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WRONGFUL DISMISSAL

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This four-volume national work provides a comprehensive treatment on the law of wrongful dismissal in Canada. Coverage includes: the contract of employment and employee status; types of dismissal and the "just cause" defence; damages and the duty to mitigate; related actions including actions tort, injunctive relief, and statutory actions; employee protections under the *Canada Labour Code*, tax considerations; the impact of statutes on the assessment of damages; practical considerations; charts of notice awards; and relevant legislation and concordance tables.

What's New in this Update

This release includes updates to Chapters 5 (Just Cause) and 13 (The Significance of Writing in Contracts).

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Highlights

- **Chapter 5. Just Cause — I. Overview — § 5:1. Generally —** There may be a difference between common law "just cause," and a contractually-defined reference to termination "for cause" or "for just cause" that is found in the terms of the employment contract between an employer and employee. However, there are limits as to what the parties can agree to, in the context, particularly where the contract wording offends the provisions of employment standards legislation. In *De Castro v. Arista Homes Limited*, 2024 ONSC 1035, the impugned employment agreement contained termination provisions that defined "cause" more broadly than was allowed under the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (ESA). Specifically, it did not require the employee's misconduct to be "wilful" or "not trivial". Also, the agreement purported to give the employer the right to terminate without notice any time there was a "breach of Employment Agreement". The court noted that in theory this could cover any sort of conduct that technically breached the contract – such as the employee's decision to wilfully come in to work a half-hour late without prior agreement, or a failure to "observe all policies and guidelines" as the contract required. The court noted that "A deliberate breach of one policy or guideline, no matter how minor, would purportedly amount to cause to terminate without notice." Ultimately, the court concluded that the termination provisions breached the ESA by going beyond permissible limits. Based on the decision in *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391, 2020 CarswellOnt 8319, 446 D.L.R. (4th) 725 (Ont. C.A.) at para. 10, leave to appeal refused 2021 CarswellOnt 356, 2021 CarswellOnt 357 (S.C.C.), all termination provisions in the contract were rendered unenforceable, entitling the plaintiff to common-law notice instead.
- **Chapter 5. Just Cause — I. Overview — § 5:1. Generally —** In an interesting series of decision culminating in a ruling by the Court of Appeal, it has been determined that a termination clause was unenforceable where it allowed the employer to dismiss an employee at its "sole discretion" and "at any time". In *Dufault v. The Corporation of the Town of Ignace*, 2024 ONCA 915, aff'g 2024 ONSC 1029, the Court of Appeal determined that the motion judge did not err in determining that these terms in the "for cause" provisions of the employment contract did not comply with the minimum requirements of the ESA, and could not be

enforced. The court noted that, in light of the requirements of the ESA, "the right of the employer to dismiss is not absolute." In coming to this conclusion, the Court of Appeal upheld its earlier finding in *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391 (which was followed in *Rahman v. Cannon Design Architecture Inc.*, 2022 ONCA 451), where it determined that the termination provisions in an employment contract must be read as a whole. If one termination provision in an employment contract violates the *ESA*'s minimum standards, then all related provisions in the contract are invalid, regardless of whether the employee is purportedly terminated with or without cause. See also *Baker v. Van Dolder's Home Team Inc.*, 2025 ONSC 952, where the court likewise struck down the impugned termination provisions of the employment contract, which purported to allow the employer to terminate without cause "at any time".

- **Chapter 13. The Significance of Writing in Contracts — II. Enforceability: The Threshold Question — C. Employment Contracts — § 13:13.50. Termination Provisions Flawed —** *Bertsch v. Datastealth Inc.*, 2024 ONSC 5593 (Ont. S.C.J.) involved an employee who had been employed about 8.5 months at the time of his termination without cause. His written employment agreement limited his rights on termination to the minimal entitlements under the *ESA*, and provided that the employee had contracted out of common law notice requirements. On termination he was given four weeks' pay in lieu of notice, which was still higher than his *ESA* entitlement. The employee argued that these contract provisions, which afforded him less compensation than he would have received under the common law, were unenforceable because they failed to expressly or properly refer to the statutory exemptions under the *ESA* and its regulation titled *Termination and Severance of Employment*, O. Reg. 288/01. Those provisions carve out an exemption from the notice requirement where the employee is terminated for "wilful misconduct, disobedience or wilful neglect of duty". The employee accordingly argued that the contract's terms were void because they purported to allow termination for cause, without notice – regardless of whether the exemption applied. In a useful summary of the recent and developing law on this point, the court wrote:

  [10] It is common ground that a c ontractual term which precludes compensation for any "just cause" dismissal would be unenforceable because it would breach the

ESA, and specifically O. Reg. 288/01. This is because it would deny compensation to employees who may have been dismissed for a common law "just cause" but not for a reason which precludes mandatory payment under the *ESA* because it is not e.g., "wilful misconduct, disobedience or wilful neglect of duty."

...

Decision

[18] I accept that employment termination provisions must clearly comply with the ESA and if they do not, they will be treated as void.

[19] The termination provision to be valid must not potentially contravene the *ESA* and its regulations; and it must properly exclude common law notice. *Machtinger v. HOJ Industries* 1992 CanLII 102 (SCC), [1992] 1 S.C.R. 986, at 1104.

[20] I find that this clause does not result in any breach of the ESA or O. Reg. 288/01.

...

[21] There is no reasonable alternative interpretation of the relevant clauses here that might result in an illegal outcome *i.e.*, there is no reasonable interpretation which would be contrary to the minimum requirements of the *ESA* and regulations.

[22] I accept there is a presumptive power imbalance between the employer and the employee, and that any ambiguity will be read to the benefit of the employee. But I do not find any ambiguity here.

[23] I agree that the interpretation and application of the termination clause is not a simple matter. But that is partly because the law is not very straight forward in respect of these issues. Many a lawyer has struggled to understand the distinctions being discussed and to predict the likely outcome if one of these claims is litigated. Any employee would benefit from legal advice before signing any such agreement. But the contractual terms here, while not simple, are clear and unambiguous.