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DENTONS

WEBINAR SERIES
LEGAL UPDATES
FOR CANADIAN EMPLOYERS

What you missed on your summer vacation

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Termination clause enforcability in Ontario

Termination law 101 refresher

- Canadian employees are entitled to reasonable notice or pay in lieu when terminated without cause.
- The starting point for determining notice is applicable employment standards legislation in the province in which the employee is employed (approximately 1-2 weeks of total compensation per year of service).
- Employees can be limited to those statutory entitlements, but only if they are subject to an employment agreement with a properly drafted termination provision.
- If there's a problem with the termination provision, courts will instead award common law notice to the terminated employee. Common law notice is a discretionary judicial amount determined with reference to a number of factors which are fact-specific to the employee (i.e. employee age, length of service, positions, seniority and ability to find comparable new employment).
- Common law notice is generally at least 1-2 months of total compensation per year of service, and often higher.
- Per *Waksdale v. Swegon* (2020), an invalidity anywhere in a termination provision will void an otherwise valid termination provision.

Dufault v. Ignace

The first of the “termination at any time” cases

- In February 2024, the Ontario court in the case of *Dufault v. Ignace* stated that if you have a termination provision which states that an employee may be terminated without cause “at any time”, the “at any time” language will make the termination provision invalid and unenforceable.
*“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...”*
- *Dufault* was upheld by the Ontario Court of Appeal in December 2024 for different reasons.

Baker v. Van Dolder's Home Team

- In April 2025, the *Baker* decision upheld the law in *Dufault v. Ignace* on the basis that the words termination “at any time” may undercut the Ontario *Employment Standards Act, 2000* and therefore will be interpreted to strike down the entire termination provision.
*Termination without cause: we may terminate your employment **at any time**, without just cause...*
- *Baker v. Van Dolder's Home Team* has been appealed to the Ontario Court of Appeal and leave to intervene has been granted to the Ontario Chamber of Commerce. Intervention is quite rare in appeals to Ontario's highest court.

Jones v. Strides Ontario

- Also in April, a different Ontario court in the decision of *Jones v. Strides Ontario* looked at the *Dufault* decision and held that the presence of the words “at any time” in a termination provision, in the absence of the words “sole discretion” (which were found in *Dufault*), do not contract out of the ESA.
*“The Organization may terminate your employment without cause **at any time** upon providing you with the following: Advance notice, or payment in lieu, in accordance with the Employment Standards Act, 2000 (“ESA”) and any other payments required by such legislation including severance pay, and as well as continuing to provide benefits (which includes participation in the group RRSP) during the applicable statutory notice period; plus...”*
- The court in *Jones* ultimately struck down the termination provision, but for a completely unrelated reason.

Li v. Wayfair Canada

- In July the court in *Li v. Wayfair Canada* ignored the *Dufault* and *Baker* cases on the basis that the termination provision in Li was “distinguishable”.

*“After your probationary period concludes, in the absence of Cause, the Company may terminate your employment **at any time and for any reason...**”*

- And the difference is what?



- No surprise, *Li* has also been appealed to the Ontario Court of Appeal.

Chan v. NYX Capital Corp.

- In August of this year, the court in *Chan v. NYX Capital Corp.* found that termination provisions containing the words “termination at any time” or “termination at any reason” are invalid and unenforceable.

*The first three months of your employment are probationary, during which time the Company may terminate your employment **at any time and for any reason** at its discretion, without notice or pay in lieu of notice, or other obligation.*

- The rest of the termination clause had the “termination at any time” language and was therefore void and unenforceable.
- The probationary clause is noteworthy because: (i) it also contained the “at any reason” language; and (ii) it proves that any part of a termination provision can invalidate the provision as a whole.

Henderson v. Slavkin

- And finally, because we're not already confused enough, here's a reminder that back in 2022, the Ontario court came to the decision that "termination for any reason" language was absolutely fine.
*"Your employment may be terminated without cause **for any reason** upon the provision of notice equal to the minimum notice or pay in lieu of notice and any other benefits required to be paid under the terms of the Employment Standards Act, if any."*
- A distinction without a difference, no?

Bertsch v. Datastealth Inc.

The new gold standard?

- **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.*

Key takeaways

1. Drafting an enforceable termination provision which will remain enforceable over time is very difficult, and despite the various cases this year, this is an area of the law which remains difficult and unpredictable.
2. Courts will usually do whatever they can to invalidate a termination provision in order to award employees greater notice of termination.
3. Employment agreement templates should be reviewed annually by employment law counsel and updated as needed.





