Recent Ontario Employment-related Decisions Heavily Favour Employees



A number of recent cases decided by the Ontario Superior Court of Justice and the Ontario Court of Appeal are changing the likely outcomes of wrongful dismissal litigation in Canada in favour of employee plaintiffs. These rulings make it easier for employees to establish that their contractual termination rights are unenforceable and to claim reasonable notice at common law in connection with a wrongful termination. The courts considered the power imbalance between employer and employee and indicated that any drafting ambiguities will be resolved in the employee's favour, and even unambiguous drafting may be interpreted in an employee's favour if the employer failed to consider and expressly provide for potential changes in the employment terms that may never be realized.

Below are summaries of four recent decisions which may fundamentally change an Ontario employee's rights on a termination of employment without just cause. It is likely the termination provisions contained in the majority of employment contracts drafted before June 2020 (when the first of these cases was decided) may now be unenforceable. It is clearly essential that employers amend their employment agreements with current employees as needed (providing "fresh" consideration for any amendments), and revise their employment agreements for future hires, to provide for enforceable termination rights and ensure employees understand these termination rights before signing. Employment agreements should also include a broad "savings" provision with a clear waiver of common law reasonable notice by the employee and which provides that an employee will never receive less than the required statutory minimums under employment standards legislation, regardless of any future changes to the employee's position, to the size of the employer's business and any future amendments to applicable employment standards legislation. Employers in M&A transactions will also need to be careful in making any seller or buyer representations to employees about the terms to govern an employee's post-transaction employment and the termination of such employment.

1. *Waksdale v. Swegon North America Inc. ("Swegon")* (June 17, 2020)

In Waksdale, the Ontario Court of Appeal limited the applicability of severability clauses, and determined that termination rights must be read together. An otherwise enforceable without cause termination clause in an employee's contract will be void if the termination for just cause provision is unenforceable.

Background

Swegon terminated Mr. Waksdale without cause on October 18, 2018. Mr. Waksdale sued for wrongful dismissal claiming common law reasonable notice damages, despite having signed an employment contract which limited his entitlement on a termination without cause to one week's notice of termination (or pay in lieu) plus the statutory minimum entitlements under the *Employment Standards Act, 2000* (the "**ESA**").

Mr. Waksdale's employment contract contained provisions addressing termination with and without cause. It also contained a severability provision, which explicitly purported to separate any invalid provisions from the rest of the contract. Swegon conceded the termination with cause provision violated statutory minimums set out in the ESA and Mr. Waksdale conceded the termination without cause provision was valid. The trial judge held no damages were owed to Mr. Waksdale because Swegon relied upon the valid stand-alone termination without cause provision to terminate Mr. Waksdale, not the invalid termination for cause provision.

Court of Appeal Decision

The Ontario Court of Appeal held the trial judge erred in considering the invalid termination with cause provision in isolation from the rest of Mr. Waksdale's employment contract and ruled that "[a]n 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." The Court of Appeal mentioned the power imbalance between employers and employees and ruled that the illegality of the termination with cause provision rendered *all* of the contract's termination provisions unenforceable, notwithstanding the termination without cause provision was entirely valid absent the illegal termination provision.

The Court of Appeal considered the enforceability of the termination provisions at the time the employment contract was drafted, rather than at the time of termination, determining that all termination provisions were invalid and unenforceable *ab initio*. The fact that Swegon never tried to rely upon the illegal termination with cause provision was therefore irrelevant.

The Court of Appeal also declined to enforce the severability provision designed to "save" the rest of the agreement if any particular term was deemed to be invalid or illegal. It held that severability clauses of this kind cannot apply to any provision in an employment agreement which would have the effect of contracting out of the ESA provisions.

Implications for Employers

The Court of Appeal's decision in *Waksdale* could potentially be very disruptive and costly for Ontario employers. It may render many existing termination provisions unenforceable. The recognition that just cause provisions are unlawful if they contract out of ESA entitlements is a fairly recent development and many employment agreements provide that employment may be terminated for just cause without notice or payment (without an exception for payments owed under the ESA). Recent case law has determined that termination without cause provisions are illegal if they attempt to contract out of ESA entitlements, including by excluding benefits continuance or severance pay from the termination without cause provision or providing that severance pay can be satisfied by working notice of termination. However, Waksdale is the first decision where a termination without cause provision, which complied with the ESA and was otherwise enforceable on its own, was rendered unenforceable because of a separate invalid termination for just cause provision, where there was no

allegation of just cause and the employment contract contained a severability provision.

