

Termination Provisions (Again): Court Decides New Avenue For Rendering Termination Clauses Unenforceable



Confidentiality and conflict-of-interest clauses can render employment agreement termination clauses unenforceable.

In a [recent decision](#), the Ontario Superior Court of Justice found that the confidentiality and conflict-of-interest clauses of an employment agreement were unlawful, rendering the otherwise lawful termination provision invalid and the employment agreement unenforceable. As a result, the employer was ordered to pay the employee common law notice.

What Happened

The defendants were oral surgeons who operated dental offices in Ontario. The plaintiff was a receptionist at one of the defendants' offices and had worked there since 1990.

In 2015, the oral surgeons made preparations to retire, including offering all employees written employment contracts so they would understand what to expect from the surgeons' impending retirements.

This employment agreement included conflict-of-interest and confidentiality clauses with consequences for failure to comply, as set out below:

- Conflict-of-interest: A failure to comply with this clause [...] constitutes both a breach of this agreement and cause for termination without notice or compensation in lieu of notice.
- Confidential information: In the event that you breach this clause while employed by the Employer, your employment will be terminated without notice or compensation in lieu thereof, for cause.

In November 2019, the oral surgeons held a meeting with employees and advised that they planned to retire in March 2020. As such, everyone's employment would terminate effective April 30, 2020. The employees were effectively given six months' working notice.

The plaintiff worked through the six months and her employment was terminated on

April 30, 2020. Unfortunately, the COVID-19 pandemic occurred and she was unable to find a job throughout 2020 and 2021.

The plaintiff claimed wrongful dismissal on the basis that her employment contract was unconscionable or illegal because, among other things, it was void for contracting out of minimum entitlements under the Ontario *Employment Standards Act 2000*, S.O. 2000, c. 41 ("ESA"). The matter proceeded by way of summary trial.

The Decision

The Court found that the termination clause, which limited the plaintiff to minimum standards of working notice or payment in lieu, complied with the ESA.

Despite this finding, the Court also found that the conflict-of-interest and confidential information clauses in the employment agreement were invalid. The prohibited conduct – i.e. violation of the conflict-of-interest or confidentiality provisions – did not necessarily amount to wilful misconduct or wilful neglect of duty that would have justified termination for cause under the ESA.

Since these two clauses were invalid, the Court decided that they rendered the entire employment agreement unenforceable, including the termination provisions. The Court concluded that the employee was entitled to common law notice of 18 months (an amount agreed upon by the parties), less mitigation amounts received.

Takeaways for Employers

This decision comes after *Waksdale v. Swegon North America Inc*, 2020 ONCA 391, where the Court of Appeal confirmed that termination provisions must be read together and that an otherwise lawful "termination without cause" provision may be rendered unenforceable due to an unlawful "termination for just cause" provision in the employment agreement. Here, the Court took a step further by concluding that invalid penalty clauses rendered the entire employment agreement – including an otherwise lawful termination provision – unenforceable.

Employment agreements can be challenging to draft. It is more important than ever to craft carefully-worded employment agreements with clauses that are not contrary to ESA minimum standards. Not only will the Court closely examine termination clauses, but this case serves as a reminder that other provisions in the employment agreement (such as penalty clauses) can dramatically affect termination provisions.

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