



e2r Alert

Ontario Termination Provisions in Doubt

The brief run on employer friendly cases seems to have come to an end.

The Ontario Court of Appeal just reversed the lower court's decision in *Waksdale v Swegon North America*, which previously held that an 'illegal' just cause termination provision would not necessarily impact the enforceability of a 'legal' without cause provision where the two provisions were separate and apart from one another (and thus severable) and where the termination was without cause.

How can a just cause termination provision be 'illegal'? In short, the Ontario *Employment Standards Act, 2000* ("ESA"), provides that an employee is not entitled to notice of termination or statutory severance pay (if applicable) where the employee's termination is for wilful misconduct, disobedience or wilful neglect of duty. The ESA standard is a *higher* standard than 'just cause' at common law. Therefore, there will be a narrow band of terminations that meet the just cause standard at common law (and thus no notice is owed) but do not meet the ESA standard (and thus ESA notice/termination pay and possibly severance pay is owed). Given this potential outcome, so the court's reasoning goes, a termination provision that provides no notice in the event of cause *potentially* provides for less than the ESA and therefore its void/unenforceable.

Waksdale originally helped employers because the lower court held that a potentially unenforceable just cause termination provision will not necessarily impact an otherwise separate and enforceable without cause provision where the termination is without cause – which makes absolute sense.

Unfortunately, the Court of Appeal disagreed and therefore an unenforceable just cause provision will now potentially put an otherwise enforceable without cause provision at risk, even where there is severability language, with the result that common law notice may be awarded.

A couple of positive points in an otherwise negative situation – 1. There was no 'saving language' in the termination provision considered in *Waksdale*, which may have altered the outcome; and 2. The law relating to what is and what is not an enforceable termination provision changes frequently and therefore the provision in *Waksdale* (or your contracts) could

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be deemed enforceable at a future date even if they would be unenforceable if a court ruled on them today.

Given this is a significant legal development we recommend speaking with an e2r® Advisor about reviewing your Ontario contracts to determinate what if anything you should be doing to address this change in the law.