Employers: The Time To Revisit Your Employment Contracts Is Now!

An Update On Waksdale And Its Impact On Termination Clauses

Based on some recent cases, it is strongly recommended that employers have experienced employment lawyers review, at this time, their existing employment contracts for their employees (or consider whether to implement such employment contracts: usually a very good idea).

In a surprising decision on January 14, 2021, the Supreme Court of Canada dismissed the application for leave to appeal the judgment in *Waksdale v Swegon North America Inc,* 2020 ONCA 391. The Ontario Court of Appeal in *Waksdale* held that any termination clause in an employee contract that violates the standards set forth in the *Employment Standards Act* will have the effect of invalidating all termination provisions in the agreement.

To provide background, the appellant employee argued that the termination clause in his contract was void because it attempted to contract out of the minimum standards set forth in the Ontario *Employment Standards Act, 2000* ("*ESA*"). The employer conceded that the termination "for cause" provision in the contract was void for violating the *ESA,* but argued that the termination "with notice" provision was valid. Because the employee had not been terminated for cause, the employer maintained that the notice provision could still be used. The issue before the court was whether the illegality of the termination for clause provision rendered the notice provision unenforceable.

In determining the correct analytical approach, the Court of Appeal held that an employment agreement "must be interpreted as a whole and not on a piecemeal basis". Termination provisions must be read together, regardless of whether they are in one place or separated throughout the agreement. This analytical approach reflects the principles that courts should favour an interpretation of the *ESA* that encourages employers to comply with the minimum requirements of the Act, and to draft *ESA*-compliant agreements.

Furthermore, the rationale for reading the termination provisions as a whole is to recognize the power imbalance between employees and employers, and to prevent mischief from being introduced by the separate consideration of provisions. By way of example, the Court of Appeal explained that employees may be unaware of their rights

under the *ESA* and mistakenly believe that they have to comply with unenforceable provisions to avoid termination. If the provisions were considered separately, the employer could turn around and terminate an employee without cause, while arguing that they are not relying on the invalid provision. Meanwhile, the employer would have still benefitted from the existence of the unenforceable clause.

Finally, the Court of Appeal considered the existence of a severability clause in the contract. The Court rejected its application, stating severability clauses have no effect on clauses that are rendered void by statute.

The Court of Appeal's decision and the refusal of the Supreme Court of Canada to grant leave to appeal provides reassurance to employees that their protections are being upheld, especially in circumstances where employees may not fully understand their rights. If a dispute arises, the courts will consider the termination clause as a whole and ensure the minimum statutory standards have been upheld. If not, the employer is penalized and the employee will benefit from common law termination rights.

However, the refusal to grant leave likely brings the unwelcome news to many employers that the termination provisions in their employees' contracts are void. It may also come as a shock down the road to employers who are unaware of the decision. Going forward, employers must be mindful to adhere to the *ESA*'s minimum standards in drafting termination provisions, or submit to the governance of the common law over termination rights. While a harsh decision from an employer's standpoint, the ruling has the potential to introduce greater compliance with *ESA* requirements.

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