



New Case Law Invalidates Employment Contracts in Ontario – Are Your Contracts Up To Snuff?

March 3, 2021

by Ljubica Durlavska, BA, LLB, CDPM

In the Summer of 2020, in the middle of a pandemic that saw many businesses struggling to adapt, shrinking their workforce, and in many cases closing their doors, the Court of Appeal dropped a bomb when they released the Waksdale Case (*Waksdale v Sweagon North America Inc.*, 2020 ONCA 391) which made firing non-unionized employees with existing contracts more difficult and more costly than ever. This decision effectively rendered termination provisions in most employment agreements unenforceable which left employers scratching their heads, wondering what to do next in the wake of Waksdale.

ENTITLEMENTS UPON TERMINATION

Waksdale gets technical, so before delving into the facts of the case, it is important to know a few key terms:

“Without Cause” vs. “With Cause” Termination

In a “without cause” termination, an employer terminates an employee without providing a reason for doing so. When an employee is let go on a “without cause” basis, they are entitled to notice or pay instead of notice, the amount of which is determined based on the employee’s contract, if any.

When an employer terminates an employee “with cause” that means that there is a justifiable reason for doing so. Whether or not the employee will receive notice or pay instead of notice upon termination “with cause” will depend on the employee’s contract, if any, and whether the employee’s conduct amounts to “wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer”. More on this “wilful misconduct” concept later.

“Common Law” vs “ESA” Termination Entitlements (Maximum vs Minimum)

The amount of an employee’s entitlements upon termination will depend on whether they have a written contract and if that contract (and its component sections) is valid.

Employees without valid contracts who are terminated “without cause” are entitled to the maximum “common law” (also known as judge made law) notice or pay instead of notice. Common law notice is calculated at approximately one (1) month for every year the employee worked for the employer up to a maximum of 24-26 months. Note that the amount of notice or pay will fluctuate depending on the particular circumstances of each case such as the age, seniority, position, likelihood of finding similar employment, etc.

By contrast, employees who have enforceable contracts containing valid termination provisions will only be entitled to the minimum amounts of notice or pay afforded by Ontario's *Employment Standards Act, 2000*, ("ESA"). The ESA provides about one (1) week for every year the employee has worked for the employer up to 8 weeks.

So, for example, let's take the lovely dental assistant who's been with you for 20 years but has to be terminated due to economic reasons on a "without cause" basis:

- *Without a valid contract*: you will owe your dental assistant "common law" notice or pay instead of notice, which is about **20 months** (adjusted for the factors discussed above)
- *With a valid contract*: you will owe this same employee the ESA notice or pay instead of notice of 8 weeks.

That's a big difference! It is this liability that drives employers to invest in making sure they have contracts that apply the ESA minimums and not the common law maximums when it is time to say goodbye to their employees. The Waksdale case is about this very difference and the struggle between employer and employee to invalidate a contract that tried to bind the parties to the ESA minimum standards.

WAKSDALE: MORE THAN JUST YOUR RUN-OF-THE-MILL WRONGFUL TERMINATION CASE

Benjamin Waksdale was a non-unionized employee who was terminated after 8 months on the job on a "without cause" basis and upon being given 2 weeks of pay in accordance with the "without cause" termination provision of his contract. Mr. Waksdale was not happy with his termination package and sued his employer claiming that he was wrongfully terminated and entitled to "common law" notice of termination.

Mr. Waksdale admitted that the section in his contract dealing with termination "without cause" (the one he was fired under), as a stand-alone provision, was lawful in and of itself. Nonetheless, in a stroke of creative legal maneuvering, Mr. Waksdale and his lawyers claimed that the section dealing with termination "with cause" was unlawful due to violating the ESA. They claimed that even though his termination was not "with cause", the invalidity of this section had the run-on effect of invalidating the "without cause" section as well. Without valid termination provisions, Mr. Waksdale argued he was entitled to common law notice upon termination instead of the 2 weeks he had received.

Mr. Waksdale's employer disagreed and argued that the "with cause" and "without cause" sections were stand alone provisions that should be analyzed separately. Furthermore, Mr. Waksdale's contract included a saving provision in the form of a "severability clause" which stated that any unenforceable sections can be removed from the contract without affecting the remainder of the contract.

