ONTARIO COURT OF APPEAL SENDS EMPLOYERS BACK TO THE DRAFTING TABLE … AGAIN!

by Joshua Suttner

On June 17, 2020, the Court of Appeal for Ontario released its decision in *Waksdale v. Swegon North America Inc.*, (“***Waksdale***”) 2020 ONCA 391, delivering a seismic victory for employees, upending decades of practice in drafting employment agreements, and sending companies scrambling to bring their agreements into compliance with the new reality.

DRAFTING EMPLOYMENT CONTRACTS BEFORE WAKSDALE

For years, employment contracts have been drafted with the following principals in mind:

a. The termination provisions in an employment agreement cannot contract out of the Employment Standards Act (the “**ESA**”), meaning that an employee could not agree to receive less than they are entitled to by statute;
b. An employee who is terminated for cause forfeits some or all of their entitlements under the ESA. Accordingly, many employment agreements provide that if the employee is fired for cause, they will not be entitled to pay in lieu of notice.

In addition, employment contracts, like most contracts, almost always contain a “severability clause” which provides that if any term of the contract is deemed to be unenforceable, that term shall be severed from the rest of the contract and shall not render the rest of the contract unenforceable.

Take a minute. Check your employment agreements with your employees. Chances are you have a “just cause” termination provision and a severability clause.

WHAT HAPPENED IN *WAKSDALE*

The employment agreement in Waksdale had three provisions:

a. a “just cause” termination provision;
b. a standard termination provisions that complied with the ESA; and,
c. a severability clause.

The employee was terminated without cause, and pay in lieu of notice was calculated in accordance with the standard termination provision which complied with the ESA. There were never any allegations that the employee was terminated for cause and the “just cause” provision was never relied upon.

The employee challenged the validity of the standard termination provision (if the standard termination provision was struck out, the employee would be entitled to common law reasonable notice, in addition to the statutory minimum notice entitlement under the ESA). The employee’s position was that the “just cause” termination provision was offside the ESA and therefore the standard termination clause also violated the ESA.

Like many readers and lawyers probably thought, this was a new argument and seemed far-fetched, especially in light of the severability clause in the agreement. The Trial Judge agreed. The Trial Judge held that even if the “just cause” provision was invalid, this did not render the separate without cause provision that did comply with the ESA invalid.

The Court of Appeal overturned the Trial Judge’s decision. The Court of Appeal held that termination provisions need to be read as together:

> 10…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 of Appeal went on to say that it made no difference that the employer did not allege just cause when the employee was terminated. The agreement must be interpreted at the time it was signed and non-reliance later on does not excuse the invalidity.

Finally, the Court of Appeal declined to consider the severability clause. Once the termination provisions had to be read as one provision of the agreement, they could not be saved by a severability clause as severability clauses cannot save a provision which is void by statute.

IS THIS DECISION FINAL?

The employer in Waksdale is considering appealing to the Supreme Court. There is a chance the Supreme Court may choose to hear the case because of its wider implications for contract law, including termination provisions and severability clauses. But there is also the possibility that the Supreme Court may decline to hear the case because it is based on an interpretation of the ESA, an Ontario statute. The Supreme Court is often satisfied letting the Ontario Court of Appeal have the final say on Ontario statutes and it may do so in this case.

For now, the Court of Appeal’s decision is the new law in Ontario until overturned by the Supreme Court or narrowed by a future decision of the Court of Appeal.

WHERE DO EMPLOYERS GO FROM HERE?

The Waksdale case has far-reaching implications for anyone with an employment contract in Ontario. It will now be more expensive to

terminate employees without cause and the termination provisions which employers intended to rely upon may no longer provide the protection bargained for. So what can employers do now?

The first step is to review your employment contracts, and not just the termination provisions. Even if your employment contracts were drafted by experienced counsel fairly recently, chances are they may contain the three offending provisions from the Waksdale case and may also contain other provisions that have been found offside by the Courts. The Court of Appeal tossed years of convention and practice out of the window. Employment contracts must be reviewed and updated regularly.

Practically speaking, this means to be enforceable the "for cause" provision in the termination section will have to align with *ESA*. In order to achieve that, the termination for cause must be limited to: "wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer" as mandated by s. 2(3) of the Regulation 288/01.

As a further precaution against drafting an employment agreement that violates the ESA, counsel can help craft a clause which guarantees employees no less than the minimum they are entitled to under the ESA, while carefully providing that common law entitlements, which are over and above the ESA minimums, are ousted.

For anyone reading outside of the employment context, the Court of Appeal did not get rid of severability clauses entirely. Its decision may turn out to be restricted to employment contracts. However, it is worth reviewing any long-term contracts with your lawyers to consider whether there are any clauses which may be vulnerable to being invalidated by statute and considering whether there are any arguments to be made that those clauses should be read together with other clauses, such that they might be determined to be a single clause and invalidate the other clause too.

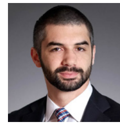
KEY CONTACTS

Mark S. Shapiro is a Partner in Dickinson Wright's Toronto office. He can be reached at 416.646.4603 or mshapiro@dickinsonwright.com.

W. Eric Kay is a Partner in Dickinson Wright's Toronto office. He can be reached at 416.777.4011 or ekay@dickinsonwright.com.

Wendy G. Hulton is a Partner in Dickinson Wright's Toronto office. She can be reached at 416.777.4035 or whulton@dickinsonwright.com.

Tracy Bergeron Lucha is a Partner in Dickinson Wright's Toronto office. She can be reached at 416.777.4047 or tbergeron@dickinsonwright.com.



Joshua Suttner is an Associate in Dickinson Wright's Toronto office. He can be reached at 416.646.3847 or jsuttner@dickinsonwright.com.