobedience or wilful neglect of duty that is not

Feature continued

trivial and has not been condoned by the employer". Therefore, the judge found that in that case, the language used in the employment contract conflated grounds for dismissal under the ESA with the common law standard and had the effect of wrongly extending the criteria for dismissal without notice to conduct not provided for in the ESA.

Second, the judge found that the "without cause" provisions in the contract contravened ESA minimum standards by disallowing Ms. Dufault from all "regular wages" she was entitled to. The termination clause only referred to Ms. Dufault's base salary without any mention of her entitlement to vacation pay, sick days and unpaid overtime hours.

Third and perhaps most notably, the judge found that the contract misstated the ESA when it gave the employer "sole discretion" to terminate the employee's employment "at any time".

The judge noted that the ESA provided for situations where an employer is prohibited from terminating an employee, such as on the conclusion of an employee's leave or in reprisal for attempting to exercise a right under the ESA. As such, the judge stated that an employer's right to dismiss was not absolute, which meant that the use of such language was a contravention of the ESA and also rendered the clause void.

The judge ultimately awarded damages for the duration of the fixed-term contract with costs.

Takeaways for Employers

Employers should be aware that employment contracts are heavily scrutinized to favour employees, unlike standard commercial agreements. Therefore, caution and care should be exercised when drafting such contracts in order to ensure compliance with all ESA minimum standards.

That said, the analysis in Dufault as it relates to the use of "sole discretion" and "at any time" is not one that has garnered much traction in Ontario to date. However, we understand that it is likely that this decision will be appealed, so there may be more to come on this particular issue should the Court of Appeal weigh in.

Notwithstanding the possibility of an appeal, Dufault again demonstrates that the courts are also regularly evolving in their reasons to hold a termination clause as unenforceable. It is therefore important for employers to regularly update the termination language in their employment agreements, in consultation with experienced employment counsel.

Dan Palayew is Partner/Regional Leader, Labour & Employment Group with Borden Ladner Gervais LLP and can be reached at dpalayew@blg.com.

Odessa O'Dell is a Partner with Borden Ladner Gervais LLP and can be reached at oodell@blg.com.