

# BRAUTI THORNING<sup>LLP</sup>

## — BT LEGAL —

### **Withholding Contractual Entitlements Upon Termination Pending a Signed Release Can Repudiate the Employment Agreement**

The Ontario courts continue to scrutinize both the drafting and application of termination provisions by employers. In [\*Perretta v. Rand A Technology Corporation, 2021 ONSC 2111\*](#), the Ontario Superior Court found that an employer's failure to comply with a *without cause* termination provision rendered it unenforceable. The court also went on to find that the *with cause* termination provision violated the *Employment Standards Act, 2000* (“*ESA*”), even though it could be read in a way which was compatible with the *ESA*. The ambiguity was resolved in favour of the employee. The employee was awarded reasonable notice in accordance with the common law.

#### **Background**

Candice Perretta's employment was terminated by Rand A Technology Corporation (“Rand”) without cause on March 31, 2020. At the time of termination, Ms. Perretta was 49 years old, had been employed for 5.5 years, and held the position of sales representative.

Ms. Perretta's employment agreement with Rand stated that in the event of a termination without cause she would receive two weeks of notice or pay in lieu, plus her minimum entitlements to termination notice, benefits and severance pursuant to the *ESA*.

Upon termination, Ms. Perretta was provided with a termination letter which stated that she would receive her *ESA* termination and severance entitlements. However, the letter also stated that she would only receive the additional two weeks of pay in lieu of notice if she signed a Full and Final Release in favour of Rand.

Ms. Perretta retained legal counsel who wrote to Rand, taking the position that Rand breached the employment agreement by refusing to pay her the additional two weeks pay which she was contractually entitled to, unless she signed a Full and Final Release. Rand responded by apologizing and promptly paid Ms. Perretta her *ESA* entitlements and the two weeks pay owed pursuant to her contract.

Ms. Perretta brought an action for wrongful dismissal claiming that she was entitled to common law reasonable notice. She argued that the termination provisions in the employment agreement were unenforceable for the following reasons:

1. Rand repudiated the employment agreement by demanding that Ms. Perretta sign a Full and Final Release in exchange for her contractual entitlements; and
2. The *Termination With Cause* provision violated the *ESA*, thereby rendering the *Termination Without Cause* provision unenforceable per the Court of Appeal's decision in *Wakesdale v. Swegon North America Inc.*, 2020 ONCA 391.

The action was heard by way of summary judgement before Justice Sanfilippo on March 4, 2021.

## **Decision**

Justice Sanfilippo accepted both of Ms. Perretta's arguments for the reasons summarized below, thereby finding that the termination provisions in the employment agreement were unenforceable and Ms. Perretta was entitled to common law reasonable notice. He awarded her six-months pay in lieu of notice.

### ***Repudiation of the Employment Contract***

Justice Sanfilippo summarized the test for repudiation as follows:

“The test is whether, considering surrounding circumstances, including the nature of the contract, the motives which prompted the purported breach, and the impact of the party's conduct on the other party, a reasonable person would conclude that the breaching party no longer intends to be bound by the contract with the result that the innocent party would be deprived of substantially the whole benefit of the contract.” (para 20)

In finding that Rand had repudiated the employment agreement, Justice Sanfilippo considered the fact that (a) the demand for Ms. Perretta to sign a Full and Final Release was repeated 4 times in the termination letter; (b) the termination letter made it clear that Ms. Perretta would not receive the two weeks pay unless she signed the Full and Final Release; (c) the Full and Final Release was a detailed document with numerous substantive terms, which was clearly prepared by Rand with purpose; and (d) a few days after issuing the termination letter, Rand reiterated its demand for Ms. Perretta to sign the Full and Final Release.

Justice Sanfilippo accepted Rand's admission that it made a mistake in demanding Ms. Perretta sign a Full and Final Release. Nevertheless, based on the above considerations, he found that a reasonable person assessing Rand's conduct of demanding Ms. Perretta sign a Full and Final Release as a precondition for receiving the two weeks pay that she was contractually entitled to, Rand no longer intended to be bound by the employment agreement.

He also found that the two weeks pay was the only monetary entitlement available to Ms. Perretta upon a termination without cause under the employment contract, apart from her statutory entitlements. Therefore, Rand's breach deprived Ms. Perretta of the entire benefit of the contract.

