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Enforceability of Minimum Standards-Only Termination Clauses in Employment Contracts – What Employers Need to Know

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On January 14, 2021, the Supreme Court of Canada denied the employer's leave to appeal application from the decision of the Ontario Court of Appeal in *Waksdale v Swegon North America.* That decision held that termination clauses in employment contracts must be read together and if one contravenes the *Employment Standards Act, 2000* (ESA), all are unenforceable (see our blog post on the decision). The decision of the Supreme Court to deny leave to appeal means *Waksdale* remains binding precedent in Ontario, which has practical implications for employers.

Enforceability of Termination Provisions Generally

The enforceability of termination clauses in employment contracts is a top-of-mind issue for nearly all employers, and it is an area where the law is evolving constantly. A particular focus of employers is the enforceability of termination clauses that seek to limit an employee's entitlements upon a "without cause" termination.

Many employers carefully draft clauses within employment contracts with the intention of limiting an employee's entitlements and rebutting the presumption that an employee should be entitled at common law to reasonable notice.

Generally speaking, and absent unusual circumstances, well-drafted termination provisions that incorporate or exceed statutory minimum entitlements under the ESA are effective and will be enforced. The recent case law in this area has focused on whether the "without cause" clause in a given employment contract incorporates or exceeds statutory minimum entitlements. The decisions from courts in Ontario have given some guidance to employers on drafting parameters, though the case law in this area continues to evolve and this guidance can often turn on very specific wording of the clause at issue.

"With Cause" Provisions

In contrast to the extensive case law on "without cause" clauses, there has been very little case law that deals with the enforceability of "with cause" termination clauses. At issue in the cases that have been decided are clauses that did not properly account for the distinction between the

common law standard of “with cause” and the standard under the ESA (“wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer”). While a limited number of prior court decisions found these clauses to be void, findings of invalidity were applied to the “with cause” clauses only, and courts had continued to apply valid “without cause” clauses. Thus, the finding of invalidity had limited practical effect.

That all changed with the decision in *Waksdale*, where the 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 ESA, both are unenforceable, regardless of whether the employee was terminated “without cause” or “with cause.”

It is important to note that the employer in *Waksdale* conceded that the “with cause” clause in the employment agreement violated the ESA and therefore the Court of Appeal did not provide any guidance as to how a “with cause” clause might comply with the ESA. Accordingly, in any case where a “with cause” clause is being challenged, the case will turn on the specific language included in the clause. Further, depending on the language in the employment agreement, there may be other arguments employers can advance to avoid a *Waksdale* outcome.

Nonetheless, the *Waksdale* decision will have implications for some employers in Ontario because their existing employment agreements may include “with cause” termination provisions that are not compliant with the ESA. It is also important to emphasize that this is not just a concern for employers who use “without cause” termination clauses that limit employees to their entitlements under the ESA, but also for employers (like the employer in *Waksdale*) who use “without cause” clauses that exceed ESA minimums, as both types of clauses could be found to be unenforceable if the “with cause” clause violates the ESA.

Practical Implications

Given the impact of *Waksdale,* Ontario employers should be reviewing their employment agreements to ensure that they are compliant with the ESA. Three of the primary questions to ask are:

1. Does the employment agreement include provisions that deal with entitlements upon termination?
2. If so, do the termination provisions ensure that the employee receives at least their ESA minimum entitlements, regardless of whether it is a “with cause” or “without cause” termination?
3. Do the termination provisions contain any language that could be attacked by the employee as somehow being offside the ESA?

It is important for employers to obtain legal advice about these questions. Not only is the case law around termination provisions constantly evolving, but the ESA is nuanced and requires careful

analysis.

We encourage you to contact your regular Hicks Morley lawyer to help you with a comprehensive review.