By reading Mr. Waksdale's termination provisions as a whole, the Court of Appeal eliminated the protection severability provisions previously offered to employers. It is possible that if this reasoning is followed and expanded so that restrictive covenants must be read together, then an overly broad and unenforceable non-compete could render an otherwise valid non-solicitation or non-interference covenant unenforceable.

Ontario employers should review their current employment agreements to ensure that both the termination for cause and termination without cause provisions comply with the ESA and consider amending their templates to increase the likelihood of enforceability. They should also amend agreements with current employees which may not contain unenforceable termination provisions at the first opportunity in exchange for "fresh" consideration (for example, by specifying that a termination for cause may be implemented without notice or payment, except as may be required under ESA), and by adding a savings provision which clarifies that in no event will an employee receive less than employee's statutory minimums under ESA.

2.*Battiston v. Microsoft Canada Inc. ("Microsoft")* (July 15, 2020)

The Ontario Superior Court of Justice in *Battiston* held that employers must give employees sufficient notice of "harsh and oppressive" termination provisions in their equity-based incentive plans, failing which limitations on employee rights in compensation arrangements may be unenforceable.

Background

Microsoft employed Mr. Battiston for 23 years before he was terminated without cause in August 2018. Mr. Battiston received part of his compensation from Microsoft in the form of merit increases, cash bonuses and annual stock awards under Microsoft's rewards policy, which unambiguously stated that "an employee's rights to unvested stock awards would terminate upon the termination of that employee's service." Microsoft had previously informed employees of this termination condition by sending them an annual email (a) advising they had received a stock award, (b) instructing them to complete an online acceptance process, and (c) informing them that completion of this acceptance process would demonstrate they "read, understood and accepted the stock award agreement" and accompanying documents.

Upon his termination, Microsoft informed Mr. Battiston that all of his unvested stock awards were null and void, pursuant to Microsoft's rewards policy, and that he would not receive a merit increase or bonus for 2018. Mr. Battiston claimed to be unaware of this termination condition, and maintained he expected to be able to cash out his granted but unvested stock awards. Mr. Battiston testified that although he received Microsoft's annual rewards policy emails, he always completed the online acceptance process without reading the long underlying stock awards documents. Microsoft did not dispute that it had not specifically drawn Mr. Battiston's attention to the termination provisions in its rewards policy.

Ontario Superior Court Decision

The Court held that Mr. Battiston was entitled to damages for his stock awards that would have vested during his termination notice period, nothwithstanding Microsoft's rewards policy "unambiguously" removed Mr. Battiston's right to continued vesting of his stock awards after his termination without cause. These termination provisions were unenforceable because Microsoft had not taken "reasonable measures"[1] to direct

Mr. Battiston’s attention to the rewards policy termination provisions. Notably, the Court did not find the termination provisions unenforceable due to their “harsh and oppressive” nature in limiting his right to continued vesting of his stock options.

Implications for Employers

Battiston presents a change to the way employers must communicate with their employees to create enforceable employee compensation arrangements. It is common practice for employers to limit an employee’s common law rights to damages on a termination without cause, and in particular, to limit rights to receive bonuses or stock options or other equity incentive grants during the notice period and to terminate unvested stock options on the termination date, subject to any ESA minimum notice period. It is not common practice to specifically draw limitations of an employee’s rights in an employment agreement or compensation agreement to the employee’s attention at the time of signing.

Following Battiston, employers should specifically direct their employees’ attention to any provisions that may restrict the rights of employees to substantial elements of their compensation (including bonuses, stock options or other equity incentives). Employers should also consider whether to specifically point out any limitations on the employee’s right to receive common law reasonable notice on a termination without cause and any restrictive covenants which might limit the employee’s ability to earn a livelihood. To this end, employers should consider implementing all or some combination of the following:

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