COURT OF APPEAL FOR ONTARIO

CITATION: Waksdale v. Swegon North America Inc., 2020 ONCA 391
DATE: 20200617
DOCKET: C67616

Pepall, Hourigan and Roberts JJ.A.

BETWEEN

Benjamin Waksdale

Plaintiff

(Appellant)

and

Swegon North America Inc.

Defendant

(Respondent)

Philip R. White and Jason K. Wong, for the appellant

Landon Young and Amanda Boyce, for the respondent

Heard: in writing

On appeal from the order of Justice Edward M. Morgan of the Superior Court of Justice, dated October 3, 2019, with reasons reported at 2019 ONSC 5705.

REASONS FOR DECISION

Introduction

[1] The appellant sued the respondent for wrongful dismissal and moved for summary judgment, arguing that he was entitled to damages because the respondent did not provide him with reasonable notice of dismissal.

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[2] The primary issue on the motion was the legal effect of the written employment contract between the parties. The appellant took the position that the termination clause in his employment contract was void because it was an attempt to contract out of the minimum standards of the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (the "*ESA*"). The respondent conceded that the "Termination for Cause" provision in the contract was void because it violated the *ESA*. However, it argued that the "Termination of Employment with Notice" provision in the agreement was valid and, because it was not alleging cause, it could rely on the latter provision.

[3] The motion judge dismissed both the motion for summary judgment and the appellant's action, and awarded the respondent $16,000 for costs of the action. He concluded that the Termination of Employment with Notice provision is a stand-alone, unambiguous, and enforceable clause.

[4] In our view, the motion judge erred in law in his interpretation of the employment contract. The termination provisions are unenforceable because they violate the *ESA*. Therefore, we allow the appeal, set aside the motion judge's order, and order that the matter be remitted to the motion judge to determine the quantum of the appellant's damages.

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Analysis

[5] The appellant began his employment with the respondent on January 8, 2018 as a director of sales. His total income was approximately $200,000 per annum. The respondent terminated the appellant without cause on October 18, 2018 and paid the appellant two weeks' pay in lieu of notice.

[6] The respondent conceded on the motion that the Termination for Cause provision in the employment contract breached the *ESA*. Likewise, the appellant acknowledged that the Termination of Employment with Notice provision complied with the minimum requirements of the *ESA*. Therefore, the issue for the motion judge was the discrete question of whether the illegality of the Termination for Cause provision rendered the Termination of Employment with Notice provision unenforceable.

[7] The law regarding the interpretation of termination clauses in employment contracts was helpfully summarized by Laskin J.A. at para. 28 of *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158, 134 O.R. (3d) 481. The following points from that summary are particularly apt for the purposes of this appeal:

- The ESA is remedial legislation, intended to protect the interests of employees. Courts should thus favour an interpretation of the ESA that "encourages employers to comply with the minimum requirements of the Act" and "extends its protections to as many employees as possible", over an interpretation that does not do so: *Machtinger*, p. 1003.

- Termination clauses should be interpreted in a way that encourages employers to draft agreements that comply with the ESA. If the only consequence employers suffer for drafting a termination clause that fails to comply with the ESA is an order that they comply, then they will have little or no incentive to draft a lawful termination clause at the beginning of the employment relationship: *Machtinger*, p. 1004.

[8] Laskin J.A. went on to observe that the enforceability of a termination provision in an employment contract must be determined as at the time the agreement was executed. The wording of the contract alone should be considered in deciding whether it contravenes the *ESA*, not what the employer might have done on termination: *Wood*, at paras, 43-44. Thus, even if an employer's actions comply with its *ESA* obligations on termination, that compliance does not have the effect of saving a termination provision that violates the *ESA*.

[9] In the present case, there is no question that the respondent would not be permitted to rely on the Termination for Cause provision. The issue is whether the two clauses should be considered separately or whether the illegality of the Termination for Cause provision impacts the enforceability of the Termination of Employment with Notice provision. The respondent submits that where there are two discrete termination provisions that by their terms apply to different situations, courts should consider whether one provision impacts upon the other and whether the provisions are "entangled" in any way. If they are not, the

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respondent argues, then there is no reason why the invalidity of one should impact on the enforceability of the other.

[10] We do not give effect to that submission. 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.

[11] Further, it is of no moment that the respondent ultimately did not rely on the Termination for Cause provision. The court is obliged to determine the enforceability of the termination provisions as at the time the agreement was executed; 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*.

[13] In the alternative, the respondent relies on a severability clause in the employment contract which reads as follows:

> You agree that if any covenant, term, condition or provision of this letter outlining the offer of employment with the Company is found to be invalid, illegal or incapable of being enforced by a rule of law or public policy, all remaining covenants, terms, conditions and provisions shall be considered severable and shall remain in full force and effect.

[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: *North v. Metaswitch Networks Corporation*, 2017 ONCA 790, 417 D.L.R. (4th) 429, at para. 44. Having concluded that the Termination for Cause provision and the

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Termination of Employment with Notice provision are to be understood together, the severability clause cannot apply to sever the offending portion of the termination provisions.

Disposition

[15] The motion judge’s order is set aside. The only defence the respondent had to the action and the motion for summary judgment was its reliance on the Termination of Employment with Notice provision. Accordingly, we order that the matter be remitted to the motion judge to determine the quantum of the appellant’s damages and the costs of the action. If the parties cannot agree on the costs of the appeal, they may file written submissions together with a bill of costs within ten days of the release of these reasons. Those submissions shall be no more than three pages in length.

“S.E. Pepall J.A.”

“C.W. Hourigan J.A.”

“L.B. Roberts J.A.”

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