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Feature

Conflict of Interest & Confidentiality Clauses can Threaten Termination Provisions

Employers must be mindful of any termination-related language in an employment contract

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The Ontario Superior Court of Justice has provided employees with yet another angle of attack against the already-vulnerable termination clause. Since the infamous decision in *Waksdale*, we have seen plenty of cases where the Court has rendered a termination clause void due to an inadequate "for cause" provision. However, in *Henderson v Slavkin et al*, 2022 ONSC 2964, the Court held that the conflict of interest and confidentiality clauses in an employment agreement could have the same effect.

Facts

The plaintiff, Rose Henderson, was a receptionist at the oral surgery dental offices of her employers, Drs. Slavkin and Kellner. She had accumulated thirty years of service before her employment was terminated on April 30, 2020, after six months of working notice.

At issue in the litigation was whether or not the new employment agreement was offside the Ontario *Employment Standards Act, 2000* (the "ESA"), which would entitle Ms. Henderson to significant common law reasonable notice.

The Decision

There were three clauses in her employment agreement that Ms. Henderson argued contravened the ESA:

1) The without cause termination clause;
2) The conflict of interest clause; and
3) The confidentiality clause.

Interestingly, the Court did find that the without cause clause was enforceable such that it limited Ms. Henderson's entitlements to those minimally required by the ESA.

The conflict of interest clause set out limitations to Ms. Henderson's behaviour, contractually defining a conflict of interest in the context of the employment relationship. It clearly stipulated that engaging in the enumerated behaviour would not only amount to a breach of the employment contract, but also provided the employer with cause for termination without notice or pay in lieu of notice.

The *Termination and Severance of Employment*, O.Reg. 288/01 (the "Regulation") clearly provides that only employees guilty of wilful misconduct, disobedience, or wilful neglect of duty may be terminated without any notice or pay in lieu of notice. The Court in *Henderson* held that the conduct listed in the conflict of interest clause was overly broad, unspecific and ambiguous. Because of this, the Court found that an employee would have difficulty determining what specific conduct could lead to termination without notice or pay in lieu. As such, the Court held that the clause was invalid, having failed to meet the narrow exception provided for in the Regulation.

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Finally, the Court held that the confidentiality clause in Ms. Henderson's employment agreement was also in breach of the Regulation. In short, the confidentiality clause stipulated that Ms. Henderson could be terminated without notice or compensation in the event that she disclosed confidential information. However, the Court held that it was possible that there could be disclosure in a manner that did not meet the exception set out in the Regulation – that is, it was possible that a disclosure was not wilful. Consequently, the Court found that this clause was also in breach of the Regulation, and therefore void.

The Outcome

As a result of the Court's analysis of the conflict of interest and confidentiality clauses, Ms. Henderson's employment agreement was held to be in breach of the ESA and the Regulation. Consequently, the agreement was held to be invalid, and the Court determined that Ms. Henderson had been wrongfully dismissed, and thus entitled to 18 months of notice.

Takeaways for Employers

In our view, the *Henderson* decision highlights how cautious employers must be in drafting employment agreements in their entirety. It is clear that the Court will not simply assess the validity of the termination clause, but rather will also look to other provisions, particularly those with implications for the employee on termination of employment.

The *Henderson* decision also demonstrates how stringently the principles around differentiating between the two types of "cause" will be applied across the board. Here, the Court was clear that the conduct contemplated in the conflict of interest and confidentiality clauses would not necessarily fall under the purview of wilful misconduct, disobedience, or wilful neglect such that no notice would be required pursuant to the Regulation.

Without question, employers continue to find themselves in an increasingly pro-employee jurisdiction. The Court in *Henderson* has demonstrated, yet again, how challenging it has become to limit employees' entitlements on termination. Employers should regularly have their termination clauses – and employment agreements generally – reviewed by counsel to ensure they reflect the most current state of law on the issue.

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