Employment Contracts: Ontario Case Casts Doubt on Enforceability of Termination Notice Limits

Unlike our neighbours to the south, employers in this country have to pay a hefty price when terminating employees without cause. One common way to limit costs is to include a clause in the employment contract expressing employees' agreement to accept just the termination notice and other payments required by the jurisdiction's employment standards (ESA) laws if they're terminated without cause.

The Challenge

The good news is that you're allowed to do this as long as you don't purport to contract out of your duty to fork over ESA termination payments. Specifically, you're allowed to prevent employees from suing for what's called common-law notice, i.e., termination entitlements that derive not from the ESA laws but laws made by judges in court cases, which can run into a lot of money.

The bad news is that clauses purporting to take away an employee's right to common-law notice are extremely difficult to enforce. Courts across Canada seize on even the slightest of ambiguities or suggestions that an employer is trying to evade its ESA termination notice duties to strike these clauses down. And a new case out of Ontario takes the judicial scrutiny against termination notice limits to a new level.

The Case

The leading man was a sales director who got terminated without cause 8 months into his employment. His contract included a provision limiting his notice for without cause termination to the minimum required by the Ontario ESA, in this case, 2 weeks' notice. Even better for the employer was that the sales director conceded that the clause ("Clause 1") was valid and enforceable.

But the termination provision also contained another clause ("Clause 2") saying that the employer didn't have to pay any notice if the director was terminated for cause. As in most jurisdictions, Ontario doesn't require notice for employees terminated for cause. But Clause 2's definition of "cause" was broader

than the ESA definition. Result: If the director got fired for something deemed cause under the contract but not deemed cause under the ESA, he wouldn't get the without cause termination notice he was entitled to under the ESA.

The employer conceded that Clause 2 was illegal but contended it was a moot point. After all, Clause 2 deals with termination for cause and the director was terminated without cause, meaning Clause 1 was the operative provision, the employer argued. And since all sides agreed that Clause 1 was legal, the illegality of Clause 2 was irrelevant.

The Court's Ruling

The director claimed that Clauses 1 and 2 weren't separate but part of a package deal and that if any one of them was illegal, the entire termination provision was illegal. And the Ontario Court of Appeal agreed. Employment agreements should "be interpreted as a whole and not on a piecemeal basis." The whole point of the ESA is to rectify the imbalance between employers and employees. And if one part of a provision violates the ESA, the whole provision is illegal, even if the employer relies on the part that's legal. Result: The Clause 1 limit on notice for termination without cause was unenforceable and the director could sue for common-law notice.

Waksdale v. Swegon North America Inc., 2020 ONCA 391 (CanLII), June 17, 2020

What the Case Means

The previous standard for limits on termination notices purporting to waive an employee's common-law notice rights is that they had to be not only consistent with ESA requirements but also totally clear and unambiguous. *Waksdale* takes the scrutiny to a new level by requiring not only perfect clarity but perfection itself, at least as far as ESA compliance goes. If any part of a termination notice limit runs afoul of the ESA, the entire provision is invalid, even if the poisonous part didn't figure into the case.

Adding to the angst is that the contract in *Waksdale* had a common provision known as a severability clause saying that if one part of the agreement is illegal, the parties agree to sever it and apply the rest of the contract. But the Court was unimpressed. Severability provisions can't save "termination provisions that purport to contract out of the provisions of the ESA."

Takeaway

The *Waksdale* case makes it imperative for employers, especially in Ontario, to review their existing termination clauses from top to bottom, including both the "for cause" and "without cause" provisions. If any provision raises an ESA red flag, you should probably remove it even if the contract has a severability clause and/or the problematic language seems inconsequential. This may require re-executing contracts with current employees.

4 Drafting Tips

Going forward, you can enhance the enforceability of termination clauses in future contracts by:

1. Clearly and unequivocally stating that the parties intend to waive common-

law notice rights for termination without cause;
2. Specifically citing the minimum notice and other termination entitlements required by your jurisdiction’s ESA;
3. Ensuring that any “for cause” termination provision accounts for the difference between “just cause” at common law the applicable ESA standard for termination with cause, i.e., ensuring that just cause doesn’t allow for termination that wouldn’t constitute cause under the ESA, the way the clause in the *Waksdale* case did; and
4. Indicating that if the termination does fall now or in the future below ESA requirements, it should be interpreted as being in compliance with those requirements.