The Superior Court agreed with the employer's arguments and Mr. Waksdale's claim for common law termination pay was rejected. Mr. Waksdale appealed and, in a surprising turn of events, the Court of Appeal sided with him, awarding him common law termination pay based on the following reasoning:

- It is irrelevant whether termination provisions "are found in one place in an agreement or separated, or whether the provisions are by their terms otherwise linked". These provisions, they said, "must be interpreted as a whole and not on a piecemeal basis" when determining whether they are lawful.
- The severability clause was of no help to the employer. The Court "declin[ed] to apply the severability clause to termination provisions that purport to contract out of the provision of the ESA. A severability clause cannot have any effect on clauses of a contract that have been made void by statute." Since the termination provisions must be read together, the Court found that a "severability clause cannot apply to sever the offending portion of the termination provisions."

The Court of Appeal's decision was appealed a short time after it was released and we've all been waiting with bated breath for the final showdown at the highest level, the Supreme Court of Canada ("SCC"). Unfortunately, on January 14, 2021 the SCC officially refused to hear the appeal and dismissed it with costs signaling their agreement with the Court of Appeal's decision and their reasoning for it. The result: the Waksdale decision still stands as good law in Ontario.

WHAT MAKES A "WITH CAUSE" PROVISION UNENFORCEABLE?

Unfortunately, the actual language of the "with cause" section in Waksdale was not disclosed and so we did not get guidance on that front. The absence of specific language makes it that much more difficult for employers to assess the risk that their own employment agreements may now face.

Nonetheless, we know that where an employer has just cause for termination, they can terminate an employee "with cause". Just cause can include anything from chronic lateness and absenteeism to theft and insubordination. When terminating an employee for just cause, an employer is still required to give termination notice or pay instead of notice unless the employee is guilty of "wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer" in accordance with the ESA (Section 2 of Regulation 288/01 of the *ESA*).

Most employment contracts do not make this distinction between the ESA definition of "wilful misconduct" and "just cause". And yet, it is this lack of distinction that may void your termination "with cause" provision and thereby all other termination provisions in your agreements.

A RUDE AWAKENING POST-WAKSDALE

Where there are written agreements, "with cause" termination provisions have gotten little attention, especially given how infrequently they are used. This is no longer the case. "With cause" termination provisions are now front-and-centre because their validity and legality have the ability to influence the validity and legality of "without cause" termination sections as well, regardless of any saving provisions in the contract.

The Waksdale decision also raises another important question: what other clauses, if found to be in contravention of the ESA, might serve to invalidate a "without cause" termination provision? Creative plaintiff lawyers will no doubt seize the opportunity to expand Waksdale in order to obtain greater termination costs for their clients – leaving employers to foot the bill.

THE BOTTOM LINE

Dentist employers are often lulled into a false sense of security when they have employment agreements in writing. The unfortunate reality is that not all contracts are created equally. More unfortunate still is that some contracts are not worth the paper they are written on – this is especially evident now, post-Waksdale.

Given the "common law" liability employers owe to their employees on termination in the absence of valid contracts, now is the time to review and revise your employment contracts to ensure their validity.

One never knows what the future brings and whether employees may have to be let go or not (whether due to economic downturn or for other reasons). The only certainty is that employers who do not have valid contracts with their employees or who continue to use old, unenforceable contracts post-Waksdale will find themselves shelling out much more in termination costs than they might have anticipated.

References

1. <https://www.canlii.org/en/on/onca/doc/2020/2020onca391/2020onca391.html?autocompleteStr=waksdale&autocompletePos=1>
 2. <https://www.canlii.org/en/on/laws/stat/so-2000-c-41/latest/so-2000-c-41.html?autocompleteStr=employment&autocompletePos=1>
 3. <https://www.canlii.org/en/on/laws/regu/o-reg-288-01/latest/o-reg-288-01.html>
-

About the Author



Ljubica Durlovska, BA, LLB, CDPM, is a lawyer at DMC LLP focusing exclusively on helping dentists with their employment law matters. Ljubica can be reached at ljubica@dentistlawyers.ca or 416-443-9280 x206. Find out more about DMC LLP (Canada's largest dental-only law firm) at www.dentistlawyers.ca.