



ARE EMPLOYMENT LAW CASES RUINING PRACTICE SALES?

Here's What You Need to Know

Every week, our law firm has this same conversation with dentists.

Dentist: “Will it hurt?”

Lawyer: “A pinch at first. You’ll barely feel it.”

Dentist: “What if I leave it alone?”

Lawyer: “It’ll eventually infect your entire practice sale.”

Dentist: “How much will it cost me?”

Lawyer: “Not much up front. But a hell of a lot later on.”

Dentist: “What other options do I have?”

Lawyer: “Lots. But only one really good one.”

Dentist: “OK, let’s get it done. Please be gentle”.

The topic: Putting team members on new or updated employment contracts prior to a sale. And this topic isn’t new. What is new is a series of Ontario court cases that have essentially rendered many existing employment agreements unenforceable when it comes to the termination clauses.

So, what does that mean for someone thinking about selling now or in the next few years? By not having contracts or updated contracts for all team members at the time of sale, a seller is giving ammunition to the buyer to discount the purchase price.



Michael Carabash, BA, LLB, JD, MBA, CDPM is a founding partner of DMC LLP, Canada’s largest dental-only law firm that helps dentists prepare, market and sell practices in Ontario. Michael leads DMC’s annual Caribbean dental mission trips (Grenada, Jamaica and Turks & Caicos). If you’re thinking about selling, contact Michael at michael@dentistlawyers.ca or 647.680.9530.

Why? Because of the perceived risk on the buyer of having to shell out big bucks to terminate an employee after the sale.

Why would a buyer terminate anyone after spending so much money buying the practice? Wouldn't it be financial suicide? Team members are one of the biggest assets in the dental practice, right? Practically speaking, yes! Theoretically, however, team members can be one of the biggest liabilities in a dental practice. If a buyer doesn't get along with them or vice-versa, the buyer could be paying out a lot to get rid of them.

Besides, in the context of a sale, the buyer's lawyer will absolutely jump on the issue of no or deficient employment agreements to help drive the purchase price down or get other better terms for the buyer. The hypothetical risk becomes a real risk to the seller. And when the seller is trying to transition, the last thing they should accept is an actual or threatened financial penalty for something that is 100 percent avoidable with proper treatment planning.

So what kind of financial penalty could the seller be looking at? It all depends. But we've seen sellers take big discounts on the purchase price to the tune of tens or even hundreds of thousands of dollars. And we've also seen dentist sellers agree to share in some portion (e.g.: 50% or 100%) of employee termination costs if the buyer terminates anyone within a set period of time (e.g.: 3, 6, or 9 months) after they buy. We've even seen some buyers follow through on actual (albeit limited) terminations and sellers end up paying.

These new court cases must be discussed, and then I'll tell you what to do to prevent them from gumming up your practice sale.

Waksdale: It Hurts!

The *Waksdale* decision came out in the summer of 2020.¹ A whopper of a case: it basically gives employees under contract new ammunition to tear through the contract's termination clauses and thereby force the employer to shell out big time money if they terminate someone for any reason.

Now, by way of background, you need to appreciate that a big reason for having any employment agreements is to do away with something lawyers call "common law damages". This is a judge-made law that requires employers to pay employees who are not on contract about 1 month of pay per year of service, up to 24-26 months. (We've also seen it

go as high as 30 months in *Dawe v. Equitable Life Insurance Company*.)² But by having a contract, the employer and employee basically agree to replace this archaic rule with the much easier-to-digest minimum pay required under the *Employment Standards Act, 2000* (the "ESA"), which is typically 1 week of pay per year of service, up to 8 weeks maximum. But if a court finds a contract's termination clauses unenforceable, the employer will need to pay common law damages.

In *Waksdale*, a 42-year-old sales director was terminated without cause after 9 months on the job. A "without cause termination" means that the employer gave the employee payment equivalent to the notice that the employee was entitled to (under the contract and in accordance with the *ESA* minimums). Had the employer terminated "for cause" (meaning the employee did something really bad like stealing, fraud, insubordination, crime, purposefully damaging property, etc.), then the employer would not have been required to pay anything more to the employee or even notice before firing them.

Back to *Waksdale*. Here, the employer offered two weeks' pay per the terms of the contract, which was more than what the *ESA* required. The employee sued, arguing that the "termination with cause" clause was invalid and that should render the "termination without clause" invalid, too. This seems to be a strange argument to make. Now, the employer here actually agreed that the "termination with cause" clause was illegal. But so what? The employer terminated without cause, remember? The Ontario Superior Court of Justice agreed with the

Team members are one of the biggest assets in the dental practice, right? Practically speaking, yes! Theoretically, however, team members can be one of the biggest liabilities in a dental practice.

Case Name	Employee	Terminated	Court Found	Result
<i>Sewell v. Provincial Fruit Co. Limited</i> ³	45-year-old senior sales rep	Without cause after 6 months on the job, paid 2 weeks' salary and benefits, in line with contract and ESA .	<p>With cause clause in the contract was invalid based on Waksdale.</p> <p>Therefore, without cause clause in the contract was also invalid.</p> <p>Common law damages applied.</p>	Employer to pay 4 months of pay as common law damages.
<i>Ojo v Crystal Claire Cosmetics Inc.</i> ⁴	52-year-old senior warehouse manager	Without cause after 10 months on the job, offered 1 week of pay in accordance with contract and ESA .		Employer to pay 3 months of pay as common law damages.
<i>Perretta v. Rand A Technology Corporation</i> ⁵	49-year-old sales rep	Without cause after 5.5 years on the job, was supposed to get two (2) weeks of pay plus minimum pay and benefits under the ESA .		Employer to pay 6 months of pay as common law damages.
<i>Lamontagne v. J.L. Richards & Associates Limited</i> ⁶	36-year-old controller	Without cause after 6 years on the job, was entitled to minimum pay required under the ESA under the contract.		Employer to pay 10 months of pay as common law damages.

employer, found the different termination clauses in the contract separable, and dismissed the lawsuit on the basis that the “termination without cause” clause was enforceable.

