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Invalid "For Cause" Termination Language Voids Entire Termination Provision – *so says Court of Appeal for Ontario*

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In a decision released last week,[1] the Court of Appeal for Ontario held an employer could not rely on a valid and enforceable "without cause" provision in an employment agreement where the agreement included a "for-cause" provision that violated Ontario's *Employment Standards Act, 2000* ("ESA").

The Court of Appeal would not "sever" the invalid provision, despite the agreement containing an enforceable term stating any invalid provision should effectively be ignored (a "severability" clause). Instead, the court held the two termination provisions must be read together, such that, if one was invalid, they both were. The court was also not moved by the fact the employment relationship was terminated *without* cause – that is, the employer never sought to rely on the invalid, for-cause provision in the first place.

This is the most recent ruling in a string of Ontario decisions in which courts have taken a very restrictive approach to interpreting any employment agreement provision that may limit an employee's termination entitlements.

It remains to be seen whether the court's reasoning will be followed by other courts moving forward. Until then, the decision is a strong reminder for employers to review their employment agreements regularly to ensure compliance with the current (fluctuating) state of employment law in Ontario.

What happened?

Benjamin Waksdale was employed with Swegon North American Inc. ("Swegon") in a Director of Sales position, with an annual income of $200,000. Prior to starting with Swegon, Waksdale signed an employment agreement which contained a:

- without cause termination provision, limiting Waksdale to minimum ESA entitlements if terminated without cause
- for-cause termination provision, confirming Waksdale was not entitled to notice or pay in *lieu* if terminated for cause
- severability provision, allowing any illegal, invalid or unenforceable provision in the agreement to be severed and the remaining provisions to remain in effect.

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

Six months after starting work, Waksdale's employment relationship was terminated without cause. He was provided his contractual (ESA) notice, which amounted to two weeks' pay plus car allowance.

Waksdale was not happy with this turn of events. He commenced a law suit claiming wrongful dismissal, that the termination provisions of his employment agreement were unenforceable, and entitlement to reasonable notice at common law.

The lower court decision

Before the lower court, the parties agreed the for-cause termination provision was invalid because it did not comply with the ESA. The provision was therefore not enforceable.

However, the parties agreed the without cause provision was enforceable because it did comply with the ESA.

The only issue left for the lower court to decide was whether the invalidity of the for-cause provision rendered the without cause provision also invalid and unenforceable. The court found it did not, applied the valid without cause provision (as the employer had), and dismissed Waksdale's law suit.

In reaching this conclusion, the lower court noted the without cause provision was clear, unambiguous, and capable of being read on its own without reference to the for-cause provision. As Waksdale's termination was without cause, it was the only termination provision that was relevant.

The Court of Appeal takes a different view

In a very brief decision, the Court of Appeal allowed Waksdale's appeal and struck down both termination provisions as violating the ESA. According to the court, the two provisions had to be read together and not piecemeal. If one provision was invalid, it would render the other provision invalid as well, and a severability provision could not avoid this:

> An employment agreement must be interpreted as a whole and not on a piecemeal basis. The correct analytical approach is to determine whether the termination provisions in an employment agreement read as a whole violate the *ESA*. Recognizing the power imbalance between employees and employers, as well as the remedial protections offered by the *ESA*, courts should focus on whether the employer has, in restricting an employee's common law rights on termination, violated the employee's *ESA* rights. While courts will permit an employer to enforce a rights-restricting contract, they will not enforce termination provisions that are in whole or in part illegal. In conducting this analysis, it is irrelevant whether the termination provisions are found in one place in the agreement or separated, or whether the provisions are by their terms otherwise linked. Here the motion judge erred because he failed to read the termination provisions as a whole and instead applied a piecemeal approach without regard to their combined effect.

The court dismissed as irrelevant the fact the employer relied only on the valid without cause provision. The question, the court said, is whether the agreement is valid at the time it is signed, not when it is enforced.

Lessons for employers

The decision of the Court of Appeal is unfortunate. Not only does it appear to misapply the law of severability in contractual relations, it arguably does not give effect to the intentions of the parties. Specifically:

- the two termination provisions were contained in separate and discrete provisions of the agreement, and could stand on their own as independent clauses
- the two termination provisions addressed wholly different fact scenarios (for-cause versus without cause)
- the without cause provision was clear, unambiguous and valid in its own right
- the employer sought to rely on the valid without cause provision, not the invalid for-cause provision
- Waksdale – a senior manager at the time he signed the contract – was likely never a vulnerable employee

As noted earlier, it remains to be seen whether the decision will be followed by other courts. **Until then, it is a strong reminder for employers to review their employment agreements regularly to ensure compliance with the current (fluctuating) state of employment law in Ontario.**

For more information and assistance reviewing your employment agreements, please contact your Sherrard Kuzz lawyer or, if you are not yet a Sherrard Kuzz LLP client, our firm at info@sherrardkuzz.com.