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Termination Clauses and the *Employment Standards Act:* A New Warning for Employers from the Ontario Court of Appeal

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Many Ontario employers document the terms of the employment relationship in a written employment agreement. These agreements commonly distinguish between an employee's entitlements on termination of employment "without cause" and termination "for cause." At the same time, it is settled law that any termination clause is void if it purports to contract out of the minimum entitlements on termination provided by the *Employment Standards Act, 2000* (Ontario) (ESA). As a consequence, employees terminated without cause under a void clause will generally be entitled to claim not only their minimum entitlements under the ESA but also wrongful dismissal damages in lieu of "reasonable notice" of termination at common law, which, depending on the employee's length of service and other factors, could amount to awards of up to 24 months' total compensation.

Since many terminations of employment occur on a without-cause basis, Ontario courts have seldom addressed employment agreements in such circumstances when the operative without cause provisions comply with the ESA but the for cause provisions do not. In a without cause termination, it could have been argued that the for cause provision was simply moot. However, in a recent decision, *Waksdale v Swegon North America Inc. (Waksdale)*,[1] the Ontario Court of Appeal has now ruled otherwise.

Background

Waksdale involved the termination without cause of a 10-month employee who had been hired subject to a written employment agreement that contained both a termination without cause provision (triggered in this case) and a separate, apparently stand-alone termination for cause provision.

The parties agreed that the termination without cause provision did not purport to contract out of the ESA. The parties also agreed that the termination for cause provision did do so – and was therefore void. The only question before the court was whether the termination for cause provision's defect invalidated the termination without cause provision too.

The lower court found that the two clauses were stand-alone and therefore found in favour of the employer. The Court of Appeal disagreed. According to the Court of Appeal: "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."[2]

The Court of Appeal therefore found the two termination clauses to form the agreement's termination provision "as a whole." The Court further declined to apply the agreement's severability clause to read down the problematic for cause provision, affirming its existing position in employment cases that a severability clause will not have any effect on a provision that is void by statute. As a result, the without cause portions of the provision were also void, and the employee became entitled to wrongful dismissal damages at common law.

What Has Changed and What Has Stayed the Same?

Subsection 5(1) of the ESA provides that any provision that purports to contract out of a minimum entitlement under the ESA is void. Thus, it has long been understood that a termination provision that purports to limit entitlements on termination of employment to less than the minimums that the ESA provides will be void. Since many employment agreements have multiple termination provisions addressing

distinct scenarios, what has been less clear has been the effect of one of these provisions purporting to contract out of the ESA when another such provision does not, and it is only the latter on which an employer seeks to rely.

According to the Court of Appeal's reasons in *Waksdale*, an employment agreement's termination provisions will be viewed collectively, with deficient wording applicable only to a particular scenario potentially voiding all termination provisions as a whole.

What does not seem to have changed, however, is the need for considered drafting, with the assistance of an employment lawyer, in order to ensure that each part of an agreement's termination provision(s) complies with the ESA.

Dispelling Some ESA Myths

Waksdale also underscores other existing principles and caveats for drafting employment agreements, some of which remain less well understood.

"Cause" and the ESA

Despite what some might believe, the ESA does not have a concept of termination for "cause" (alternatively called "just cause"). "Cause" is a common law concept. On a termination for cause, an employee who normally would be entitled to "reasonable notice" of termination at common law will not be entitled to any notice or compensation on termination.

However, the ESA provides separate, statutory notice of termination and severance entitlements. These do not depend on whether or not there has been cause at common law. Instead, Ontario Regulation 288/01 made under the ESA prescribes circumstances in which an employee will not be entitled to notice of termination or severance. One such circumstance is when the employee "has been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer." Numerous Ontario court cases have addressed the distinction between this ESA standard and common law cause. Sometimes conduct will be so egregious as to meet both thresholds, but at other times conduct can constitute cause at common law but fall short of "wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer" under the ESA. In this case, a contractual provision that purported to deny an employee ESA termination entitlements in all cases of termination for cause would be void.

"Cause" under an Employment Agreement

Rather than relying solely on the common law concept of cause, which can be ambiguous and is subject to the continued interpretation of the courts, many employers also draft employment agreements to contain a contractually defined concept of "Cause." In these cases, such agreements often define Cause with reference to specific conduct or infractions, some of which may not constitute cause at common law. For example, a contractual definition of Cause for an employee in a position of trust could include any conviction of the employee for a financial crime (perhaps not related to their employment), even though such a conviction might not constitute cause at common law. Sometimes these contractual definitions of Cause include a broad, catch-all reference to any conduct that would constitute cause at law.

As stated above, an employment agreement may provide that certain termination entitlements up to and including common law "reasonable notice" are not payable in the event that the employee is terminated for contractually defined Cause. However, notice of termination and severance pay under the ESA may still be payable, and a clause that purports to provide otherwise on a termination for Cause will run into the same difficulties as those noted in the previous section.

Considered Drafting Is Still Available to Employers to Avoid the Result in *Waksdale*

While the *Waksdale* decision provides clarity on the interconnected relationship of termination provisions within an employment agreement, it is worth noting that it may not be as significant a sea change as might appear on first blush.

As noted above, the *Waksdale* decision does not preclude an employment agreement from having an enforceable, contractual for-cause (or for-Cause, as contractually defined) termination provision. However, drafters will still need to ensure that all such provisions in an

agreement do not purport to contract out of the ESA. The involvement of an employment lawyer is advisable, particularly when interconnected termination provisions address multiple scenarios, each with differing termination entitlements.

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[1]2020 ONCA 391.

[2]Ibid at para 10.

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