

# EMPLAWYERS' UPDATE

A Quarterly Newsletter on Labour and  
Employment Law Issues

## In this Issue

- Termination Clauses —  
Cautionary Tale of Ambiguity and  
a Missing Comma 1
- Ontario Superior Court Upholds  
Termination Clause Utilizing  
“sole discretion” and  
“at any time” Language 2
- Fixed-Term Employment Contracts  
and the Enforceability of  
Termination Clauses 3
- Short Service Executives —  
Long Common Law Notice Periods 3

### Termination Clauses — Cautionary Tale of Ambiguity and a Missing Comma

The recent decision of *Brocklehurst v. Micco Companies Limited*, 2025 NSSC 192, from the Nova Scotia Supreme Court, serves as an important reminder for employers to use clear and unambiguous language in termination clauses.

Termination clauses are a crucial component of a contract within the employment relationship as it outlines what entitlements the employee may be afforded.

The plaintiff, Craig Brocklehurst, was employed by Micco Companies Limited as a sales representative for 8.5 years. His employment terms were outlined in a letter of employment, which included a base salary of \$36,000 with the potential for higher annual earnings due to commissions, and contained express provisions regarding termination of employment. Brocklehurst was terminated without cause from Micco on June 3, 2024, and was provided with four weeks' pay in lieu of notice, aligning with the entitlement under the Nova Scotia *Labour Standards Code*. Micco Companies Limited additionally offered an extra two weeks' pay if he signed a release, which Brocklehurst did not accept and instead commenced a wrongful dismissal claim.

The termination clause at issue reads as follows:

*“only such minimum notice of termination, or pay in lieu thereof, and severance pay (if applicable) to which you are entitled under the Nova Scotia Labour Standards legislation.”*

The court determined that Brocklehurst was wrongfully dismissed and was entitled to eight months' common law notice. This determination was based on the following criterion:

- i) The Nova Scotia *Labour Standards Code* does not expressly define the term “severance pay” and because it is not defined, the clause can be interpreted in multiple ways.

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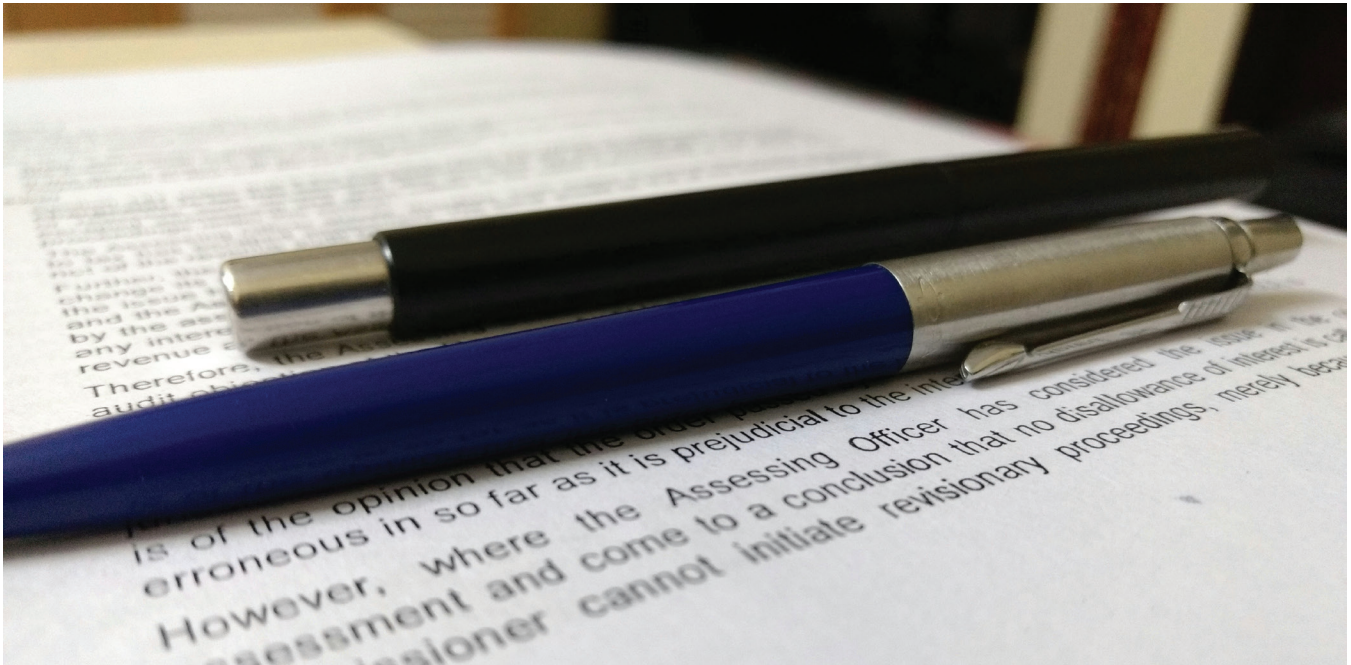


