

A Cautionary Tale: Refusing to Payout Contractual Entitlements Without a Release Could Repudiate the Entire Employment Agreement

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In a recent Ontario decision, [*Timmins v. Artisan Cells*](#), the Court reviewed circumstances often faced by employers considering termination of employment: the employment contract provided for three months' notice/pay in lieu on termination without cause; however, the agreement did not require the employee to sign a release.

The employee in this case held a senior level role and was terminated without cause. The employer offered one week of termination pay (which it claimed was pursuant to the Ontario *Employment Standards Act, 2000* (the ESA)) and required a broad release to provide the balance of the three months' pay owed under the employment contract. Notably, with 3.5 years of completed service, the employee was actually entitled to three weeks of termination pay under the ESA.

The employee took the position that by requiring a release to provide his contractual entitlements, where no such requirement existed in his employment agreement, the employer had repudiated the contract. Therefore, the employee argued, there was no valid restriction on his entitlement to common law reasonable notice of termination or pay in lieu.

This case was initially defended by the employer and proceeded through examinations for discovery. At discovery, the representative for the employer admitted that the company was aware that the employee was entitled to three months of pay on termination, but had no explanation for withholding the payment in exchange for a release. Just prior to trial, the employer withdrew its defence and the matter proceeded to trial undefended.

The Court held that by failing to pay the employee's three months of contractual severance (or even the three weeks of termination required by the ESA), and by insisting on a broad release, the employer had repudiated the employment agreement. As a result, the employee was entitled to common law reasonable notice of termination. The Court awarded a nine month notice period, considering the employee's role (Chief Development Officer), age (44 years old), 3.5 years of completed service, the niche industry the employee worked in and his total annual compensation of more than \$450,000.

It is worth noting that the Court declined to consider whether the employment agreement violated the ESA

by including an exclusive jurisdiction clause in favour of the courts. The employment agreement provided as follows:

You and the Company submit to the exclusive jurisdiction of the courts located in the Province of Ontario in connection with any Dispute or any claim related to any Dispute, and waive any right to a jury with respect to such Dispute.

However, [section 96\(1\)](#) of the ESA permits anyone alleging ESA violations to file a complaint with the Ministry of Labour. The employee argued that this exclusive jurisdiction clause violated [section 96\(1\)](#) because it attempts to oust the jurisdiction of the Ministry to address ESA complaints.

Since the action was undefended by the employer and the Court did not have the benefit of argument on both sides of this issue, the Court left for another day the determination of whether the employment agreement was rendered invalid by including this exclusive jurisdiction clause. Instead, the Court resolved the case on the repudiation issue alone.

The Court also declined to award punitive damages in the circumstances.

This case is a cautionary tale for employers navigating a termination without cause where the employment agreement provides for specific contractual entitlements without expressly requiring a release. Employers should be aware that an employment agreement could be repudiated if they insist an employee execute a release in exchange for amounts provided in the employment agreement where no such contractual obligation exists. Moreover, if an employer subsequently withholds payment of contractual entitlements on termination because the employee refuses to execute a release without a contractual obligation to do so, the employment agreement may also be repudiated.

When an employment agreement is repudiated, the consequences can be significant. The employer may be precluded from relying on a valid termination clause to limit an employee's common law entitlements or other important clauses in the employment agreement, such as post-termination employee covenants and obligations.

For employers who desire a release on termination without cause (which is generally recommended and good practice), it is worthwhile reviewing your employment contracts to ensure it validly entitles the employer to require an executed release before providing contractual termination entitlements above the statutory minimums under the ESA. Please reach out to any member of our [Employment & Labour Group](#) if you have any questions.