

## Significant Decision from the Ontario Court of Appeal Impacts Enforceability of Termination Clauses

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September 23, 2020

As the old adage goes, "less is more." This might now be true for termination clauses in employment contracts after a recent decision from Ontario's top court.

In ***Waksdale v Swegon North America Inc., 2020 ONCA 391*** ("***Waksdale***"), the employer had an employment agreement that contained a termination clause broken up into two common parts: 1) a "Termination for Cause" provision; and 2) a "Termination Without Cause" provision. The employee's employment was ultimately terminated without cause and in accordance with the "Termination Without Cause" provision in the employment agreement.

At trial, the employer conceded that the "Termination for Cause" provision was in violation of the ***Employment Standards Act, 2000*** ("***ESA***"), but argued that was inconsequential because it terminated the employee's employment on a without cause basis. In other words, if the void provision was not engaged, then it should not be considered in determining the validity of the separate "Termination Without Cause" provision. The Ontario Superior Court of Justice agreed with the employer, finding that the two clauses could be treated separately.

The matter was appealed to the Ontario Court of Appeal. There, the Court of Appeal sided with the employee and against the employer. In doing so, they highlighted the importance of the ESA in protecting employees and the obligation on employers to draft compliant termination clauses. To rule otherwise, says the Court of Appeal, would invite "mischief" in employment contracts by allowing employers to potentially benefit from an otherwise illegal termination provision.

In addressing the employer's specific argument that the "Termination for Cause" provision could be ignored because it was not relied upon by the employer, the Ontario Court of Appeal stated at paragraph 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 at the time the agreement was executed; non-reliance on the illegal provision is irrelevant."*

This ruling showcases the potential vulnerability of termination clauses with multiple provisions or, more specifically, that contain a "just cause" termination provision. As a result of the finding in ***Waksdale***, most employers will find themselves in need of revising their just cause termination provisions, or removing them altogether.

We will continue to monitor this ever evolving area and provide you with further updates as they become available. Please note that this bulletin is intended for informational purposes only and does not constitute legal advice or an opinion on any issue. We strongly recommend that you contact your Miller Canfield lawyer with your specific questions in regards to this change in the law so that those questions can be addressed properly with you.