Cassels

Ontario Court of Appeal Delivers Significant Blow to the Enforceability of Termination Provisions in Employment Agreements

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As many employers in Ontario know, courts will carefully scrutinize termination provisions in employment agreements to ensure compliance with the *Employment Standards Act, 2000* (the ESA). In the event of a drafting error, irregularity or ambiguity, the clause may be rendered void and replaced by a more generous common law notice obligation.

In the past, the focus of judicial scrutiny of termination provisions has been on the language in "without cause" provisions and less so on the rarely relied upon termination "for cause" provisions. However, as a result of the Ontario Court of Appeal's recent decision in *Waksdale v. Swegon North America Inc. 2020 ONCA 391* (*Waksdale*), that focus is about to change.

In *Waksdale*, the Court has once again moved the target for employers attempting to enforce termination provisions by finding that even where a "without cause" termination provision is perfectly drafted and otherwise enforceable, the clause will be deemed unenforceable if the "for cause" termination provision is not compliant with the ESA. The decision will apply even where no cause for termination is alleged and regardless of whether the agreement includes a severability provision.

Background

Mr. Waksdale was employed by Swegon North America Inc. (Swegon) as a Director of Sales. Prior to commencing his employment, Mr. Waksdale signed an employment agreement containing two termination provisions: "Termination with Notice" and "Termination for Cause."

After eight months of employment, Mr. Waksdale's employment was terminated without cause. Swegon provided Mr. Waksdale with two weeks' pay in lieu of notice, relying on the Termination with Notice provision in the employment agreement, which permitted the company to terminate Mr. Waksdale's employment without cause by providing his minimum entitlements to notice, severance pay and benefit continuation under the ESA, plus an additional one week's pay. Mr. Waksdale sued for wrongful dismissal, seeking six months' pay in lieu of notice at common law.

Summary Judgment Decision

At issue on summary judgment was the enforceability of the termination provision. Although Mr. Waksdale acknowledged that the Termination with Notice provision was compliant with the ESA, he argued that the Termination for Cause provision contravened the ESA and therefore rendered both provisions void and unenforceable.

In response, Swegon conceded that the Termination for Cause provision was unenforceable, however took the position that the Termination for Cause and Termination with Notice provisions were separate, stand-alone provisions, and as Mr. Waksdale was terminated without cause, the Termination for Cause provision was irrelevant.[1]

Swegon further argued that if necessary, the Termination for Cause provision could be severed from the agreement by the severability provision, which provided as follows:

You agree that if any covenant, term, condition or provision of this letter outlining the offer of employment with the Company is found to be invalid, illegal or incapable of being enforced by a rule of law or public policy, all remaining covenants, terms conditions and provisions shall be considered severable and shall remain in full force and effect.

The motion judge agreed with Swegon and dismissed Mr. Waksdale's action, finding that the Termination for Cause provision was a stand-alone provision and was not relevant to determining Mr. Waksdale's notice entitlements upon termination without cause. As the relevant provision complied with the ESA, Mr. Waksdale had no entitlement to notice of termination at common law.

Court of Appeal Decision

On appeal, the Court of Appeal overturned the motion judge's ruling and held that the illegality of the Termination for Cause provision rendered the Termination with Notice provision unenforceable, entitling Mr. Waksdale to reasonable notice of termination at common law.

In coming to its decision, the Court set out the often-cited principles with respect to the interpretation of termination provisions in employment contracts. The Court noted the power imbalance between employees and employers and reiterated that the ESA is remedial legislation intended to protect the interests of employees and therefore must be interpreted in a way that encourages employers to comply with its requirements. In applying these principles, the Court held as follows:

1. Termination provisions in an employment agreement must be interpreted as a whole and not on a

piecemeal basis;
2. In conducting this analysis, it is irrelevant whether the termination provisions are found in one place in the agreement or separated, or whether the provisions are by their terms otherwise linked; and
3. It did not matter that Swegon did not rely on the "for cause" provision. The Court is obliged to determine the enforceability of the termination provisions at the time the agreement was executed.

The Court also refused to apply the severability provision to save the otherwise valid without cause provision, finding that, “a severability clause cannot have any effect on clauses of a contract that have been made void by statute.”

With respect to severability, the Court relied on its prior decision in *North v. Metaswitch Networks Corporation,* 2017 ONCA 790 (*North*). Notably however, the *North* decision did not address a situation involving two distinct termination provisions. Instead, it considered whether an offending sentence within a without cause termination provision could be severed to leave the remainder of the provision in place. In declining to sever the offending sentence, the court held that a severability clause was inoperative on provisions that are void due to a breach of the ESA as there was nothing to which the severability clause could be applied.

The decision in *Waksdale* takes the analysis in *North* further by finding a severability provision inoperative with respect to distinct termination provisions where one provision is voided due to a breach of the ESA, and the other is otherwise enforceable. In requiring that these provisions be read together, the *Waksdale* decision represents a departure from prior case law and a notable development in the law on the application of severability provisions.

Takeaway for Employers

While it is possible that Swegon will seek leave to appeal to the Supreme Court of Canada, absent a successful appeal, the *Waksdale* decision will have a significant and wide-reaching impact on employers attempting to rely on “without cause” termination provisions in existing offer letters and employment agreements to limit an employee’s common law entitlements on termination.

The impact is likely to be particularly significant for employers in the context of the COVID-19 pandemic as it has the potential to increase severance costs at a time when many companies are trying to manage costs and considering reductions in their workforce.

To address the developments in the *Waksdale* decision, we strongly encourage employers to undertake a review of their existing employment agreements, and in particular, the “for cause” or “just cause” termination language, to ensure compliance with the ESA and avoid an outcome where the “for cause” provision renders an otherwise valid “without cause” provision unenforceable.

[1] The enforceability of the “Termination for Cause” provision was not at issue in this case as it was conceded to be in breach of the ESA. As a result, the language of the provision was not reproduced in either the lower court or appellate decisions.