Lunchbag Letdown: The Court of Appeal Does not Address "Without Cause" Termination Clause in *Dufault v. Township of Ignace*

By Landon Young and Natalie Caballero

Employment lawyers and observers have been eagerly anticipating the release of the Ontario Court of Appeal's decision in *Dufault v. The Corporation of the Township of Ignace* ("*Dufault"*), which was released today. The hope was that the Court would provide guidance as to the enforceability of "without cause" termination clauses that include language to the effect that an employer may terminate at its "sole discretion" or "for any reason."

Unfortunately for those expecting legal dramatics, the Court disappointed by deciding not to decide the issue or provide any guidance whatsoever as to the enforceability of such "without cause" termination clauses.

Nonetheless, the case is noteworthy in that it means that the confusion in the law that currently exists in regard to certain termination clauses will continue. This case also highlights the dangers of fixed term contracts.

Background

In *Dufault* the Ontario Superior Court of Justice considered the enforceability of two early termination clauses in a fixed-term employment contract that purported to take away the employee's right to reasonable notice under the common law. The decision was made on a motion for summary judgement.

Ms. Dufault, the employee, argued that the termination provisions in her contract violated the *Employment Standards Act, 2000* ("ESA") and were therefore unenforceable.

The language at issue in the contract was 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.
>
> **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...

The Judge at first instance found that both termination clauses were unenforceable.

The first "for cause" clause was found to be void on the grounds that the "cause" standard under the common law is a lower standard than "wilful misconduct…or neglect of duty" (to paraphrase the language in the ESA). The logic is that because the common law standard of "cause" does not require a wilful component as does the ESA, any clause that provides an employee may be terminated without notice for "cause" or "just cause" potentially violates the ESA. In other words,

there may be instances where the employer's reason for termination amounts to "cause", but not to "wilful misconduct", with the result that the employee may not be entitled to notice under the common law, but is entitled to notice under the ESA.

The Judge applied the reasoning in the case of *Waksdale v. Swegon North America Inc.*, which states that termination provisions must be read together. An invalid clause, such as the "for cause" provision, renders the entire termination framework unenforceable, including the "without cause" clause.

The Judge could have decided the case only on the basis that the "for cause" clause was void and left it at that. However, she went on to consider whether the "without cause" clause was also unenforceable.

This is where the Judge broke new legal ground. The Judge decided that that language permitting an employer to terminate at its "sole discretion" could potentially give the employer the right to terminate an employee during a protected leave contrary to the ESA. The fact the employer did not actually terminate Ms. Dufault during a protected leave did not matter. Again applying the logic in *Waksdale*, all that mattered was that the employer potentially could rely on the language to violate the ESA.

With the termination clauses unenforceable, Ms. Dufault was awarded 101 weeks of compensation—the unexpired term of her fixed-term contract.

Court of Appeal Decision

The employer on appeal argued that the termination clauses complied with the ESA and that the invalid "for cause" clause should be severed from the contract to preserve the enforceability of the "without cause" clause.

The employer asked the Court of Appeal for a five-member panel to hear the appeal so that it could consider overturning the *Waksdale* decision. The Court refused the request to have a five member panel hear the appeal. The Court held that, as a result, it was precluded from reconsidering *Waksdale* and applied its reasoning to uphold the motion Judge's decision on the "for cause" clause.

The Court went on to decline to rule on the validity of the "without cause" clause. The Court opted to leave this issue for a future case where it would directly impact the outcome.

However, until the Court of Appeal addresses the enforceability of such language, employers and employees can expect continued litigation and uncertainty.

Implications for Employers

By declining to consider the enforceability of the "without cause" clause on its own, the Court of Appeal has left some key questions unanswered. These include just what kind of termination

"without cause" language might be considered to be contrary to the ESA and how far the Courts are prepared to go in finding that technical and theoretical breaches of the ESA that do not involve "for cause" termination clauses will result in all termination clauses being found to be void. The Court's decision leaves unresolved questions about the enforceability of "without cause" clauses containing language like "at any time" or "at the employer's sole discretion."

This legal uncertainty will likely persist until the Court of Appeal directly addresses these clauses in a future decision.

This decision underscores the critical importance of ensuring employment contracts comply with the ESA from the outset to avoid being caught in the uncertainty that now applies to certain "without cause" termination clauses.

The *Dufault* ruling also highlights the risks associated with invalid termination provisions in fixed-term contracts. Employers found to have unenforceable termination clauses may face significant financial exposure, as courts are likely to award damages based on the unexpired term of the contract.

For more information, **please contact**:

Landon P. Young at lyoung@stringerllp.com or +1416-862-1713
Natalie G. Caballero at ncaballero@stringerllp.com or +1416-849-2552

UPDATE is an electronic publication of Stringer LLP
20 Queen Street, Suite 3002, Toronto, Ontario M5H 3R3
T: 416-862-1616 Toll Free: 1-866-821-7306
E: info@stringerllp.com I: www.stringerllp.com