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Terminating an Employment Contract

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Prudent advice dictates that the terms of employment are to be set out in a written agreement. One of the most important of those terms is that of severance, namely, what are the obligations of the employer when the relationship needs to be terminated? This is important, because without such a contractual provision, a court may order the employer to pay what it believes is reasonable which is likely to be significantly greater than the employer's view.

In a number of recent decisions, courts in Ontario have had the opportunity to examine contractual severance provisions and found them ineffective in limiting the employee's rights to payment on termination of employment. In the following cases, the Court concluded that these provisions offended the *Employment Standards Act, 2000* (Ontario) (the "ESA"), and were therefore ineffective in limiting the employee's common law right of reasonable notice on termination of employment. These cases make it critical to review the severance provisions in each written employment agreement.

The Recent Cases

1. *Waksdale v Swegon North Amercia Inc.*, 2020 ONCA 391 ("*Waksdale*"). In this case, the contract in question contained both "termination for cause" and "termination without cause" provisions. The employer terminated Mr. Waksdale without cause and accordingly relied on the without cause provisions which called for payment pursuant to the ESA. While the Court found nothing wrong with this clause, it ruled it unenforceable because the "for cause" term of the contract (even though cause was not alleged and the clause not relied on) did offend the ESA. In other words, the illegality of the "with cause" portion of the termination provisions made all of the termination provisions in the employment contract unenforceable.

2. In a more recent case, *Perretta v Rand A Technologies Corporation*, 2021 ONSC 2111 (S.C.J.) ("*Perretta*"), the "for cause" provision in the contract had a similar defect to that in *Waksdale*. The clause did, however, state that it was "subject to the ESA". While the Court did accept the employer's submission that this wording "can be read [in a way] that is compatible

with the ESA", it went on to find that the clause was ambiguous and the test of its validity is not to struggle to find a way to make it consistent with the ESA, "however convoluted". Rather, the Court ruled that an ambiguous clause is to be read in a manner that provides the highest benefit to the employee. Again, as in *Waksdale*, the fact that the employer did not terminate for cause was irrelevant. The defective "for cause" provision was sufficient to render all termination provisions in the contract unenforceable.

Takeaways

While the reasoning in these cases has attracted considerable attention and, from some at least, criticism, they should be viewed as a clear incentive for employers to review their employment contracts and amend as necessary to avoid the unanticipated consequences the employers encountered in *Waksdale* and *Perretta*. This includes review of all clauses which deal with termination to ensure (i) compliance with the ESA based on recent case law, (ii) language that is clear and non-ambiguous and (iii) consistency of their terms.

The information contained in this article is intended to provide information and comment, in a general fashion, about recent cases and related practice points of interest. The information and views expressed are not intended to provide legal advice. For specific legal advice, please contact us.