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- ii) The lack of comma in the phrase “only such minimum notice of termination, or pay in lieu thereof, and severance pay (if applicable) to which you are entitled to under the Nova Scotia Labour Standards legislation” could be read as applying only to “severance pay” only and not to “minimum notice”.
- iii) The clause did not clearly state that statutory minimums were the ceiling, and thus failed to displace common law notice.

**Key Takeaways for Employers:**

- i) Employers must critically examine their termination clauses within new employment agreements, and amend as necessary to ensure there is no ambiguous language.
- ii) A high level of attention to detail is required when drafting employment agreements. Omitting a comma could change the meaning of the phrase.
- iii) If the intention is to limit the terminated employees’ common law notice entitlements, the employer must do so explicitly and clearly communicate that statutory entitlements are the maximum amount the employee may receive.

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**Ontario Superior Court Upholds Termination Clause Utilizing “sole discretion” and “at any time” Language**

Several recent decisions out of the Ontario courts have sparked controversy surrounding the enforceability of termination clauses that include the wording “sole discretion” and “at any time.”

In *Dufault v. Ignace (Township)*, 2024 ONSC 1029 (“*Dufault*”), the court held that “sole discretion” and “at any time” language in a termination clause breached the *Employment Standards Act, 2000* (“*ESA*”). The court reasoned that an agreement that allows an employer to terminate an employee under its “sole discretion” and “at any time” could include employees on job-protected leave or employees at risk of reprisal after making an *ESA* complaint.

In *Baker v. Van Dolder’s Home Team Inc.*, 2025 ONSC 952 (“*Baker*”), the court adopted the reasoning in *Dufault* in finding that the use of “at any time” in a termination clause rendered the entire clause unenforceable.

Two more recent cases have strayed away from the approach taken by the court in *Dufault* and *Baker*.

In *Li v. Wayfair Canada Inc.*, 2025 ONSC 2959, the court rejected the plaintiff’s argument that the use of “at any time” and “for any reason” invalidate the termination clauses. In this matter, the court determined that, when reading the agreement as a whole, the scope of the termination

payments were compliant with the *ESA* despite the inclusion of “at any time” and “for any reason” language.

Similarly, in *Jones v. Strides Toronto*, 2025 ONSC 2482, the court held that the use of “at any time” without “sole discretion” does not result in a violation of the *ESA*.

These decisions offer conflicting analyses regarding the implication of “at any time” and “sole discretion” on termination clauses. We will have to wait for guidance from the Ontario Court of Appeal, which has declined to weigh in on this apparent incompatibility within the lower court’s jurisprudence.

#### **Key Takeaways for Employers:**

- i) The use of phrases “at any time” and/or “sole discretion” may not invalidate termination clauses within an employee’s employment agreement.
- ii) Clear language in employment contracts is essential for enforceability.
- iii) Regularly review employment agreements to ensure compliance with current Ontario laws.

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### **Fixed-Term Employment Contracts and the Enforceability of Termination Clauses**

The Manitoba case *Hebert v. Colin’s Mechanical Service Ltd.*, 2025 MBKB 87, considered the amount of pay in lieu of notice an employee is entitled to, per the termination clause of his employment agreement.

In 2021, George Hebert entered into a share purchase agreement with Colin’s Mechanical Service Ltd. for his electrical contracting business. Part of this share purchase agreement contained a condition that Mr. Hebert would enter into a four-year term employment contract, commencing on August 1, 2021, and ending on July 31, 2025. The termination clause stated that Colin’s Mechanical may terminate Mr. Hebert’s employment at any time during the four-year term without cause, subject to notice or payment in lieu of notice, or any combination thereof in accordance with the Manitoba *Employment Standards Code* (“*Code*”).