Making sense of Bill 101

Bill 101 - *An Act to improve certain labour laws in Quebec*

- Introduced on April 24, 2025 - Aims to modernize and harmonize several labour laws
- Key laws concerned
 - *Labour Code*
 - *Act respecting labour standards*
 - *Act respecting industrial accidents and occupational diseases*
 - *Act respecting occupational health and safety*
 - *Act to modernize the occupational health and safety regime.*

Labour Code

- Mandatory Timelines Introduced:
 - Arbitrator appointment must occur within 6 months of the grievance being filed.
 - First hearing must begin within 1 year of filing.
- Evidence disclosure: 30 days before hearing
- Mediation must be considered before arbitration.

Act respecting Labour Standards

New Unpaid Leave for Public Health and Disaster Situations

- Employees may take unpaid leave if unable to work due to a recommendation, order, or decision issued under the *Public Health Act*, *Quarantine Act*, *Emergencies Act*, or the *Civil Protection Act*.

Enhanced Leave for Armed Forces Reservists

- Eligibility threshold reduced: Only 3 months of continuous service required (previously 12 months).
- Extended duration: Up to 24 months of leave within a 60-month period.
- New purpose added: Leave may now be taken to receive treatment or participate in a rehabilitation program for physical or mental health conditions resulting from military service.

Act respecting Labour Standards

- Revised Penalties under the ALS
 - General Violations:
Fines increased to \$1,000–\$10,000 for individuals and \$2,000–\$20,000 for legal entities.
 - Psychological Harassment Offences:
 - Fines may now reach up to \$25,000 for individuals and \$50,000 for legal entities.

Act respecting industrial accidents and occupational diseases

- New expanded definition of 'worker' to includes executive officers performing work personally
- Introduction of a voluntary negotiation process for administrative reviews (indemnity, suitable employment)
- Tighter grip on access to medical records
 - Modification of the offence relating to unauthorized access in order to broaden its scope.
 - Reduction of the fines applicable for those offences

Act respecting occupational health and safety

- Financial support for reassignment of pregnant/breastfeeding workers
 - CNESST may reimburse employers for lower-paid reassignment

Act to Modernize the Occupational Health and Safety Regime

- The implementation of provisions that were due to come into force on or before October 6, 2025, is postponed to on or before October 6, 2026.
 - The interim regime currently in place is therefore extended by one year.

Conclusion

- **Please note that this remains a proposed bill.**
 - But, its adoption is expected shortly.
- **We will keep you informed of any updates or developments.**



Federal workplace developments

Use of replacement workers officially prohibited

- Bill C-58, *An Act to amend the Canada Labour Code and the Canada Industrial Relations Board Regulations, 2012* came into force on June 20, 2025
- Use of replacement workers to do the work of striking or locked out unionized workers is now **prohibited** in federally regulated workplaces
- Employers and unions **must** come to a “Maintenance of Activities Agreement” within 15 days after notice to bargain is issued to determine what work needs to continue during a work stoppage

Expanded pregnancy / child placement leave entitlements

- On June 28, 2025, regulations related to three proposed amendments to the *Canada Labour Code* were published:
 - Creation of a leave related to pregnancy loss (up to 8 weeks)
 - Enhanced bereavement leave entitlements (up to 8 weeks)
 - Creation of a leave for placement of a child (up to 16 weeks)
- New pregnancy loss leave and expanded bereavement leave amendments are scheduled to come into force on **December 12, 2025**
- Amendments related to leave for placement of a child are anticipated to come into effect in 2026

Is there a federal right to disconnect?

- It is expected that by the end of 2025, federally-regulated employer will be required to establish a right-to-disconnect policy that will be required to contain rules and expectations regarding work-related communication outside of scheduled hours of work
 - Goal of limiting work-related communication outside of scheduled working hours
- Policy must be posted and reviewed and updated every 3 years, and employers must consult with employees when developing or updating the policy



Alberta: Breaking new ground

Lischuk v K-Jay Electric Ltd.

2025 ABKB 460

Facts:

- 1978 – Lischuk commences employment with K-Jay
- 2002 – Lischuk becomes a shareholder
- 2008 – Lischuk becomes a general manager
- 2013 – Lischuk is terminated

Issues:

- Was Lischuk entitled to vacation pay for vacation earned but not taken?
- **What is Lischuk's reasonable notice period?**
- **How does mitigation affect the notice period, if at all?**
- Was Lischuk entitled to an annual bonus, and if so, what was the value?
- What was the value of Lischuk's shares over the reasonable notice period?

Lischuk v K-Jay Electric Ltd.

2025 ABKB 460

Reasonable Notice Period

- 26 months
- Exceptional circumstances:
 - Full working career at K-Jay
 - Key employee
 - Forced retirement
 - Low prospects of reemployment

Lischuk v K-Jay Electric Ltd.

2025 ABKB 460

Mitigation

- Test for failure to mitigate
 - Did the employee make reasonable efforts to find work? and
 - Were suitable jobs available, such that if the plaintiff had taken steps to pursue such opportunities, they would probably have found employment?
- Objectively reasonable standard
- Burden remains on the defendant

Nickles v 628810 Alberta Ltd.

