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Dufault and the Interpretation of Termination Clauses: Navigating the Impact of Hypothetical ESA Breaches in Ontario Case Law

The Court of Appeal for Ontario ("ONCA") will hear the appeal of *Dufault v The Corporation of the Township of Ignace* ("*Dufault*") this Friday. While Ontario courts previously recognized that creating jurisprudence based on hypothetical situations is a slippery slope, since the decision in *Waksdale v Swegon North America Inc*, courts in Ontario have repeatedly invalidated termination clauses in employment agreements by considering hypothetical breaches of employment standards legislation.

Dufault is an extreme example, where not only was the *Employment Standards Act, 2000* ("ESA") misinterpreted, but the Court also relied on a potential breach of the ESA not grounded in the facts of the case. The appeal of *Dufault* provides an opportunity to course correct decisions invalidating termination clauses that are the fall out of *Waksdale.*

Facts

In *Dufault,* Justice Pierce introduced new grounds for invalidating termination clauses in employment agreements. The employment agreement at issue contained the following language:

> "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…"

In interpreting this section of the employment agreement, Justice Pierce found that it violated the ESA because pursuant to the protections afforded by the ESA, an employee cannot be terminated at the conclusion of a statutory leave (s. 53) or for attempting to exercise a right under the ESA (s. 74). Justice Pierce interpreted section 4.02 of the agreement to provide the employer with an absolute right to dismiss an employee at any time. She found such language demonstrated an intent to be able to terminate both at the end of a leave or where an employee attempts to exercise a right under the ESA.

Issues

Termination at Any Time is not a Contravention of the ESA

Respectfully, Justice Pierce's decision that the "sole discretion… at any time" language contravenes the ESA by proposing to permit termination at the end of a statutory leave or as reprisal for exercising a right under the ESA obfuscates the plain meaning of the termination clause and misconstrues sections 53 and 74 of the ESA. The plain meaning of the clause does not provide an intention by the employer to terminate employment in circumstances contrary to the ESA.

Sections 53 and 74 of the ESA do not prohibit termination at any time, instead they prohibit terminations for specified reasons. While section 53(1) states that an employer shall return an employee to employment at the end of their leave, section 53(2) states that section 53(1) "does not apply if the employment of the employee is ended solely for reasons unrelated to the leave". Pursuant to section 53(2), an employee can still be terminated at any time, including at the conclusion of a statutory leave, provided the reason for termination is unrelated to the leave.

Section 74 of the ESA similarly prohibits termination for certain reasons, not termination at certain times. Pursuant to section 74, an employer may not terminate an employee because they asked the employer to comply with the ESA, tried to enforce their rights under the ESA, or other enumerated reasons. Section 74 does not prohibit termination following an employee taking a specified action, only termination because of the action.

The law has long recognized the mutual right of both employers and employees to unilaterally terminate an employment contract at any time provided there are no express provisions to the contrary, as seen in *Wallace v United Grain Growers Ltd*. Justice Pierce's decision in *Dufault* misinterprets the ESA and unjustly limits the employers' right to terminate at any time. Justice Pierce inferred intent to terminate in circumstances prohibited by the ESA, which were not apparent on the face of the clause and failed to consider the employer's right to unilaterally terminate at any time.

Potential Breaches of Employment Standards Should Not Invalidate Termination Clauses

Ontario courts recognized that creating jurisprudence based on hypothetical situations is a slippery slope. In *Oudin v Le Centre Francophone de Toronto*, 2015 ONSC 6494, aff'd 2016 ONCA 514, the trial judge expressly rejected the plaintiff's argument that the termination clause should be struck where a potential interpretation of the clause might, in a hypothetical

circumstance, violate the ESA. In recent years, the reasoning in *Oudin* has not been applied in Ontario but is applied in British Columbia (BC).

Courts in BC have rejected arguments seeking to invalidate termination clauses for potential breaches of BC's *Employment Standards Act* ("BC ESA").

In *Forbes v Glenmore Printing Ltd* (*Forbes*), the plaintiff employee challenged the validity of the termination clause in his employment agreement, which included an 8-week cap on notice. Mr. Forbes argued the clause violated section 64 of the BC ESA, which provides for 12 and 16 weeks of notice for group terminations.

The Supreme Court of British Columbia upheld the enforceability of the termination clause because it did not include any waiver of the employer's responsibility to give an employee notice of collective termination under section 64 of the BC ESA. The 8-week cap in the contract mirrored the 8-week maximum notice for individual terminations under the BC ESA. Despite the potential interpretation of a violation of the BC ESA, there was no violation when considering the clause's plain meaning.

Forbes demonstrates how courts in BC have taken a starkly different approach to termination clauses than Ontario courts, interpreting termination clauses without engaging exhaustive consideration of potential employment standards breaches.

Development of the Case Law

Since the *Waksdale* decision, Ontario courts continue to make rulings invalidating termination clauses for potential ESA breaches not at issue in the termination before the court. *Dufault* presents an opportunity for ONCA to fine-tune this line of case law and provide guidance on distinguishing language that violates the ESA from hypothetical violations that could arise in remote scenarios not considered by the parties at the time of entering the contract. We look forward to what the Court has to say on this issue.