Rand's breach could not be cured by its post-breach apology and payment of the two weeks pay. Citing the Court of Appeal in *Wood v. Fred Deeley Imports*, 2017 ONCA 158 (“Wood”), Justice Sanfilippo found that if the only consequence to Rand for its breach of the employment agreement was to apologize and pay the amount that it was lawfully required to pay, there would be little or no incentive to comply with its termination provision.

### ***Illegality of the Termination With Cause Provision***

The termination *with cause* provision in the employment agreement read:

“**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, subject to the *ESA*. For the purposes of this Agreement, “just cause” means just cause as that term is understood under the common law and includes, but is not limited to: [list of Eleven Categories of Just Cause]”

Three of the eleven categories of just cause were: i) a material breach of this Agreement or our employment policies; ii) unacceptable performance standards; iii) repeated, unwarranted lateness, absenteeism or failure to report for work (the “Offending Categories”).

Justice Sanfilippo focussed his analysis on the fact that these three categories of just cause did not amount the standard of “wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer” that must be met in order to deprive an employee of their statutory termination and severance entitlements pursuant to the *ESA* under O. Reg. 288/01.

He found that the first sentence of the *Termination With Cause* provision states that Ms. Perretta’s employment could be terminated at any time, without notice or pay in lieu of notice or severance pay, only if her conduct rose to the level of O. Reg. 288/01 of the *ESA*. However, the next sentence says that Ms. Perretta’s employment can be terminated at any time, without notice or pay in lieu of notice or severance pay on the basis of the Offending Categories, which do not rise to the level of O. Reg. 288/01 of the *ESA*.

Read generously, the words “subject to the *ESA*” could have been found to neutralize or deactivate the Offending Categories and make the *Termination With Cause* provision compatible with the *ESA*. However, the *Termination With Cause* provision could also be read as disentitling Ms. Perretta to her statutory termination entitlements for conduct that does not rise to the level of O. Reg. 288/01 of the *ESA*.

Reading the provision as a whole, Justice Sanfilippo found that the provision was ambiguous and that the inclusion of the Offending Categories flew in the face of compliance with the *ESA*. This ambiguity had to be interpreted in a manner which gave the highest benefit to Ms. Perretta. The *Termination With Cause* provision therefore violated the *ESA*, rendering the entire termination provisions unenforceable. The ‘saving provision’ in the employment agreement could not save the illegal provision.

### ***Jurisdictional Issues***

Notably, Justice Sanfilippo also commented on the fact that Ms. Perretta’s claim was for \$32,660.00, which was within the jurisdiction of the Small Claims Court. While he declined to exercise his discretion to transfer the action to the Small Claims Court, Justice Sanfilippo cautioned that Ms. Perretta’s failure to transfer the action exposed her to the cost consequences under Rule 57.05 of the *Rules of Civil Procedure*. Justice Sanfilippo encouraged the parties to agree on costs rather than make a costs award. The parties did indeed agree on costs.

### **Practical Implications**

This decision raises several important practical considerations for employers in drafting and enforcing termination provisions:

1. If a termination provision within an employment agreement provides termination entitlements above statutory minimums, an employee is contractually entitled to these amounts without having to sign any form of release. An employer may be found to have repudiated the employment agreement if they require the employee to sign a release in order to obtain their contractual entitlements. If the employer repudiates the employment agreement, the employee will be entitled to common law reasonable notice, regardless of whether the termination provisions are otherwise enforceable.
2. Further to point 1, if an employer wishes to rely on a termination provision, they must comply with it. An employer should pay out an employee’s contractual termination entitlements even if the employee takes the position that they are entitled to more than the contractual amounts.

3. Employers should avoid lists/definitions of just cause in a termination for cause provision. If the list/definition includes conduct that does not rise to the level of “wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer” under O. Reg. 288/01, the termination provision may be found to violate the *ESA*. If the termination for cause provision violates the *ESA*, the termination without cause provision will be deemed unenforceable as well.
4. Parties must ensure that their action is commenced in the appropriate court. Failure to do so may lead to cost consequences.

For further information, please contact a member of our team: [Leslie Dizgun](#), [Allyson Fischer](#), [Mitchell Smith](#), [Paul Schwartzman](#), [Justin Anisman](#), [William McLennan](#), [Alyssa Jagt](#), and [Oscar Moody](#).

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