

**DENTONS**

# **Repair and maintenance: How to fix your termination clauses**

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# The termination clause “rules”

1. All contractual provisions must meet the minimum notice requirements for termination without cause set out in the *Employment Standards Act, 2000* (*Machtinger v. HOJ Industries Ltd.*, 1992 CanLII 102 (SCC), [1992] 1 S.C.R. 986, [1992] S.C.J. No. 41, at p. 998);
2. There is a presumption that an employee is entitled to common law notice upon termination of employment without cause;
3. Provided minimum legislative requirements are met, an employer can enter into an agreement to contract out of the provision for reasonable notice at common law upon termination without cause (*Nemeth v. Hatch Ltd.*, 2018 ONCA 7, 287 A.C.W.S. (3d) 291 (Ont. C.A.) at para. 11 citing *Machtinger* at pp. 1004-1005);
4. The presumption that an employee is entitled to reasonable notice at common law may be rebutted if the contract specifies some other period of notice as long as that other notice period meets or exceeds the minimum requirements in the ESA (*Machtinger* supra, at p. 998);

# The termination clause “rules”

5. The intention to rebut the right to reasonable notice at common law “must be clearly and unambiguously expressed in the contractual language used by the parties” (*Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158 (CanLII), 134 O.R. (3d) 481, at para. 40);
6. The need for clarity does not mean a specific phrase or particular formula must be used, or require the contract to state that “the parties have agreed to limit an employee’s common law rights on termination”. The wording must however, be “readily gleaned” from the language agreed to by the parties (*Nemeth* at para. 9);
7. Any ambiguity will be resolved in favour of the employee and against the employer who drafted the termination clause in accordance with the principle of *contra proferentum* (*Miller v. A.B.M. Canada Inc.*, 2015 ONSC 1566 (CanLII), 27 C.C.E.L. (4th) 190, at para. 15 (Div. Ct.); *Ceccol v. Ontario Gymnastic Federation* (2001), 2001 CanLII 8589 (ON CA), 55 O.R. (3d) 614 (C.A.), at para. 45); and
8. Surrounding circumstances may be considered when interpreting the terms of a contract but they must never be allowed to overwhelm the words of the agreement itself (*Sattva* at para. 57).

# The “any time” problem

- **Termination without Cause:** We may terminate your employment at any time, without just cause, upon providing you with only the minimum notice, or payment in lieu of notice and, if applicable, severance pay, required by the Employment Standards Act. If any additional payments or entitlements, including but not limited to making contributions to maintain your benefits plan, are prescribed by the minimum standards of the Employment Standards Act at the time of your termination, we will pay same. The provisions of this paragraph will apply in circumstances which would constitute constructive dismissal.
  - *The Act prohibits the employer from terminating an employee on the conclusion of an employee’s leave (s. 53) or in reprisal for attempting to exercise a right under the Act (s. 74). Thus, the right of the employer to dismiss is not absolute.*
  - *Baker v. Van Dolder’s Home Team Inc., 2025 ONSC 952*

# The fix

- We may terminate your employment at any time permitted by applicable law...
- We may termination your employment without cause by providing you with...

# The “greater” problem

## Term of Employment

...

The company may terminate the employment of the Managing Director by providing the Managing Director the greater of the Managing Director’s entitlement pursuant to the Ontario *Employment Standards Act* or, at the Company’s sole discretion, either of the following:

- a. Two (2) months working notice, in which case the Managing Director will continue to perform all of his duties and his compensation and benefits will remain unchanged during the working notice period.
- b. Payment in lieu of notice in the amount equivalent of two (2) months Base Salary. [Emphasis added.]

