Il est temps de revoir vos contrats de travail – Une décision de la Cour d'appel renvoie les employeurs à repenser certaines clauses

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En Ontario, un contrat de travail écrit (ou "lettre d'offre") peut préciser les droits d'un employé en cas de licenciement sans motif sérieux. Toutefois, pour être exécutoires, ces droits doivent être égaux ou supérieurs aux droits minimums spécifiés en vertu de la législation sur les normes d'emploi applicables.

Si la clause de licenciement figurant dans le contrat de travail écrit d'un employé est inapplicable ou si l'employé n'a pas de contrat de travail écrit, l'employé aura droit à un "préavis raisonnable" (ou à des dommages-intérêts compensatoires) en cas de licenciement sans motif sérieux. Le plus souvent, l'application des normes de la common law se traduit par un droit beaucoup plus important pour l'employé en cas de licenciement.

Jusqu'à récemment, l'opinion dominante était que, à moins qu'elles ne soient inextricablement liées, chacune des clauses de cessation d'emploi était indépendante. Cependant, dans l'affaire *Waksdale c. Swegon North America Inc.* la Cour d'appel a déterminé qu'une clause de licenciement "avec motif sérieux" inapplicable entachera irrémédiablement une clause de licenciement " sans motif sérieux " distinct.

Ce billet est disponible en anglais seulement.

In Ontario, a written employment contract (or “offer letter”) can specify an employee’s entitlements upon termination without cause. However, to be enforceable, such entitlements must be equal to or greater than the minimum entitlements specified under applicable employment standards legislation.

If the severance provision in an employee’s written employment contract is unenforceable or the employee does not have a written contract of employment, the employee will be due “reasonable notice" (or damages in lieu) of termination upon a termination without cause. More often than not, the application of common law standards results in a much greater entitlement to the employee on termination.

Until recently, the prevailing view has been that, unless they were inextricably intertwined, each of the clauses to end an employee's employment stood alone. However, in *Waksdale v. Swegon North America Inc.*, the Court of Appeal has determined that an unenforceable "for cause" termination provision will irreparably taint a separate "without cause" termination provision.

Background

Mr. Waksdale commenced employment with Swegon North America Inc. ("Swegon") on January 8, 2018. Before he started employment, Mr. Waksdale and Swegon entered into an employment agreement (the "Employment Agreement"). Among other provisions, the Employment Agreement contained the following separate clauses:

1. a "Termination for Cause" provision, which was conceded by the parties to be a violation of Ontario's *Employment Standards Act, 2000* ("*ESA*")*;*
2. a "Termination of Employment with Notice" provision, which provided that, upon a termination "without cause" Mr. Waksdale would receive one week of notice or pay in lieu of notice, in addition to the minimum notice or pay in lieu of notice and statutory severance pay required by the *ESA;* and
3. a "severability" provision, which would make any illegal clause severable from the remainder of the Employment Agreement.

On October 18, 2018, Mr. Waksdale's employment was terminated by Swegon on a "without cause" basis. Mr. Waksdale was provided his entitlements in accordance with the "Termination of Employment with Notice" provision of the Employment Agreement.

Motions Judge Decision

At a motion for summary judgment, Mr. Waksdale submitted that the "Termination for Cause" provision breached the terms of the *ESA* and, therefore, rendered the entire Employment Agreement (or at least the "Termination of Employment with Notice" provision) unenforceable (which would entitle him to damages in lieu of "reasonable notice" at common law).

Swegon conceded that the clause violated the *ESA* but asserted that it was irrelevant to the current dispute, as it was not seeking to rely on that provision. In other words, since Mr. Waksdale was not terminated for cause, the fact that the "Termination for Cause" provision did not comply with the *ESA* was irrelevant and should not affect the enforceability of the "Termination of Employment with Notice" provision.

The Motion Judge upheld the "Termination of Employment with Notice" provision as enforceable, noting that Swegon was not seeking to invoke or remediate the standalone "Termination with Cause" provision. Rather, Swegon was invoking and seeking to enforce the "Termination of Employment with Notice" provision on the terms that the parties had agreed upon. As such, the Motion Judge determined that the clause was valid when the Employment Agreement was entered into and remained valid upon Mr. Waksdale's termination.

Mr. Waksdale appealed the Motion Judge's decision.

Ontario Court of Appeal Decision

Ultimately, the Court of Appeal determined that the "Termination of Employment with Notice" provision was unenforceable and Plaintiff was entitled to "reasonable notice" at common law. In coming to its decision, the Court of Appeal found that:

1. an employment agreement must be interpreted as a whole and not on a "piecemeal" basis. It was 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;
2. to avoid the mischief associated with an illegal provision, the fact that Swegon did not rely upon the "Termination for Cause" provision was not relevant. The Court of Appeal noted that an employer may still indirectly benefit from an illegal clause (if, for example, an employee strives to comply with overreaching provisions), even if the employee is ultimately terminated without cause on terms that would be compliant with the *ESA*; and

3. a severability clause cannot be applied to termination provisions that purport to contract out of the provisions of the *ESA*. Having concluded that the "Termination for Cause" and "Termination of Employment with Notice" provisions must be understood together, the severability clause cannot apply to sever offending portions.

The Court of Appeal set aside the Motion Judge's order and remitted the matter back to the Motion Judge to determine the quantum of Mr. Waksdale's damages and the costs of the action.

Impact and Action

The Ontario Court of Appeal's decision is a stark reminder that employers must be extremely vigilant and constantly reviewing and updating their employment agreements to deal with this ever-changing landscape.

Notably, neither the Motion Judge nor the Court of Appeal were asked to determine the precise manner in which the "Termination for Cause" provision violated the *ESA*.

Under the *ESA*, only “wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer” will relieve the employer from paying out the *ESA* termination entitlements. In this case, the contractual "Termination for Cause" provision was broadly drafted with numerous enumerated grounds that the parties had agreed would constitute just cause.

From this decision, it can be inferred that any language that permits the termination of employment for cause in circumstances outside of those permitted in the *ESA* may impact the enforceability of the contractual termination provisions.

However, there remains hope for employers in that this case may be distinguishable on its facts. By way of example, in this written decision:

1. the parties expressly agreed that the "Termination for Cause" provision violated the *ESA*, which is not the case with every such provision. In the recently decided *Alarashi v. Big Brothers Big Sisters of Toronto*, the court found that the enumerated definition of cause was not inconsistent with the ESA and that the parties had expressed an intent to comply with the *ESA*;
2. the Court of Appeal did not consider any remedying effect of a "savings" provision (or other similar interpretative provision expressing the parties' intent); and
3. the Court of Appeal did not consider the interpretation of the word "cause" in circumstances where the parties had not defined it.

Conclusion

Given the Ontario Court of Appeal's ruling (alongside recent past rulings, which has shown our courts’ expectation of perfectionism in drafting enforceable severance provisions), employers are well-advised to:

1. Immediately review existing templates to make necessary adjustments;
2. Review existing employment agreements with internal and external legal advisors before moving forward with a termination of employment; and
3. Consider a practice of updating employment agreements prior to implementing a new benefit or a promotion.

We will continue to watch to see if Swegon will seek leave to appeal this decision to the Supreme Court of Canada.

Any future developments will be posted on this blog.