Member's Quarterly Summer 2021 Edition

Feature

Accepting the New Reality with Termination Clauses

The changed contractual reality for employers in Ontario

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It's now official. The Court of Appeal's decision in *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391 will not be heard by the Supreme Court of Canada. The case remains the leading authority for interpreting termination provisions in employment agreements in Ontario.

Let's start with the concept confirmed by the Court of Appeal in this case: termination provisions must be interpreted organically as one entire working element. If one part of the clause violates the law, the whole clause is in jeopardy and no "severability" provision will save it.

Termination clauses have three main parts: resignation, termination without cause and termination for cause (after probationary period). The key element in this case was the "just cause" provision. Most agreements say that in the event of just cause, an employer may terminate without notice or pay in lieu of notice — the employee is paid nothing except whatever is owing to the date of notice, including accrued vacation pay.

But here's the problem identified by the Court: the only way to deprive an employee of notice or pay in lieu of notice under the *Ontario Employment Standards Act, 2000* (the *Act*) is for "wilful misconduct, neglect and disobedience". This is a higher standard, so the traditional "just cause" provision has the potential to violate the *Act*, with the fundamental finding that just cause and wilful misconduct are not the same thing. The entire provision may therefore be in violation of the *Act*. The employer is then left with an unenforceable clause with termination subject to common law notice or payment in lieu of notice.

This is especially problematic if the agreement provides for the payment of only statutory minimum termination amounts under the *Act*. For now, this appears to be a problem only for Ontario employers.

How do employers fix this? It is not easy for existing employees who have already signed agreements with the more traditional just cause language. Here are a few suggestions:

1. If the employer is terminating an employee who is subject to a problematic clause, consider offering a package that is more than the amount prescribed — but ask for a release. This is especially important if the contract provides for only statutory minimum notice and severance in the event of termination without cause. The extra amount should have regard to common law notice, especially if it is determined that the existing termination provision is truly problematic.
2. The existing agreement template should be reviewed and updated. While at it, carefully review the bonus provisions, given more changes outlined by the Supreme Court of Canada late last year on the topic of bonuses payable over the notice period. Finalize the template and use it for all new hires as soon as possible.
3. For existing employees who have already signed a problematic agreement, the key question is whether to have them sign a new and improved one. There is no right or wrong answer, as having existing employees sign new agreements is fraught with risk, as outlined below. However, under certain circumstances, a new agreement should be introduced.

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Feature continued

4. Consideration is key for existing employees to sign a new employment agreement. In order to be binding, every employment agreement needs consideration — the bargain that flows between the parties in order to support the obligations in the agreement. This is the challenge with having existing employees sign an agreement mid-employment — they already work for the company. It is easy with new employees, as the bargain is the job itself as long as the agreement is signed before the new employee starts. But what do existing employees get as consideration? In such a case, classic consideration would include a promotion or changes to compensation which are not in the ordinary course. For example, the introduction of a new commission or bonus plan. This means that an employer may just have to wait for the opportunity to have new agreements signed and implement the new form on a gradual basis.

What if the employer wishes to have a new contract signed as soon as possible? This is the hardest question of all. Typically, our advice is to provide a signing bonus in such cases, in an amount that recognizes what the employee is being asked to give up.

It is very difficult to generalize as to what the amount should be as it is always specific to the circumstances (and the terms of the particular agreement being replaced).

Overall, employers must accept the reality that their employment contracts may be in jeopardy and should be developing strategies to accept that reality. The challenge is manageable but certainly requires proper planning.

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