

Member's Quarterly

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Feature

Ontario Court of Appeal Finds Illegal Termination Clause Not Saved by Enforceable Termination Clause

Taking the good with the bad

Termination clauses are a hot topic in employment law and the enforceability thereof is seemingly ever-changing. A recent decision of the Ontario Court of Appeal is no exception. The Ontario Court of Appeal in *Waksdale v Swegon North America Inc.*, 2020 ONCA 391 (CanLII) found that termination clauses, no matter how separate or whether they deal with different circumstances (termination without cause and termination for cause), must be considered as a whole when determining enforceability and an unenforceable termination clause renders the entire employment contract void, regardless of the legality of any other termination clause.

A former employee brought an action for damages for wrongful dismissal against his former employer. The employment relationship was governed by an employment contract which contained separate clauses for termination of employment without cause and for cause. The employer terminated the employee's employment on a without cause basis in accordance with the clause in the contract which provided greater notice of termination than the minimum provided in the *Employment Standards Act, 2000*.

The contract also contained a separate termination for cause provision, which both parties conceded violated the *Employment Standards Act, 2000*. Both the employee and the employer brought motions for summary judgement. At the summary judgment motion, the employee argued that the termination for cause provision violated the *Employment Standards Act, 2000* and was unenforceable, rendering the entire contract void. The employer argued that the termination for cause provision was irrelevant as the termination was without cause and furthermore, the contract contained a severability clause making any illegal provisions, such as the termination for cause provision, severable from the remaining terms of the contract.

The motions' judge found that the termination without cause provision was unambiguous, enforceable and stood alone from the termination for cause provision which didn't apply. The motions' judge found that the employer acted within its rights under the agreement and the employee had been provided with notice of termination in accordance with the contract, and dismissed the employee's claim.

The employee appealed the decision of the motions' judge to the Ontario Court of Appeal. The Court of Appeal noted that the narrow issue to be decided by the motions' judge was whether the illegality of the termination for cause provision (which was not relied on) rendered the termination without cause provision unenforceable.

The Court of Appeal reviewed the law regarding the interpretation of termination clauses, centring on the principles that courts should favour an interpretation that encourages compliance with the *Employment Standards Act, 2000* and protects employees as much as possible; and that termination clauses should be interpreted in a way that encourages employer compliance with the *Employment Standards Act, 2000* to incentivise employers to draft lawful termination provisions. The Court of Appeal opined that the wording of the contract alone must be considered in deciding whether it complies with the *Employment Standards Act, 2000*, not whether the employer might have relied on that provision therefore, the employer's compliance with the otherwise enforceable termination without cause provision, does not save the termination



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for cause provision which violates the *Employment Standards Act*, 2000.

The Court of Appeal determined that employment contracts must be interpreted as a whole, including the termination provisions. Employers have the right to restrict an employee's right to common law reasonable notice in an employment contract but, courts will not enforce termination provisions that are in whole or in part illegal and the motions' judge erred by treating the termination provisions as separate, rather than reading them as a whole and considering their combined effect. The fact that the employer did not rely on the termination for cause provision makes no difference because the Court of Appeal found that a determination regarding enforceability of the termination provisions as a whole is made at the time the agreement was executed.

Lastly, with respect to the severability clause, the Court of Appeal declined to apply the clause, opining that a severability clause cannot have that effect on clauses of a contract that are void by statute. Ultimately, the Court of Appeal concluded that the motions' judge erred in law in interpreting the employment contract and allowed the appeal, remitting the matter back to the motions' judge to determine the quantum of damages.

In light of this decision and the rather significant change in the law with respect to how employment contracts and termination clauses in particular are interpreted, employers should be very careful to ensure that termination clauses are enforceable so as not to negate the enforceability of the contract as a whole.

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