

Essential Employment Law Update for Charities and NFPs

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Essential Employment Law Update For Charities and NFPs

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Overview of Presentation

A Essential Employment Case Law Update

1. *Lefebvre v Gisborne Holdings Ltd.*, 2023 BCSC 2231
2. *Dufault v The Corporation of the Township of Ignace*, 2024 ONSC 1029
3. *Bertsch v. Datastealth Inc.*, 2024 ONSC 5593
4. Comparing *Dufault* and *Bertsch*

B Amendments to the *Employment Standards Act, 2000*

1. Working for Workers Four Act
2. Working for Workers Five Act

C Key Takeaways

A. Essential Employment Case Law Update

1. *Lefebvre v Gisborne Holdings Ltd.*, 2023 BCSC 2231

- a) British Columbia Supreme Court Decision: Employer Liable for Wrongful Dismissal
 - Employee's Contract: 18-month fixed-term for parental leave (starting May 2, 2022), \$25.95/hour, \$5,000 bonus upon completion
 - Termination: Six weeks in, employer terminated the employee after an email following a heated meeting
 - The email addressed communication concerns with a client
 - Employee wasn't informed of termination for cause
 - Compensation: Paid 2 weeks' pay as notice

- b) Court Decision: No Just Cause for Dismissal
 - Employer's Burden: Had to prove the email justified dismissal for cause
 - Court disagreed; email was firm but not unprofessional
 - Suggested progressive discipline as more reasonable
 - Contract Lacked Early Termination Clause: Without an enforceable clause for early termination, employee was entitled to:
 - Full pay for remaining contract term and \$5,000 bonus
 - Damages: Employer ordered to pay \$81,800, plus costs
 - No punitive damages due to lack of severe misconduct by employer



- c) What lessons can Ontario employers and legal practitioners learn from this decision, even though it's a British Columbia case?
- Be careful when alleging cause for dismissal — Employer has the burden of proof that the facts justified cause
 - Consider progressive discipline, and apply a progressive discipline policy
 - If employer wants to terminate a fixed term contract early, make sure the contract contains an enforceable termination clause
 - Fixed term contract can result in greater liability to the employer on termination than indefinite term contracts, as employer may be liable for the unexpired part of the term



2. *Dufault v The Corporation of the Township of Ignace, 2024 ONSC 1029*

- a) Ontario Superior Court of Justice ruling: Unenforceable termination clause
- Position: Employee hired as Youth Engagement Coordinator under a fixed-term contract (Nov 24, 2022 – Dec 31, 2024)
 - Termination: Contract ended Jan 26, 2023, without cause
 - Employer paid 2 weeks' termination pay and benefits (excluding pension)
 - Employee sued for wrongful dismissal, claiming damages for the remaining term (101 weeks = \$157,071.57)
 - Employer argued compliance with ESA, offering minimum 2 weeks' pay (\$3,169.07)

- b) Court Findings: Employment Contract contravened ESA in 3 ways
1. “For Cause” Issue: Contract’s “for cause” clause didn’t align with ESA’s stricter “wilful misconduct” standard
 2. Wages: Contract limited pay to base salary, but ESA requires all regular wages, including vacation and sick days
 3. Employer Discretion: Allowed termination “at any time,” violating ESA protections for job security after leave
 - ESA also prohibits termination in reprisal for exercising ESA rights
- Employer owed Employee the rest of the salary of the fixed term

3. *Bertsch v. Datastealth Inc.*, 2024 ONSC 5593

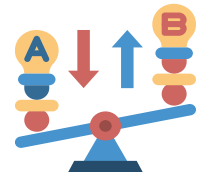
- a) Ontario Superior Court of Justice upholds employer’s termination clause
- Employment Details: Hired July 14, 2023, terminated June 7, 2024
 - Termination Pay: Employer paid 4 weeks, above ESA minimum of 1 week
 - Contract Limits: Only provided ESA minimums; waived common law notice rights
 - Employee’s Argument: Claimed termination provisions were unclear and did not meet ESA standards
 - Argued clause allowed termination “for cause” whether or not there was “wilful misconduct” (O Reg 288/01)
 - Employee’s claim for 12 months’ pay (\$300,000) was dismissed by the court.