But then the employee appealed. And this is when things started to go nuts. Because the Ontario Court of Appeal actually sided with the employee. And the Court of Appeal didn't even allow the severability clause in the contract (which directed a court to sever any offensive illegal clause from the rest of the legal agreement) to save the day. The employer lost. The case was sent back to a lower court to determine how much the employer owed the employee in terms of common law damages. And the final nail came when the Supreme Court of Canada refused to even hear the employer's appeal. This left the Court of Appeal's decision as the highest precedent for lower courts to follow.

Personally, I was hoping for other courts to disregard (by distinguishing) *Waksdale* or even legislative intervention to give employers some relief, but to no avail. Quite the opposite: a flood of recent Ontario court cases cited and followed in *Waksdale's* footsteps – all to Ontario employers' detriment. They are summarized in the table above.

Your Treatment Plan

Given these court cases and the likelihood of *Waksdale* continuing to be wielded by employees, all dentist employers need to update their team agreements ASAP.

And that's even more important in the context of a sale. Because, while you may avoid big payouts by having staff voluntarily resign or not firing anyone at all, when you're looking for big bucks on a sale, this is one of the biggest things going against you: not having team members on proper and up-to-date contracts.

Luckily, we dental lawyers can see this coming a mile away. So, your best is to give us a shout and start the process of switching team members from no contracts or old contracts to new ones. How does it work? We prepare the contracts and actually attend your office to present them using a soft touch.

Keep these things in mind.

1. Don't try to do any of this yourself. If you say or write the wrong thing, your entire effort goes out the door. In other words: stick to dentistry; don't play lawyer. You won't have the answers and you'll end up jabbing yourself.

2. The contracts that are presented should not be signed by your staff until the minimum amount of notice has passed; otherwise, the contracts could be deemed invalid later on due to not being entered into properly or you could be sued for something we lawyers call “constructive dismissal” (basically where the employer unilaterally changes a fundamental term of the employment relationship without giving adequate notice). The minimum amount of notice is a calculation, based on an employee’s length of employment, seniority, position, and other factors.
3. The contracts themselves need to take into account *Waksdale* and all those cases that followed. This means that the language needs to be uber-precise when it comes to all of the termination clauses. This is where our legal drafting skills, developed over years, shines. DMC’s lawyers collectively and constantly review and update our employment contracts to help prevent them from being challenged on the basis of *Waksdale*.
4. For the contracts to be valid, you also need to offer something lawyers refer to as “consideration” (something of benefit to the employee that’s not just continued employment) to the employees to entice them to sign the contract. By signing, they accept replacing common law damages for terminations with *ESA* minimums. How much “consideration” are we talking? We have seen “consideration” in the form of an hourly wage raise or a one-time lump sum signing bonus (for as low as \$50 or as high as a few hundred to a few thousand dollars). It depends on a multitude of factors, but also how much it would take to get the employee to sign sooner rather than later. If you don’t offer any consideration and simply wait for the notice period to expire, the contracts may not be enforceable given various recent Ontario court cases.⁷
5. Because we understand the value that your staff bring to the table, we do not approach them as if they are liabilities. We also don’t take a hard or threatening approach. Why? Because we don’t need to. Once you actually start the process of introducing contracts (which your staff cannot stop), you’re good to go when it comes to selling. You also don’t necessarily need your team members to sign before you sell. We just need to start the process. Keep in mind that we take a light-footed approach and try our best to get them on contract in a way that’s a win-win for everyone.

Don’t try to do any of this yourself. If you say or write the wrong thing, your entire effort goes out the door. In other words: stick to dentistry; don’t play lawyer. You won’t have the answers and you’ll end up jabbing yourself.

We explain that we’re there to help clean up the practice legally (e.g.: preparing a policy manual, negotiating a lease renewal, purifying the corporation) and this is just part of the overall process, which is actually the truth.

If you do all of the above prior to, or even during, the sale process, you’ll be in a better position when it comes to actually negotiating the purchase and sale agreement. By having team members on proper contracts at the time of sale, we are mitigating risks to the buyer (at a significantly reduced cost to the seller). So, our selling dentist no longer needs to accept huge price discounts or sharing of employee termination costs after the sale. Problem solved! ✨

If you’re thinking about selling now or in the not-to-distant future, contact the author for a complimentary phone call so you’re prepped and ready to go when it’s time to do the real thing.

References

1. *Benjamin Waksdale vs. Swegon North America Inc.* 2020 ONCA 391, leave to appeal to the Supreme Court of Canada rejected in *Swegon North America Inc. v. Benjamin Waksdale*, 2021 CanLII 1109 (SCC).
2. 2018 ONSC 3130 (CanLII).
3. 2020 ONSC 4406 (CanLII).
4. 2021 ONSC 1428 (CanLII).
5. 2021 ONSC 2111 (CanLII).
6. 2021 ONSC 2133 (CanLII).
7. *Krishnamoorthy v. Olympus Canada Inc.*, 2017 ONCA 873 (CanLII); *Holland v. Hostopia Inc.*, 2015 ONCA 762 (CanLII); *Rejidak v. Fight Network Inc.*, 2008 CanLII 37909 (Ontario Superior Court of Justice).