Mr. Hebert was given notice of termination on April 1, 2024, with his termination effective on May 1, 2024, 15 months before the contract was due to expire. Mr. Hebert obtained alternative employment on August 26, 2024, but chose to sue Colin’s Mechanical to recover the difference.

Mr. Hebert contended that his employment agreement with Colin’s Mechanical was a four-year fixed-term contract, and as such, is required to pay an amount that would have equaled Mr. Hebert’s wages and benefits to July 31, 2025.

Mr. Hebert further submitted that the termination clause was unenforceable because it did not comply with the *Code*.

Conversely, Colin’s Mechanical submitted that the section of the termination clause at issue was properly interpreted and gave the right to terminate Mr. Hebert at any time during the term without cause, and has more than satisfied the requirements of the *Code* by paying Mr. Hebert four weeks’ notice, where the *Code* would normally only require two weeks in a case such as this.

The court determined that Colin’s Mechanical was found to be not liable to make any further payments to Mr. Hebert in lieu of notice. The court based this determination on the fact that the language and meaning of the termination clause was clear and unambiguous. Colin’s Mechanical had the right to terminate at any time during the four-year term and would provide the corresponding obligation to give notice and/or pay in lieu of notice pursuant to the *Code*.

#### **Key Takeaways for Employers:**

- i) **Clarity of Language:** The court ruled in favour of the Employer because the language of their termination clause was clear and explicit (i.e. terminate at any time *during the four-year term*). Here the language is clear and concise because it sets out an explicit period of time the employer is able to terminate without cause.
- ii) **Jurisdiction Matters:** It is important for employers to take into consideration the preceding law in the jurisdiction they or their employee are in, before drafting agreements, as certain use of phrases may not be defined in the employment standards legislation.

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### **Short Service Executives — Long Common Law Notice Periods**

Forget about one month of notice per year of service for short-service employees. There is trend in employment law of generous notice period awards for short-service employees that were previously reserved for those with longer tenures. The upwards tick in notice periods is most apparent for short-service executives, due to their specialized knowledge, limited availability of similar roles, and the inherent difficulty of explaining the short durations of their prior employer when searching for a new job.

The following three cases highlight the factors that Ontario courts assess when awarding notice periods for short service executives.

#### ***Chan v. NYX Capital Corp.*, 2025 ONSC 4561**

The plaintiff, Reginald Chan, sued his former employer for wrongful dismissal after being terminated one day before the



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end of his contractual probationary period. His title was that of Vice President – Acquisitions and Asset Management and Chief Compliance Officer.

The court found that the termination clause in the employment agreement, including the probationary clause, to be void and unenforceable. The court awarded Mr. Chan 3 months of notice based his senior position, specialized skill set, the difficulty of explaining his short tenure, and limited prospects for comparable employment justified an extended notice period. The court characterized him as an executive.

***Shelp v. GoSecure Inc., 2025 ONSC 49***

Here the court awarded 6 months’ reasonable notice to a Vice President of Sales who had been employed for only 10 months before being terminated without cause. The parties agreed that the termination clause was unenforceable, entitling Mr. Shelp to common law notice.

The court held that Mr. Shelp’s short tenure did not justify a proportionally brief notice period, emphasizing the significance of his senior position, the specialized nature of his expertise, and the difficulty of securing comparable employment.

***Grimaldi v. CF+D Custom Fireplace Design Inc., 2023 ONSC 6708***

In Grimaldi, the court considered reasonable notice entitlements for a short-service employee in a specialized, senior role. Mr. Grimaldi, though not given an executive title, was the company’s highest-paid employee and was expected to operate with the authority and responsibility of an owner. He was terminated without cause after less than 5 months of employment. Mr. Grimaldi’s employment contract did not have an enforceable termination clause.

The Court awarded Mr. Grimaldi nearly 5.5 months of reasonable notice, finding that despite his brief tenure, his senior position, specialized skill set, and limited prospects for comparable employment justified an extended notice period. The court characterized him as an executive. The court also recognized that Mr. Grimaldi’s termination left him particularly vulnerable in the job market.

***Key Takeaways for Employers:***

- i) Short-service employees in senior or specialized roles are often entitled to substantial notice periods.
- ii) Employers should ensure that termination clauses are carefully drafted and enforceable, as courts continue to award generous notice periods where contractual provisions fail.