- b) Court held that termination provisions were “clear and unambiguous”
- Court found the termination provisions compliant with ESA
 - No Illegal Outcome: No interpretation suggested an illegal outcome or exclusion of ESA entitlements
 - No Trial Needed: No factual disputes required further examination
 - Key Takeaway: Ontario charities and not-for-profits should draft employment agreements that clearly align with ESA standards
 - Contrast: Stands out against other recent cases where courts favored employees in termination clause disputes



4. Comparing *Dufault* and *Bertsch*

- a) How were the termination provisions different in *Dufault* and *Bertsch*?
- *Dufault*:
 - For Cause: Allowed termination “at any time” without notice, citing “failure to perform services”
 - Without Cause: Gave employer broad rights without clearly limiting to ESA
 - *Bertsch*:
 - Termination clause specified ESA minimums only if terminated without cause.
 - ESA clauses clarified no entitlement to extra benefits (notice, severance, etc.) in certain cases
 - Excluded any common law entitlements beyond ESA standards



b) Why did *Dufault* violate ESA, but *Bertsch* did not?

- *Dufault*:
 - Clauses allowing termination “at any time” and at employer’s “sole discretion” violated ESA protections
 - Section 53: Requires reinstatement after job-protected leave
 - Section 74: Prevents termination as retaliation for exercising ESA rights
 - Broad definition of “cause” did not meet strict ESA standards for wilful misconduct
- *Bertsch*:
 - Termination clause met ESA standards
 - Court found no “reasonable” alternative interpretation that could lead to an illegal outcome or violate ESA minimums



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c) What should employers expect with future case law in Ontario on the enforceability of termination provisions in employment contracts?

- Increased Scrutiny: Since *Waksdale v Swegon*, 2020 ONCA 391 and recent rulings, courts closely examine termination clauses for ESA compliance
- Uncertainty Remains: Ongoing judicial decisions add uncertainty to enforceability of termination clauses
- *Bertsch* Case Insight: Shows that courts may uphold employer-friendly clauses, but this decision (Oct 7, 2024) could be appealed

- d) How can charities and not-for-profits best prepare for a decision like the one in *Bertsch*, and not like the one in *Dufault*?
- Draft Carefully: Poorly drafted clauses can make contracts unenforceable
 - Review Regularly: Don't assume long-standing contracts are legally secure
 - However, it's impossible to entirely predict how a judge will decide any case

 - There are some key lessons to be learned from these decisions:
 - Fixed-Term Contracts: Ensure enforceability to avoid full-term liability
 - Avoid Broad "Cause" Descriptions: Use ESA standards for termination
 - Termination Without Notice: Reference ESA O Reg 288/01 as the standard
 - Avoid "Any Time" Clauses: Avoid terms like "at any time" or "sole discretion"
 - Include ESA Benefits: Ensure benefits continuity in termination clauses



B. Amendments to the *Employment Standards Act, 2000*

1. ***Working for Workers Four Act***

- a) Ontario Bill 149, received Royal Assent on March 21, 2024
- New Part III.1 of the ESA sets out certain requirements and prohibitions related to the content of publicly advertised job postings, not yet in force (to be proclaimed)
 - 8.2 (1) Every employer who advertises a publicly advertised job posting shall include in the posting information about the expected compensation for the position or the range of expected compensation for the position
 - 8.3 (1) No employer who advertises a publicly advertised job posting shall include in the posting or in any associated application form any requirements related to Canadian experience
 - 8.4 (1) Every employer who advertises a publicly advertised job posting and who uses artificial intelligence to screen, assess or select applicants for the position shall include in the posting a statement disclosing the use of the artificial intelligence
 - Requirement to retain copies of all publicly advertised job postings, and applications, for 3 years

2. Working for Workers Five Act

- a) Ontario Bill 190, received Royal Assent on October 28, 2024
 - More job posting requirements added to the ESA (not yet in force — to be proclaimed)
 - 8.5 (1) Every employer who advertises a publicly advertised job posting shall include in the posting,
 - (a) a statement disclosing whether the posting is for an existing vacancy or not; and
 - (b) such other information as may be prescribed
 - 8.6 If an employer interviews an applicant for a publicly advertised job posting, the employer shall, within the prescribed time period, provide the applicant with the prescribed information
 - Section 50 of the ESA is amended so that employers retain the right to require evidence of entitlement to sick leave but are not permitted to require a certificate from a qualified health practitioner
 - Section 132 of the ESA, which sets out the fines applicable for convictions under the ESA, is amended to increase the maximum fine for an individual to \$100,000
 - [Reminder: corporations can be fined up to \$500,000 for repeat offences]

C. Key Takeaways

-  Be careful with fixed-term contracts, and avoid their use for long terms of employment
-  Review and update employment contracts regularly, especially termination clauses
-  Avoid using language describing “just cause” termination in employment contracts
-  Start to prepare publicly advertised job postings in compliance with new ESA requirements



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