

All Or Nothing: Void Just-Cause Termination Provision Invalidates Entire Termination Clause



In a recent decision, the Court of Appeal for Ontario held that an employer could not rely on a valid and enforceable without-cause termination provision because the employment contract included a separate for-cause termination provision that violated the *Employment Standards Act, 2000* ("ESA").

In coming to its decision, the Court of Appeal considered it irrelevant that the employer had not actually relied on the for-cause termination provision when terminating the employment relationship. The Court of Appeal also refused to give any effect to the employment contract's severability provision.

This decision underscores the importance of ensuring that all termination provisions comply with the requirements of the ESA, both individually and collectively, as the courts may rely on the invalidity of one such clause to refuse to give effect to other ESA-compliant provisions.

Factual Background

The employee was a 42-year-old Director of Sales with an overall annual income just shy of \$200,000. The employment relationship was regulated by a written employment agreement that included, among others, the following provisions:

- A without-cause termination provision, which the parties agreed complied with the ESA;
- A separate for-cause termination provision, which the employer conceded was not ESA-compliant; and
- A severability provision.

The employee began his employment with the company on January 8, 2018, and was dismissed without cause on October 18, 2018. Following the termination of employment, the employee sued his former employer for wrongful dismissal. The matter was heard by the Ontario Superior Court of Justice on a summary judgment motion.

Employer Wins Summary Judgment Motion

Before the lower court, the employee took the position that the unenforceability of the for-cause termination provision rendered the entire agreement – or at least the termination provisions – void and unenforceable. The employee argued that the ESA is remedial legislation, and that the case should be decided in a way that incentivizes employer compliance with the statute.

The employer, while conceding that the for-cause termination clause was void for violating the ESA, asserted the violation did not serve to invalidate the without-cause termination clause. The employer further argued that it was this latter clause that was relevant on the facts of the case, since the dismissal had not been issued for cause.

Deciding in favour of the employer and dismissing the motion for summary judgment, the lower court noted that, while employment agreements should generally be interpreted as delineating and enforcing employees' rights, this principle cannot be stretched to the point of finding ambiguity where none exists. The lower court held that the without-cause termination clause was unambiguous, enforceable, and, further, stood apart from the for-cause termination clause as a separate and distinct contractual provision.

The lower court also held that there was "no need to sever anything" in this case, as the for-cause termination provision did not apply, and there were no grounds on which to challenge the enforceability of the without-cause termination clause. Since that clause did not contravene the ESA, it was "valid and enforceable as written and agreed to".

The lower court distinguished case law on severability provisions relied on by the employee, stating that, in this case, the employer did not seek to invoke or to in some way remediate the invalid for-cause termination clause. Rather, it invoked and sought to enforce, a valid without-cause termination clause on the very terms the parties had agreed upon. The lower court held that the without-cause termination clause was valid when the agreement had been entered into, and remained valid upon the employee's termination.

The Court of Appeal Overturns Motion Judge's Order

In a very brief decision, the Court of Appeal sided with the employee, setting aside the motion judge's order, and ordering that the matter be remitted to the motion judge to determine the quantum of the appellant's damages.

The Court of Appeal identified the only issue as whether the two termination clauses should be considered separately or whether the illegality of the for-cause provision impacted the enforceability of the without-cause termination provision.

The Court of Appeal rejected the employer's submission that the two termination provisions were discrete and not entangled, such that there was no reason why the invalidity of one clause should impact on the enforceability of the other.

Disagreeing with the employer, the Court of Appeal stated as follows:

[10] . 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. Recognizing the power imbalance between employees and employers, as well as the remedial protections offered by the ESA, courts should focus on whether the employer has, in restricting an employee's common law rights on termination, violated the employee's ESA rights. While courts will permit an employer to enforce a rights-restricting contract, they will not enforce termination provisions that are in whole or in part illegal. 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. Here the motion judge erred because he failed to read the termination provisions as a whole and instead applied a piecemeal approach without regard to their combined effect.

The Court of Appeal went on to state that it was "of no moment that the respondent ultimately did not rely on the Termination for Cause provision".

Building on its view that the two termination clauses should not be viewed as separate clauses, the Court of Appeal declined to apply the severability provision, stating that, having concluded the two clauses were to be read and understood together, the severability clause could not apply to sever the offending portion of the termination provisions.

The Court of Appeal's decision arguably did not give any effect to the intention of the parties, who agreed to a contractual arrangement that clearly contemplated separate obligations and entitlements in the event of for-cause and without-cause terminations. Furthermore, the Court of Appeal's emphasis on employee vulnerability in its analysis was inconsistent with the fact that the agreement in question was negotiated by a sophisticated managerial employee with a sizeable six-figure income.

Check the Box

This latest Court of Appeal decision in employment matters underscores the importance of ensuring that employment standards are scrupulously adhered to when drafting termination provisions. The decision also highlights that employers may not be able to rely on severability provisions to safeguard otherwise valid and enforceable termination clause language.

In light of this decision, employers are well advised to undertake a review of their employment agreements to ensure compliance with employment standards obligations. Where employment contracts for existing employees require update or revision, employers should also remember that consideration (i.e. something of value) must be provided to the employee in order to ensure their agreement to be bound by the new terms and conditions of employment is valid and enforceable.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

by Giovanna Di Sauro, Fillion Wakely Thorup Angeletti LLP