



## **Ontario Employment Contract Termination Provisions Under More Scrutiny to Protect Employee's Interests**

*Employers may now need to revise and re-write their employment contracts to ensure enforceability.*

The recent Ontario Court of Appeal decision in *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391, has changed the rules of the game for termination provisions in employment contracts. Many employment agreements contain “for cause” termination provisions which state that an employee may be terminated for cause without *any* entitlement to notice or pay in lieu of notice. In this decision, the Court of Appeal ruled that such provisions are void and unenforceable as they violate the *Employment Standards Act, 2000*, which states that absent wilful misconduct or wilful neglect of duty, an employee terminated for cause is still entitled to their *ESA* minimums. The consequence is that the entire termination clause is void and unenforceable, regardless of whether the “without cause” portion of the termination provision is enforceable and regardless of whether the employment agreement contains a severability clause. The decision will result in many employment agreement termination provisions being unenforceable, increasing severance costs, and creating uncertainty.

### **Background:**

Mr. Waksdale was terminated *without cause* from his job. His employer relied on a termination “without cause” provision in his employment contract which provided for two weeks’ pay in lieu of notice. In response, Mr. Waksdale sued his employer, alleging wrongful dismissal and claiming six months’ pay in lieu of notice for the eight months he was employed.

Mr. Waksdale’s employment contract contained two individual clauses regarding termination: one regarding termination “with cause” and one regarding termination “without cause.” Mr. Waksdale was terminated according to the latter, which read:

“You agree that in the event that your employment is terminated without cause, you shall receive one week notice or pay in lieu of such notice in addition to the minimum notice or pay in lieu of such notice and statutory severance pay as may be required under the *Employment Standards Act 2000* as amended. All reimbursements for business expenses shall cease as of date of termination of your employment, however, you shall be reimbursed for legitimate business expenses that have been incurred and submitted to the Company but not as yet paid you to that date. The terms of this section shall continue to apply notwithstanding any changes hereafter to the terms of your employment, including, but not limited to, your job title, duties and responsibilities, reporting structure, responsibilities, compensation or benefits.”

At trial, it was conceded by the employer that the clause which governed termination for cause breached the Ontario *Employment Standards Act, 2000* (“ESA”) and was therefore void and unenforceable. However, Mr. Waksdale had been dismissed "without cause." It was acknowledged that, on its own, the without cause provision was valid and complied with the minimum requirements set out by the ESA, and functioned independently of the “for cause” clause. On this basis, the trial judge ruled in favour of the employer.

### **Court of Appeal Decision:**

On appeal, the Court analyzed whether the illegality of the Termination for Cause provision rendered both termination provisions void. The Court ultimately ruled in favour of Mr. Waksdale and found that the unenforceability of the for cause provision extended to the without cause provision. It did not matter that he was not dismissed under the illegal clause itself. Additionally, the Court found that the severability clause would not function to save the “without cause” provision.

The provisions governing termination of employment must be cohesive. Contracts cannot have two separate provisions governing termination, where one is drafted in a way that contravenes the ESA. As the Court of Appeal states, “an employment agreement must be interpreted as a whole and not on a piecemeal basis. The correct analytical approach is to determine whether the termination provisions in an employment agreement read as a whole violate the ESA” (para 10).

Employers in similar situations will also not be saved by adding severability clauses in their employment agreements, which would generally allow individual clauses to be considered separately from one another. Employers will still be able to enforce rights-restricted contracts, but the courts "will not enforce termination provisions that are in whole or in part illegal" (para 10).

Termination provisions in employment contracts should be analyzed from a perspective that emphasizes employee protections. This was highlighted by Justice Laskin in *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158, 134 O.R. (3d) 481 as follows:

“The ESA is remedial legislation, intended to protect the interests of employees. Courts should thus favour an interpretation of the ESA that “encourages employers to comply with the minimum requirements of the Act” and “extends its protections to as many employees as possible” over an interpretation that does not do so” (*Wood*, para 28; citing *Machtinger*).

In conclusion, moving forward, while Ontario employers will be able to enforce contracts where the rights of employees are restricted in part, in no event will they be able to implement termination clauses that are in whole or in part illegal. Doing so will render the termination provisions as a whole void and unenforceable and give rise to expensive severance costs and legal fees.

**Practical Tips:**

1. Review the termination provisions of existing employment contracts and create new ones if required to ensure enforceability,
2. Clearly reference all minimum entitlements under the statute; and
3. Ensure that termination with cause provisions are drafted to ground the difference between with cause at common law and the ESA standard (“willful misconduct or willful neglect of duty”).

All Canadian employers should consult with their lawyers to ensure that their employment contract termination clauses are enforceable.

If you have questions regarding the enforceability of your employment contracts or any other workplace law matters, please do not hesitate to contact Brauti Thorning LLP.