THE COMMON LAWYER

Have you done an internal employment audit lately?

By Justin Jakubiak

"But we have a really good employment lawyer, and she redid all our employment contracts a few years back..."

I recently received the above response from one of my largest dealer group clients. The group is sophisticated, well organized, completes regular training, has internal audit procedures and more – in short, the group sets the benchmark for what most dealers should strive for in all aspects of their business.

The groups response was further to my advice regarding an employee (a business manager) who had recently been terminated from one of their dealerships. He had been terminated, on a without cause basis, just past the expiration of his 3 month employment period. I was called after the dealer had received a letter from an employment lawyer **demanding 5 months' base pay (or almost $60,000) on the employee's behalf!**

"5 months for being with us only 3 months!!! This is b@(($#!+!!!" was my client's very understandable reaction.

"Let me see the employment agreement" I replied – the employment agreement is the first place I look when an employer comes to me with this sort of dilemma. A well drafted employment agreement is an immensely important tool and can help with all sorts of scenarios – unreasonable demands for pay in lieu of notice, theft of company property and corporate opportunities, wrongful competition and more.

But a bad (or in this case an old) employment agreement is often barely worth the paper it is written on.

Unfortunately, like cars, employment law is constantly changing and evolving. Consequently, employers must constantly review their employment agreements, policies and procedures to ensure they are in line with the latest legal developments and continue to remain enforceable.

Upon review of my client's employment agreement, I was left with the unenviable position of telling a valuable client bad news – the termination provisions in the agreement were no longer valid further to a 2020 decision of the Ontario Court of Appeal, Waksdale v Swegon North America.

Waksdale

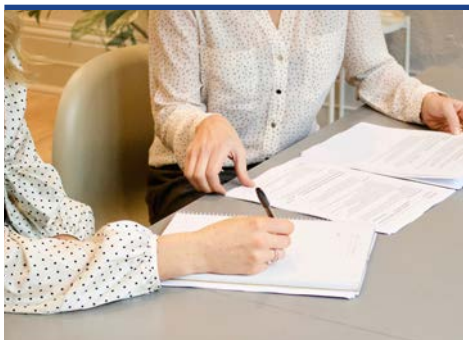
Waksdale v Swegon North America (2020 ONCA 391) is an Ontario Court of Appeal decision which caught the entire employment bar off guard and essentially necessitates that all Ontario employers must take a good look at their employment agreements, even if they are relatively new and even if they were drafted by excellent employment lawyers. The Court of Appeal ruled that 'without cause' termination provisions of employment contracts are unenforceable if the wording of any other termination provisions in the same contract contravene any aspect of the Employment Standards Act ("ESA"), or its regulations. The employment agreement in Waksdale had three provisions:

A. a "just cause" termination provision (that did not comply with the ESA);

B a standard termination provision (that complied with the ESA); and,

C. a severability clause.

Like with my client, the employee in Waksdale was terminated without cause, and pay in lieu of notice was calculated in



accordance with the properly drafted and legally compliant termination provision. As with my client, there was no allegation that the employee was terminated for cause and accordingly the just cause provision (improperly drafted) was not relied upon.

The employee challenged the termination provisions of the employment agreement and took the position that he was entitled to common law notice. The employee's lawyer asserted that the just cause termination provision in the agreement was not legally enforceable and therefore all the termination provisions, even those that were not technically offside, were improper and must be struck.

The trial judge rejected the argument and held that even if the just cause provision was invalid, its invalidity did not mean that the without cause provision was also invalid. The trial result was consistent with what most lawyers would have told you was the law at the time.

Notwithstanding same, and to everyone's surprise, the Court of Appeal overturned the Trial Judge's decision and held that 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. **Recognizing the power imbalance between employees and employers, as well as the remedial protections offered by the ESA, courts should focus on whether the employer has, in restricting an employee's common law rights on termination, violated the employee's ESA rights.** 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.

What does this mean?

This means that employers should ensure that all clauses in their employment contracts are enforceable, regardless of whether they pertain to termination or other aspects of the employment relationship. Employers who fail to do so risk having their entire employment contract invalidated by a court, as well as expensive legal fees and potentially more money owing to an ex-employee than they would like.

In summary, the Waksdale decision has implications for all employers who use custom or standard form employment contracts – especially if they were drafted before 2020.

My client, like so many employers, had obtained an employment agreement that was really good at one time, and simply recycled it with subsequent employees – never thinking that the law could change so radically as to result in the invalidity of key provisions.

As we spring into summer, your dealership should consider obtaining legal advice to ensure that its employment agreements are current and legally enforceable by today's standards. While you are at it, ask yourself if your dealership has the following in place:

- Harassment Prevention Policy and Training (Required under OHSA)
- Violence Prevention Policy and Training (Required under OHSA)
- Health and Safety Policy and Training (Required under OHSA)
- AODA – mandated Policies and Training (Required under AODA)
- Copy of the Occupational Health and Safety Act available in workplace.
- Poster: "Health & Safety at Work: Prevention Starts Here" posted in your workplace.
- Employment Standards Poster posted in your workplace.
- Joint Health and Safety Committee (if your organization employs 20 or more employees) formed and trained.
- Health and Safety Representative (if your organization employs more than 5 but less than 20 employees) selected and trained.
- Disconnecting from Work Policy (required under ESA if your organization employs more than 25 employees)
- Electronic Monitoring Policy (required under ESA if your organization employs more than 25 employees)

The above is a simple list outlining certain legal requirements that apply to most workplaces in Ontario.

If you are missing any of the above, or if you have any questions about your employment agreement and its enforceability, please contact your legal professional (or me!).

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This article is intended for general information purposes only, and should not be relied upon as legal advice. Views and opinions are Justin's alone. ■