2025 ABKB 212

Facts:

- 1986 – Nickles commenced employment with 628 as an office manager, working primarily from her home office
- 2023 – Return to work mandate (less than 3 months notice)

Issues:

- Was Nickles constructively dismissed?
- If so, was Nickles obligated to mitigate damages by accepting a hybrid work arrangement?

Nickles v 628810 Alberta Ltd.

2025 ABKB 212

Constructive Dismissal

- Can arise where:
 - The employer breaches an essential term of the employment contract; or
 - The employer's conduct establishes that it no longer intends to be bound by the employment contract

Mitigation

- Cannot use the obligation to mitigate to force an employee to accept a fundamental change
- Reasonable bystander test

Nickles v 628810 Alberta Ltd.

2025 ABKB 212

“This was not a return to work arrangement of the type that was common after the COVID pandemic. The COVID return to work template does not fit this paradigm.”

Thakor v Loblaws Inc.

2025 AHRC 75

Facts:

- 2011 – Commenced employment as a part-time salad bar clerk
- 2018 – Work related injury (off work)
- 2020 – job abandonment

Thakor v Loblaws Inc.

2025 AHRC 75

Prima Facie Discrimination:

1. Did the complainant have a characteristic that is protected by the Act? **Yes.**
2. Did the complainant suffer an adverse impact or treatment? **Yes.**
3. Was the protected characteristic a factor in the adverse impact? **No.**

Duty to Accommodate and Duty to Cooperate

- Multi-party inquiry
- Failure to cooperate – no communication, not accepting or engaging in modified duties offered, and not obtaining further medical



**BC duty to mitigate confirmed:
Should you take stock of your
fixed-term agreements?**

Mac's Convenience Stores Inc. v. Basyai,

2025 BCCA 284

- BC Court of Appeal confirmed that employees on fixed-term contracts are required to mitigate if the contract is terminated early, unless there is an express term to the contrary.
- The plaintiffs were all workers who had been recruited to work at Mac's convenience stores in western Canada under Canada's Temporary Foreign Worker Program.
- The Court of Appeal acknowledged that the barriers to mitigation were likely "significant" for these employees, but stated it was important to "distinguish between the duty to mitigate and the capacity for mitigation."
- The Court of Appeal agreed that it would likely be difficult for the employer to meet its burden to prove that the employee had not taken reasonable steps to avoid loss in the circumstances; however, that did not mean there was no duty to mitigate at law.

Notable cases across Canada:

- ***Quach v. Mitrux Service.s Ltd.* 2020 BCCA 25** – Court of Appeal upheld trial judge’s decision to award balance of the contract based on specific language contained in contract regarding early termination. Reiterated the law in BC that the fixed term nature of a contract does not entitle the employee to damages in the full amount of unpaid wages for the balance of the term without deduction of monies earned elsewhere during the term, absent a provision otherwise.
- ***Crook v Duxbury*, 2020 SKCA 43** – Court of Appeal for Saskatchewan held that income earned by the Plaintiff that overlapped with the fixed term following termination by the Employer should properly be deducted from amounts owing for the balance of the fixed term.
- ***Rice v. Shell Global Solutions Canada Inc.* 2021 ABCA 408** - Court of Appeal of Alberta confirmed that Shell was required to pay the balance of the four-year term (34.5 months), not just reasonable notice of termination (had offered 15 months). Contract silent on early termination prior to the end of the term. Mitigation not at issue on appeal but award was reduced by trial judge to account for earnings within the term.

Notable cases across Canada:

- ***Province of New Brunswick v. Dr. John Dornan*, 2023 NBKB 225** – Terminated Chief Executive Officer awarded balance of five-year term after being terminated four months into employment. Court upheld the arbitrator’s decision including that the employee had made efforts in mitigation and employer did not prove failure to mitigate.
- ***Howard v. Benson Group Inc.* 2016 ONCA 256**, following *Bowes v. Goss Power Products Ltd.* 2012 ONCA 425 – takes opposite approach to other courts on employment contracts:

“There is no reason to depart from the rule in *Bowes* that there is no duty to mitigate where the contract specifies the penalty for early termination. It does not matter whether the penalty is specified expressly, as in *Bowes*, or is by default the wages and benefits for the unexpired term of the contract, as in the case of fixed term contracts generally.”

Best practices for dealing with fixed-term agreements

- Set a fixed-term only when the role is truly temporary (e.g. maternity leave replacement). It is highly unlikely that there is a valid business reason for more than a two-year term.
- Include clear language relating to early termination and, if applicable, duty to mitigate.
- Avoid being subject to common law – avoid successive fixed term agreements and don't let the fixed-term expire without action.
- Where amending a fixed term contract (or any contract), do so clearly, in writing and with consideration.
- Where you want to enforce the duty to mitigate having terminated a fixed-term early, consider tracking and sharing other job opportunities with the former employee to push the issue of applying for new work.

Thank you



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