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Recent Court of Appeal Decision May Result in Termination Provisions Being Unenforceable

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The law with respect to the enforceability of termination provisions in employment contracts is an ever-evolving area of law in Ontario. Because the common law rules established by the courts dictate quite generous notice periods when an employee is terminated, employers have long sought to limit employees to the minimum notice periods that are required under the *Employment Standards Act*, *2000* (the "ESA"). This is generally achieved by crafting termination provisions in employment contracts that comply with the ESA minimums, but do not permit the more generous notice that would otherwise be available at common law. The flip side of this is that employees have long sought new strategies for attacking the enforceability of termination provisions in contracts to claim the more generous common law notice periods.

It is well-understood by both employers and employees that a termination provision in an employment contract that attempts to provide an employee with termination notice, pay or benefits that are less generous than the minimum statutory provisions in the ESA is unenforceable. A recent Ontario Court of Appeal decision has provided employees with another strategy for attacking a termination provision as unenforceable.

In *Waksdale* [1], the employment contract under consideration had two separate termination clauses, as is similar to many other employment contracts drawn up in Ontario. There was one clause relating to termination "for cause". It provided that the employer could terminate the employee for cause without any notice or payment under the ESA. The other clause related to termination "without cause". It provided that the employee could be terminated and would only be entitled to the amounts set out in the ESA. In *Waksdale*, the employer terminated the employment of an employee, relying on the "without cause" provision in the contract. However, the employer conceded, at both the Ontario Superior Court of Justice and the Ontario Court of Appeal, that its "for cause" termination provision was unenforceable, as non-compliant with the ESA. Unfortunately, neither the Superior Court of Justice nor the Court of Appeal discussed on what basis the "for cause" clause was non-compliant with the ESA however it appears that the "for cause" provision at issue permitted termination without notice for grounds that were not provided for in the ESA, which limits terminations without pay to instances where an employee is "guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer".

Despite the fact that the employer was not relying upon the "for cause" provision in the contract, but was instead relying upon the "without cause" provision, the Court of Appeal held that the termination provisions had to be considered as a whole and, if either provision was non-compliant with the ESA, then all termination provisions in the contract (i.e. the "for cause" and "without cause" provisions) were unenforceable. This was despite the presence of a severability clause in the employment contract, which provided that if any term was held to be unenforceable, all other terms would remain in force.

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The *Waksdale* decision is sending shockwaves through the employment bar in Ontario. Employers can no longer rely only on the fact that their "without cause" termination provisions are compliant with the ESA. Accordingly, every employment contract should be reviewed to ensure that each provision relating to termination is compliant with the technical requirements of the ESA. Failing that, employers may find themselves liable for notice periods that far exceed the minimums provided in the ESA.

[1] *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391

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