

Case In Point

Courts Differ on Termination Provisions and Need for Future Compliance with ESA

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Over the last few years, courts have been reluctant to enforce different “ESA only” termination provisions due to ambiguity. However, not all judges have taken the same position with respect to what constitutes an ambiguous termination provision. The following two cases offer differing views on termination provisions in employment contracts and future compliance with the *Employment Standards Act, 2000* (“ESA”).

In 2011, in [Wright v. The Young and Rubicam Group of Companies \(Wunderman\)](#), the Ontario Superior Court found that the termination provision in an employment contract was void because, in addition to not mentioning benefit continuance, it was possible that it would violate the statutory minimum entitlements under the ESA at a future date. This was the ruling even though at the time of actual termination the applicable termination provision was in compliance with the ESA. In particular, while the plaintiff was paid his statutory entitlement at the time of termination, the contract was not in compliance with the statutory minimums had he been terminated after, for example, 9.5, 10.5 or 11.5 years of service, all of which would “run afoul” of the ESA by 0.5 weeks.

On the other hand, in the relatively recent decision [Ford v. Keegan](#), the Ontario Superior Court disagreed with the reasoning in *Wright* and held that a termination provision in an employment contract is valid if it complies with the ESA on the date of termination, even though it may not be in compliance at some future point.

The Court’s comments in *Ford v. Keegan* bring some reassurance to employers that they do not have to draft termination provisions with notice periods “of such a length as to satisfy the legislative requirements in every conceivable circumstance.” It is also good practice to stipulate in employment contracts that the employee shall not receive less than his or her minimum entitlements under the ESA.