*Andros v. Colliers Macaulay Nicolls Inc.*, 2019 ONCA 679

# The “greater” problem

- The Court held that the termination clause could reduce “the benefits to which [the respondent] could be entitled on termination to something less than he would be entitled to under the ESA.”
- If clause 4(a) applied, it did not provide for severance pay and, if clause 4(b) applied, it did not provide for benefits
- The termination clause was unclear as to whether clauses 4(a) and 4(b) included statutorily-compliant severance and benefits
- At the time of signing, the employee would not have known whether he would be paid severance pay if clause 4(a) were applied, or if he would be paid benefits if clause 4(b) were applied

# The fix

- Keep it simple – avoid formulas.
- If you really want a formula than avoid “the greater of”.
- Consider “we will provide you with your minimum entitlements under the ESA plus...”

# A problem of employer choice...

- **Termination without Cause:** We may terminate your employment by providing you with notice or pay in lieu of notice equal to 4 weeks plus 2 weeks for every completed year of service. Upon termination, you will receive your wages earned to the date of termination, your accrued and unpaid vacation pay (if any). For certainty, your benefits will be continued only to the extent and for the minimum period required by the *Employment Standards Act, 2000*. You agree to accept the notice of termination or pay in lieu of such notice and other entitlements required by this paragraph in full and final satisfaction of any obligations that the Company has, or may have, arising out of the termination of your employment without just cause and you hereby expressly waive any entitlement you have to receive reasonable notice at common law.

# The “employer’s choice” problem

- “[The Company] is entitled to terminate your employment at any time without cause by providing you with 2 weeks' notice of termination or pay in lieu thereof for each completed or partial year of employment with the Company. If the Company terminates your employment without cause, the Company shall not be obliged to make any payments to you other than those provided for in this paragraph. . . . The payments and notice provided for in this paragraph are inclusive of your entitlements to notice, pay in lieu of notice and severance pay pursuant to the *Employment Standards Act, 2000.*”
  - *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158
- Employers cannot provide statutory severance pay by working notice.

# The fix

- Draft the termination clause so that it only offers pay in lieu of notice.
- Structure the termination clause so that it expressly references the employee's entitlement to statutory severance pay.

# A “defining” problem for just cause

- **Termination With Cause:** We may terminate your employment for just cause at any time without notice, pay in lieu of notice, severance pay, or other liability, other than any notice, pay in lieu of notice or severance required pursuant to the applicable employment standards legislation. For the purposes of this Agreement, just cause includes, but is not limited to:
  - (i) a material breach of this Agreement or our employment policies;
  - (ii) unacceptable performance standards;
  - (iii) theft, dishonesty or falsifying records, including providing false information as part of your application for employment;
  - (iv) intentional destruction, improper use or abuse of Organization property;
  - (v) violence in the workplace;
  - (vi) obscene conduct at our premises, property or during Organization-related functions at other locations;
  - (vii) harassment of your co-workers, supervisors, managers, customers, suppliers or other individuals associated with the Organization;
  - (viii) insubordination or willful refusal to take directions;
  - (ix) intoxication or impairment in the workplace;
  - (x) repeated, unwarranted lateness, absenteeism or failure to report for work;
  - (xi) personal or off-duty conduct (including online conduct) that prejudices the Organization’s reputation, services or morale; or
  - (xii) any conduct that would constitute just cause pursuant to common law.

# A “defining” problem for just cause

- The termination with cause provision contains categories of “just cause” for termination without notice that would not constitute “wilful disobedience or neglect of duties” under the *Employment Standards Act 2000* Regulations.
- The first paragraph of the termination with cause provision contains the following words: “other than any notice, pay in lieu of notice or severance required pursuant to the applicable employment standards legislation”.
- In the judge’s view, those words were not sufficient to save the termination provision as they are immediately followed by categories that clearly do not comply with the ESA and the requirement for deliberate conduct.

# The fix

- Do not include a list of conduct that will constitute “just cause”.
- Expressly state that in the event of a just cause dismissal, the employer will comply with the *Employment Standards Act, 2000* (as amended).
- Do you need a just cause termination provision?

# How do I introduce a new employment contract for existing employees?

- Promotion letters
- Compensation changes
- Provide fresh consideration for the changes → Signing bonus, enhanced benefits, additional vacation

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# Thank you!

## Feedback survey

