

Case In Point

Appellate Court Holds Termination Clauses Must Be Read Together – If One Contravenes the ESA, All Are Unenforceable

Date: June 19, 2020

In [Waksdale v Swegon North America](#), the Ontario Court of Appeal ruled that the “without cause” and “with cause” termination clauses in an employment contract must be read together: if one is not compliant with the *Employment Standards Act, 2000* (ESA), both are unenforceable.

The plaintiff employee sued the defendant employer for damages for wrongful dismissal. The plaintiff, a 42 year old Director of Sales making roughly \$200,000 / year was terminated by the defendant without cause after 8 months of employment. He sought payment of 6 months’ pay in lieu of notice.

The parties had an employment agreement which set out the terms of the employment relationship. The agreement contained the following clause that applied in the event the plaintiff was terminated without cause:

Termination of Employment with Notice

You agree that in the event that your employment is terminated without cause, you shall receive one week notice or pay in lieu of such notice in addition to the minimum notice or pay in lieu of such notice and statutory severance pay as may be required under the Employment Standards Act 2000 as amended. All reimbursement for business expenses shall cease as of the date of termination of your employment, however, you shall be reimbursed for legitimate business expenses that have been incurred and submitted to the Company but not as yet paid you to that date. The terms of this section shall continue to apply notwithstanding any changes hereafter to the terms of your employment, including, but not limited to, your job title, duties and responsibilities, reporting structure, responsibilities, compensation or benefits.

The employment agreement also contained a provision that applied in the event the plaintiff was terminated with cause, however, the defendant conceded that the clause was unenforceable for violating the ESA.

The agreement contained the following severability clause:

You agree that if any covenant, term, condition or provision of this letter outlining the offer of employment with the Company is found to be invalid, illegal or incapable of being enforced by a rule of law or public policy, all remaining covenants, terms conditions and provisions shall be considered severable and shall remain in full force and effect.

Before a summary judgment motion judge, the plaintiff argued that the employment agreement as a whole was void and unenforceable. The plaintiff argued that the with cause and without cause termination provisions should be read together in assessing enforceability – and because the with cause provision was void and unenforceable, both termination provisions were therefore void and unenforceable and could not be saved by the severability clause.

The defendant argued that the with cause and without cause provisions were separate, stand-alone clauses and that the void and unenforceable with cause provision could be severed from the agreement using the severability clause. The plaintiff’s entitlements upon his termination without cause could therefore be properly determined in accordance with the valid without cause provision.

The [motion judge agreed with the defendant](#) and the plaintiff’s motion was dismissed with costs.

On June 17, 2020, the Court of Appeal overturned the motion judge's decision and found for the plaintiff. The Court held that:

- An employment agreement must be interpreted as a whole and not on a piecemeal basis, including when assessing termination provisions' potential contravention of the ESA – Courts “will not enforce termination provisions that are in whole or in part illegal” [para 10]. Termination provisions must be read together, regardless of whether they are found in one place in the agreement or not.
- A severability clause cannot save a termination provision that attempts to contract out of the ESA – “A severability clause cannot have any effect on clauses of a contract that have been made void by statute” [para 4]. Having concluded that the with cause and termination without cause termination provisions are to be considered together, the severability clause could not apply to sever the offending (i.e. with cause) portion.
- The enforceability of a termination provision must be assessed at the time the agreement was executed as opposed to the time of termination – the parties must assess whether the contract contravenes the ESA regardless of the reason the employee was ultimately terminated.

The enforceability of any termination provision will depend on the specific wording of the provision. Employers should seek legal advice on their employment contracts, including termination provisions.