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Ontario Court of Appeal Finds Unenforceable Language in "For Cause" Termination Provision to be Fatal Even When Employee Terminated "Without Cause"

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The Ontario Court of Appeal's decision in *Waksdale v. Swegon North America Inc.*[1] was released on June 17, 2020 and is the latest in a series of recent decisions which have all considered the enforceability of specific termination provisions within employment agreements. These decisions are not always easy to reconcile with one another and the Court's pendulum seems to swing back and forth between protecting an employee's *prima facie* common law right to reasonable notice of termination without cause and upholding an employer's ability to replace this common law right with a contractual termination provision that specifies some other period of notice or provides the basis on which to calculate such period of notice. *Waksdale* has swung the pendulum further in favour of employees by introducing yet another barrier to the enforceability of termination provisions that attempt to replace the employee's common law reasonable notice entitlements following a without cause termination.

The *Waksdale* decision considered whether the "without cause" termination provision in an employment agreement, which attempted to limit notice entitlements to the minimum requirements set out in the *Employment Standards Act, 2000*[2] ("ESA"), was enforceable even though both parties conceded that the separate "for cause" termination provision included in the same agreement was unenforceable because it contravened the ESA. It bears repeating that these were two separate provisions contained in the same employment agreement, addressing two different and mutually exclusive possible conclusions to the employment relationship. The employment agreement also included a severability clause which stated that any illegal provision was severable from and would not affect the legality of the remainder of the agreement.

In a relatively short decision, the Ontario Court of Appeal held that the correct analytical approach was to determine whether the termination provisions in an employment agreement read as a whole violated the ESA; the agreement must be interpreted as a whole and not read on a piecemeal basis.[3] This reversed the lower court decision which held that the "without cause" termination provision was a stand-alone clause which never referenced the problematic "for cause" termination provision and was therefore clear and enforceable on its own express terms.[4]

Both decisions also addressed the effect of the severability clause. The Ontario Superior Court held that there was no need to sever anything from the "without cause" termination provision in order to make it enforceable as this provision was separate and distinct from any unenforceable language included in the "for cause" termination provision. The Court of Appeal held that the unenforceability of the "for cause" termination provision essentially infected the "without cause" termination provision such that both were equally unenforceable and therefore unable to be saved by a severability clause, which cannot have any effect on provisions that have already been made void by statute.[5]

The Court of Appeal's decision also referenced the fact that a termination provision must be enforceable as at the date it was entered into and that an employer complying with the relevant legislation at the time of termination cannot validate an otherwise

unenforceable termination provision.[6] One of the goals of this interpretive approach, as previously expressed by the Court of Appeal,[7] is to incentivize employers to draft enforceable termination provisions from the start of the employment relationship. However, this does not address the fact that there have been frequent appellate level decisions released over the past few years that have all significantly impacted what language does and does not need to be included in a termination provision for it to be enforceable.[8]

Incentivizing employers in this way also ignores the fact that an employer cannot revise an existing termination provision to bring it into compliance with the most recent guidance set out in the relevant case law, without first providing its employees with fresh consideration for doing so. Revising existing termination provisions to ensure compliance with the most recent case law can also have a negative impact on employee morale or engagement, as employees may be concerned by the focus on the termination provisions in their employment agreements.

As a result of the Ontario Court of Appeal's decision in *Waksdale*, it will be even more challenging for employers to draft enforceable termination clauses from the start of an employment relationship. The finding in this decision that a separate "for cause" termination provision can have the effect of nullifying an otherwise enforceable "without cause" termination provision contained in an entirely separate clause in the same agreement, seems to indicate that the Ontario Court of Appeal requires absolute perfection in order to enforce a written termination provision that limits notice entitlements to the minimum entitlements set out in the ESA.

In light of these concerns and the numerous appeals which continue to seek further clarity from our courts on this heavily litigated issue, the time may be right for the Supreme Court of Canada to weigh in on the proper drafting and enforceability of termination provisions in employment agreements. However, until that happens, employers should consider reviewing the enforceability of the termination language included in their existing employment agreements (as well as any employment agreement templates) on a periodic basis, and should definitely do so before any terminations take place or any material changes are made to the terms and conditions of an individual's employment.

Key take-away for employers: review your employment agreements and existing templates with legal counsel on a periodic basis and prior to any termination of employment to ensure that they include enforceable termination provisions.

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[1] 2020 ONCA 391 (*Waksdale*)

[2] S.O. 2000, c. 41 ("ESA")

[3] *Waksdale*, *supra* note 1 at para 10

[4] 2019 ONSC 5705, at paras 15 and 17

[5] *Waksdale, supra* note 1 at para 14, citing *North v. Metaswitch Networks Corp.*, 2017 ONCA 790 at para 44

[6] *Ibid* at para 11

[7] *Wood v Fred Deeley Imports Ltd.*, 2017 ONCA 158 at para 47 (*Wood*)

[8] *Wood; Nemeth v. Hatch Ltd.*, 2018 ONCA 7; *Andros v. Colliers Macaulay Nicolls Inc.*, 2019 ONCA 679

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