ANOTHER BRICK IN THE WALL (REMOVED) (PART 29): COURT OF APPEAL CONTINUES TO CHIP AWAY AT ESA TERMINATION PROVISIONS

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Termination provisions in most employment agreements provide for three distinct scenarios: resignation, termination for cause and termination without cause. A well-drafted termination provision protects employers from a debate over the common law notice period when dismissing an employee without cause. Up until recently, the prevailing view in Ontario was that as long as the provisions were separated, illegality in one did not render the other clauses unenforceable.

However, the recent Ontario Court of Appeal ("the Court") decision of *Waksdale v. Swegon North America*[1] has changed the prevailing view by holding that if one clause is not compliant with the Employment Standards Act, 2000, (the "**ESA**"), the other clauses are unenforceable.

Background

Mr. Waksdale's employment agreement contained a "termination for cause" and a "termination without cause" provision. The termination without cause provision limited Mr. Waksdale to his minimum entitlements under the ESA.

Notwithstanding the fact that Mr. Waksdale was terminated without cause, Mr. Waksdale took the position that the termination for cause provision breached the ESA and the illegality of the termination for cause provision rendered the entire agreement – or, at the very least, the termination without cause provision in the employment agreement – void and unenforceable.

The employer conceded that the termination for cause provision was unenforceable as it provided something less than the ESA, but took the position that the unenforceability of the termination for cause provision was irrelevant as Mr. Waksdale was terminated without cause.

The trial court judge sided with the employer and dismissed Mr. Waksdale's wrongful dismissal action. Mr. Waksdale appealed to the Court.

Decision

The Court overturned the trial judge's decision and held that the two termination provisions must be read together:

> *[10] … An employment agreement must be interpreted as a whole and not on a piecemeal basis.* ***The correct analytical approach is to determine whether the termination provisions in an employment agreement read as a whole violate the ESA.*** *… While courts will permit an employer to enforce a rights-restricting contract, they will not enforce termination provisions that are in whole or in part illegal.* ***In conducting this analysis, it is 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****. Here the motion judge erred because he failed to read the termination provisions as a whole and instead applied a piecemeal approach without regard to their combined effect.* [emphasis added]

Further, the Court reasoned that an employer cannot be permitted to insert an illegal provision into an employment agreement and then remedy or save the illegal provision by acting in accordance with the ESA later. This is because an employee may not know that the provision is illegal, and would act in accordance with it, which would allow the employer to derive a benefit from the illegal provision until the employee realizes the provision is illegal, if at all:

> *[11]* ***Further, it is of no moment that the respondent ultimately did not rely on the Termination for Cause provision…non-reliance on the illegal provision is irrelevant.***
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> *[12] The mischief associated with an illegal provision is readily identified.* ***Where an employer does not rely on an illegal termination clause, it may nonetheless gain the benefit of the illegal clause****. For example, an employee who is not familiar with their rights under the ESA, and who signs a contract that includes unenforceable termination for cause provisions, may incorrectly believe they must behave in accordance with these unenforceable provisions in order to avoid termination for cause.* ***If an employee strives to comply with these overreaching provisions, then his or her employer may benefit from these illegal provisions even if the employee is eventually terminated without cause on terms otherwise compliant with the ESA****.* [emphasis added]

Finally, the Court rejected the employer's reliance on a severability clause in the employment agreement:

> [14] We decline to apply this clause to termination provisions that purport to contract out of the provisions of the ESA. **A severability clause cannot have any effect on clauses of a contract that have been made void by statute …**

Takeaways for Employers

The Court's decision is yet another example of how difficult it is for employers to rely on termination provisions in their offer letters. The language of the termination for cause provision was not cited in the case as the employer had conceded it was unenforceable, but employers must carefully review their offer letters to ensure compliance with the ESA. An illegal termination for cause provision in an employment agreement is likely to render the termination without cause provision unenforceable, even if these two provisions appear under separate subheadings in the employment agreement.

We often see termination for cause provisions that state that if the employee is terminated for "cause" the employee is not entitled to any notice or pay in lieu of notice. Such provisions have been found to violate the ESA because the ESA has a higher standard for when misconduct disentitles an employee to notice and severance.[2] As such, to the extent that an employer's existing employment agreement contains an illegal termination for cause provision, it may not be able to rely on the termination without cause provision even though that provision complies with the ESA. This is likely to result in the terminated employee being entitled to reasonable notice at common law.

Employers should ensure that their offer letters are frequently reviewed to ensure that their agreements comply with the ESA.

If you have any questions relating to the above, please do not hesitate to contact a member of the Employment and Labour Relations Group.

by Patrick Groom and Dave J. G. McKechnie

[1] 2020 ONCA 391 (CanLII).[ps2id id='1' target=''/]
[2] Please see subsections 2(1)3 and 9(1)6 of O. Reg. 288/01: TERMINATION AND SEVERANCE OF EMPLOYMENT and Khashaba v Procom Consultants Group Ltd., 2018 ONSC 7617 (CanLII).[ps2id id='2' target=''/]

A Cautionary Note