

Wilds v. 1959612 Ontario Inc. - A Cautionary Decision for Employers and Employees

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A recent decision of the Ontario Superior Court of Justice in [Wilds v. 1959612 Ontario Inc.](#) provides a helpful example of common pitfalls employers make when drafting termination clauses in employment contracts as well as the types of employer conduct on termination that can lead to an award of punitive damages. While the employee in *Wilds* was ultimately successful, the decision also provides a warning to employees and their counsel of the risks in claiming excessive amounts and commencing proceedings in the wrong Court.

Wilds involved a 52-year-old employee who was terminated in October 2020 during the COVID-19 pandemic after being employed as an executive assistant for only 4.5 months.

While the relevant termination provisions purported to entitle Ms. Wilds to two weeks of notice or pay in lieu of notice in addition to her statutory minimum under the *Employment Standards Act, 2000* (ESA) (which in this case amounted to three weeks in total), the terminations provisions were found to be unenforceable for a host of reasons.

In addition, while the employer offered to pay Ms. Wilds her contractual entitlements, the company made payment of any termination pay (including the one-week ESA statutory entitlement) conditional on Ms. Wilds signing a full and final release. When Ms. Wilds refused, the employer only paid her wages up to the date of termination. The employer also failed to reimburse Ms. Wilds' legitimate business expenses and submitted her Record of Employment late.

Flaws in the Termination Provisions

In granting Ms. Wilds summary judgment for wrongful dismissal, the Court provided a detailed review of the underlying principles regarding the enforceability of termination provisions in employment agreements generally, and identified “many problems” with the termination provision in this case that rendered it unenforceable.

These problems included the following:

1. The “without cause” termination provision stated that pay in lieu of notice would be calculated using “base salary” and only health and dental benefits were maintained for the statutory notice period.

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This failed to take into account Ms. Wilds' vacation pay, bonus, and other benefits that Ms. Wilds was entitled to receive under the ESA.

2. The "without cause" termination provision also required that Ms. Wilds execute a release in order to receive any pay in lieu of notice. An employer cannot require an employee to sign a release in order to receive minimum statutory entitlements, and this therefore amounted to a further violation of the ESA.
3. The "just cause" provision provided a list of categories of just cause that fell short of the higher ESA standard, which generally requires an element of wilfulness or intent on the part of the employee. The categories of employee misconduct listed in the "just cause" provision included "a material breach" of the employment agreement or the employer's policies; "unacceptable performance standards"; "repeated, unwarranted lateness, absenteeism or failure to report for work"; "personal or off-duty conduct (including online conduct) that prejudices the [employer's] reputation, services or morale"; and "any conduct that would constitute just cause pursuant to the common law." As it is possible for an employee to engage in these types of misconduct without necessarily doing so deliberately, the "just cause" provision was also found to be contrary to the ESA.
4. While the "just cause" provision included certain "saving" language to the effect that the employee would not receive anything "other than any notice, pay in lieu of notice or severance required" by the ESA, the Court found that this language was insufficient to remedy the termination provision since it was immediately followed by the categories of conduct that did not constitute the type of deliberate actions contemplated by the ESA. This contradictory language rendered the "just cause" provision ambiguous, and any such ambiguities are to be interpreted in favour of employee.
5. A similar conclusion was reached regarding the employment agreement's overall "saving provision," which confirmed that the intention was to comply with the ESA and that the minimum statutory provisions would replace any contractual terms that were found to provide for less than what is required by the ESA. This is insufficient to cure any clear violations of the ESA in the termination provisions.

Summary Judgment is Granted

Despite Ms. Wilds' claim for five months of pay in lieu of notice (a period longer than her actual length of employment), the Court concluded the reasonable notice period at common law was only two months. Ms. Wilds was awarded \$7,500 in lost salary along with lost benefits, bonus and unpaid vacation pay/reimbursement of expenses bringing the total to \$9,923.85.

While the Court rejected Ms. Wilds' claims for aggravated, mental distress, and/or moral damages on the basis that there was no evidence that Ms. Wilds had suffered damages beyond the normal distress/hurt feelings that accompany a loss of employment, it did award her punitive damages in the amount of \$10,000 due to the egregious conduct of the employer in failing to pay Ms. Wilds her minimum entitlements under the ESA unless she signed a release, failing to reimburse her legitimate business expenses, and issuing her

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Record of Employment late.

Key Takeaways for Employers and Employees

While far from an exhaustive list, this case serves as a useful reminder to employers of the various ways in which termination provisions may be rendered invalid and that saving provisions are insufficient to cure these defects. Employers must pay careful attention when drafting termination provisions and should, as the Court describes, have “strict compliance with the ESA as their main objective.”

However, despite the motion for summary judgment being granted and punitive damages being awarded, the [subsequent costs decision](#) did have one saving grace for employers and should serve as a warning for employees: the overall damages awarded totalled less than \$20,000 and therefore the action should have been commenced in the Small Claims Court. While the Court nonetheless exercised its discretion to award the plaintiff some costs, it limited the award to only \$6,000, which reflected the maximum costs plus disbursements that would have been available in the Small Claims Court, but reduced further to reflect the somewhat divided success of the parties (namely, the employee’s failure to prove aggravated, mental distress, or moral damages).

The cost award of only \$6,000 combined with the damages of less than \$20,000 means that the plaintiff’s actual costs incurred significantly exceeded her total recovery. This decision should therefore serve as a cautionary tale for overzealous plaintiff lawyers: commencing an action claiming unrealistic notice periods or including unsupportable heads of damages can backfire with significant consequences for their clients even in cases where an employee is ultimately successful.

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