



IFW NEWSLETTER

March 2024

WHAT'S NEW AT IFW

- Partner Carita Wong will be speaking at [Osgoode Hall Professional Development's Human Resources Law for HR Professionals course](#) on March 21, 2024.
- Partner Behzad Hassibi will be speaking at the [Law Society of Ontario's Eight-Minute Employment Lawyer 2024](#) on April 11, 2024.
- Partner Behzad Hassibi will be speaking at [Osgoode Hall Professional Development's Human Resources Law for HR Professionals course](#) on April 11, 2024.



WHAT'S NEW IN THE LAW

Ontario decision holds that a termination clause stating that an employer may terminate an employee's employment "at any time" in its "sole discretion" is illegal and void

In the very recent decision of *Dufault v. The Corporation of the Township of Ignace*, 2024 ONSC 1029, the Ontario Superior Court of Justice examined the following termination provisions:

4.01 *The Township may terminate this Agreement and terminate the Employee's employment at any time and without notice or pay in lieu of notice for cause.*

...

4.02 *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:*

(i) the Township will continue to pay the Employee's base salary for a period of two (2) weeks per full year of service to a maximum payment of four (4) months or the period required by the Employment Standards Act, 2000 whichever is greater. This payment in lieu of notice will be made from the date of termination, payable in bi-weekly installments on the normal payroll day or on a lump sum basis at the discretion of the Township, subject at all times to the provisions of the Employment Standards Act, 2000.

... [Emphasis added]

The court held that the termination provisions were null and void based on the following:

- 1) Clause 4.01 did not differentiate between the common law standard of just cause and the higher *Employment Standards Act, 2000* ("ESA") "willful misconduct" standard.
- 2) Clause 4.02 only provided the employee with "base salary" contrary to the ESA's requirement that all "wages" (which includes not just salary, but commissions, vacation pay, etc.) not be reduced during the statutory notice period; and
- 3) The references in Clause 4.02 to being able to terminate in the employer's "sole discretion" and "at any time" violated the ESA's provisions relating to reinstatement on the conclusion of a protected leave (s. 53) as well as reprisal for exercising a statutory right (s. 74) – because the "**right of the employer to dismiss is not absolute**" in those specific circumstances.



Unlike the first two points, the third basis on which the court invalidated the termination provisions is a **new and novel** one, with significant and far reaching implications for the enforceability of most termination provisions that typically include language that allows for termination in the employer’s “sole discretion”, “at any time”, and possibly, “for any reason.”

While the law evolves frequently in this area, this decision potentially represents the most significant development since the decision in *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391 (which invalidated all termination provisions within a contract – even a termination provision not

being relied upon – based on the presence of an illegal just cause provision in the contract).

In the circumstances, **we strongly recommend that you contact a member of our team in order to review your employment agreement templates to minimize possible employer liability resulting from this novel and significant new application of the ESA to termination clause enforceability.**

IFW’S BREAKFAST WEBINAR – SAVE THE DATE

Our always-popular annual breakfast seminar is back on **May 2, 2024** from 8:30 am to 10 am. Please respond to Urmeela Billar at ubillar@israelfoulon.com to let us know your preference for an in-person or Zoom session.

LET’S TALK

Israel Foulon Wong LLP is one of Canada’s leading employment and labour law firms. The firm’s partners, Peter Israel, Chris Foulon, Carita Wong, Alex Van Kralingen, Krista Kais-Prial, Behzad Hassibi, Katherine Chau, Mark Repath and their associates, Vibhu Gairola and Domenica Moran, have over 125 years of collective experience in assisting clients with employment and labour law issues.

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