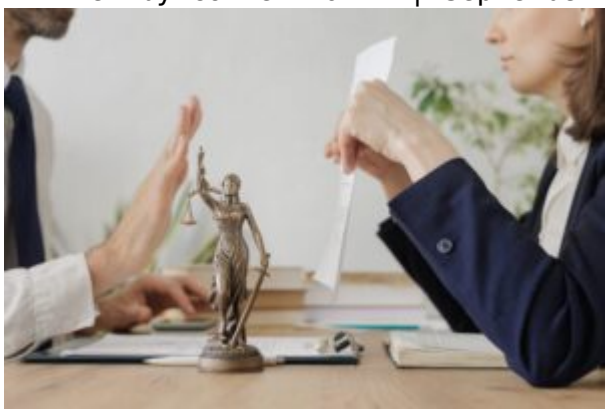
Court Finds That Saving Clause Does Not Fix An Illegal Termination Provision

written by Conner Lantz | September 27, 2023



Bottom Line

Despite a "saving provision" that purported to incorporate the provisions of the *Employment Standards Act, 2000* (the "*ESA*") into the employment agreement, the Ontario Superior Court of Justice in *Tan v. Stostac Inc.*, 2023 ONSC 2121, found a termination clause to be unenforceable for inconsistency based on the principles articulated in *Waksdale v. Swegon North America Inc.* 2020 ONCA 391 ("*Waksdale*").

Facts

The Plaintiff, Hans Tan, was employed as a depot manager with Stostac Inc. ("Stostac"). His employment was terminated on May 28, 2020, as a result of economic conditions relating to the COVID-19 pandemic. At the time of his employment termination, the Plaintiff was 40 years old and had been employed by Stostac for just under five years.

The Plaintiff was employed pursuant to a written employment agreement, which included the following termination provision:

The Employer may end the employment relationship at any time without advanced notice and without pay in lieu of such notice for any just cause recognized at law.

Subsequent to the probationary period, the Employee understands and agrees that employment may be terminated at any time by the Employer providing the Employee with two (2) weeks of notice, pay in lieu of notice or a combination of both, at the Employer's option, plus one additional week of notice (or pay in lieu) for each year of completed service to a maximum of eight (8) weeks. In addition, after completing five (5) years of continuous employment, severance pay pursuant to the Ontario *Employment Standards Act, 2000* may be payable upon termination of employment in accordance with the terms of the Ontario *Employment Standards Act, 2000*. Upon receipt of the above notice (and severance pay if applicable) the Employee agrees that no further amounts shall be owing to him/her on account of the termination of the Employee's employment under statute or at common law. **The provisions of the Ontario *Employment Standards Act, 2000*, as they may from time to time be amended, are deemed to be incorporated herein and shall prevail if greater.** [Emphasis added]

The Court’s Decision

Justice Dineen held that the termination clause was unenforceable for inconsistency with the *ESA*, despite the fact that it contained an *ESA* saving provision.

As set out above, the termination clause stated that Stostac could terminate the employment relationship “at any time without advanced notice and without pay in lieu of such notice for any just cause recognized at law”. Justice Dineen noted that language of this sort is inconsistent with the standard in section 2(1)(3) of the Termination and Severance of Employment regulation under the *ESA* (O. Reg. 288/01), which provides that employees who are “guilty of wilful misconduct, disobedience or wilful neglectful duty that is not trivial and has not been condoned by the employer” are not entitled to notice of termination or termination pay.

Following the precedent in *Waksdale*, the Court found that the invalidity of the “with cause” portion of the termination clause rendered the entire clause unenforceable. Stosac’s attempt to incorporate the *ESA*‘s provisions into the “without cause” portion of the termination clause did not fix the unenforceability of the clause.

Accordingly, the Plaintiff was entitled to reasonable notice at common law and was awarded seven months’ pay in lieu of reasonable notice. Justice Dineen declined to deduct CERB payments received by the Plaintiff from the award.

Check the Box

This decision serves as yet another reminder that employers must take care when drafting employment agreements to ensure that the contractual termination provisions comply with the law. Termination clauses that are unenforceable for inconsistency with the ESA are unlikely to be “saved” through the inclusion of an *ESA* saving provision.

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