Employment

"Employers should review and update termination clauses and think twice before entering fixed-term employment agreements."

What was the most interesting development of 2024, and why?

2024 provided the employment bar with decisions from both the Ontario Superior Court of Justice and the Court of Appeal for Ontario in the case of *Dufault v The Corporation of the Township of Ignace*. In the lower court decision, Justice Pierce introduced new grounds for invalidating termination clauses in employment agreements. Justice Pierce found that the termination clause, which contemplated an employer's ability to terminate "at any time" and "in their sole discretion", violated the *Employment Standards Act* (ESA) because pursuant to the protections afforded by the ESA, an employee cannot be terminated at the conclusion of a statutory leave (section 53) or for attempting to exercise a right under the ESA (section 74).

This reasoning ignores the plain meaning of the termination clause and misconstrues the ESA. The plain meaning of the clause at issue does not provide an intention by the employer to terminate employment in circumstances contrary to the ESA.

This decision is significant because many termination clauses contain "at any time" or "in their sole discretion" language. This decision impugns the enforceability of many employment agreements in Canada. The employment bar hoped the Court of Appeal would clarify the law, however, in their decision, the Court of Appeal specifically chose not to address this issue.

The decision may still be appealed to the Supreme Court of Canada.

What's the primary takeaway for businesses from the past year?

Employers should review and update termination clauses and think twice before entering fixed-term employment agreements.

In both the cases of *Dufault* and *Kopyl v Losani Homes (1998) Ltd*, the termination clauses were found to be unenforceable, and the former employees were entitled to all compensation and benefits to the end of the fixed term. In *Dufault*, the employee was terminated two months into a 25-month fixed-term contract and was awarded the remaining 23 months. In *Kopyl*, the employee was terminated 9 days into a 12-month fixed-term contract and was awarded the remaining nearly 12 months.

Termination clauses limiting termination entitlements to those set out in applicable employment standards legislation, or providing greater entitlement, mitigate risks associated with the early termination of a fixed-term contract. Such clauses should typically be favoured over fixed-term contracts.

What's one trend you are expecting in 2025?

We are watching to see if the use of motions to strike in wrongful dismissal claims will become more common following the decision in *Bertsch v Datastealth Inc*.

In *Bertsch*, the Superior Court confirmed the enforceability of an ESA-minimum termination clause that excluded common law notice periods in a motion to strike. The defendant employer brought the motion to strike in advance of defending the claim.

The Court held that the motion was appropriate in this case and could be relied on to resolve issues of law relating to contractual interpretation. The Court noted that the use of a motion to strike in this situation is an efficient use of the Court's processes, resulting in a useful and just outcome.

Ultimately, the Court agreed with Datastealth that the terms of the contract were unambiguous, and that there is no reasonable interpretation of the provisions which result in a violation of the minimum requirements of the ESA and its regulations. The claim was struck without leave to amend.

In the end, the Court sided with Datastealth, agreeing that the contract's terms were clear and straightforward. The Court found that there was no reasonable way to interpret the contract that would lead to a violation of the minimum requirements set by the ESA and its regulations. As a result, the claim was dismissed, and no changes to the claim were allowed.

We understand the case is being appealed. If the decision is upheld, we anticipate more employers will use motions to strike in contractual termination clause disputes as they provide a timely and cost-effective path to dismiss frivolous claims.

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