Ontario Decision: Important Reminder to Review and Update Termination Provisions

Last year, we wrote about the Ontario Court of Appeal decision in *Waksdale v. Swegon North America* that cast doubt on the enforceability of termination provisions in many employment contracts in Ontario. In that decision, the court said that termination provisions must be read as a whole. If a cause termination provision violates the *Employment Standards Act, 2000* (ESA), the without cause termination provisions are also void and unenforceable.

Since that decision, many employers have rewritten their standard employment contracts to fix their termination provisions. A recent Ontario court decision[1] clarifies that adding the phrase "subject to the ESA" in a cause termination provision, that would otherwise breach the ESA, may not be enough.

What Happened?

An employee sued her employer after she was terminated without cause. Her employment contract said employment could be terminated without cause by providing two weeks' notice or pay in lieu plus the minimum entitlements under the ESA. The contract did not require her to sign a release for the additional two weeks. When she was terminated, the employer refused to pay the additional two weeks unless she signed a release.

The employee argued that the employer repudiated the contract by its mistake. She also said the cause termination provision in the contract was void because it breached the ESA and, as a result, the without cause termination provision was also void.

The cause termination provision said the employer could terminate for just cause "[…] without notice, pay in lieu of notice, severance pay or other liability, subject to the ESA". Just cause was defined as cause under the common law and included a list of 11 different grounds that would be considered just cause. Three of the 11 grounds for just cause were:

- "a material breach of this Agreement or our employment policies"
- "unacceptable performance standards"
- "repeated, unwarranted lateness, absenteeism or failure to report for work"

The employee argued that these three grounds did not meet the threshold required to

disentitle an employee to notice of termination and severance pay under the ESA. To meet the cause threshold under the ESA, an employee must be "guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer". The employer relied on the phrase "subject to the ESA" to read the cause termination provision in a manner consistent with the ESA. The employer also relied on so-called saving provision. One provision said that if a right or benefit was less than provided by the ESA, it would be deemed to provide the minimum rights or benefit under the ESA. The other said that if minimum entitlements on termination were greater under the ESA than in the contract, the ESA would apply.

What did the Court Decide?

The judge decided that the employer repudiated the contract by demanding the employee sign a release for the additional two weeks' pay required by her contract. As a result, the employer could not rely on the without cause termination provision in the contract to limit the employee's entitlements. That conclusion was enough to end the case in the employee's favour. You can read our discussion of that portion of the case here.

The judge also commented on the employee's argument that the without cause termination provision was not enforceable because the cause termination provision violated the ESA. The judge agreed that some of the just cause grounds for termination did not meet the threshold necessary to disentitle an employee to notice of termination or severance pay under the ESA. That is, some were not wilful misconduct, disobedience or wilful neglect of duty that is not trivial and had not been condoned by the employer. Since the contract allowed the employer to terminate without liability based on those grounds when they did not meet the threshold, the cause termination provision was contracting out of the ESA.

The judge agreed with the employer that there was a way that the cause termination provision could be read to comply with the ESA. The phrase "subject to the ESA" could "disqualify or neutralize the [o]ffending [c]ategories of [j]ust [c]ause". However, the judge said the test of validity was not to find a way to read the provision as consistent with the ESA. Because the provision could be read as violating the ESA, the provision was, at best, ambiguous. That ambiguity must be resolved in favour of the employee and read to provide her with the greatest benefit. This led to the conclusion that the cause termination provision was invalid. This meant the without cause provision was also invalid following the decision in *Waksdale*. The judge also said the saving provisions could not fix a termination provision that did not comply with the ESA from the outset.

Takeaway for Employers

The portions of this case dealing with the cause termination provision were made by the judge in passing. The case was actually resolved in the employee's favour based on the conclusion that the employer had repudiated the contract. That does not mean that employers should ignore these important comments.

These comments are an important reminder to employers. It is time to review and, if necessary, update your employment contracts. A seemingly simple fix – inserting "subject to the ESA" in a cause termination provision that might breach the ESA – may not be sufficient depending on the provision. The provision may need more or different changes to comply with the ESA and to avoid invalidating the without cause termination provision. Once reviewed with your lawyer and corrected, the provision can be used in template contracts for new employees. Changing the termination provision in contracts with existing employees raises special legal and strategic

considerations that should be discussed in detail with your lawyer.

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