Employment Contracts: Review or Regret

Many employers rely upon standard form employment contracts, believing that they are sufficient to meet their specific hiring needs. However, employers should have experienced employment law lawyers regularly review their employment contracts, to ensure that the terms are valid and enforceable. The recent Court of Appeal for Ontario decision, *Waksdale* 2020 ONCA 391, is an example of how employers would be wise to revisit their standard form employment contracts.

The employee in *Waksdale* was terminated on a "without cause" basis, this means that the employer did not allege cause justifying its decision to end the employment relationship. Most employees who are terminated without cause have entitlements under the *Employment Standards Act*, 2000 (the "***ESA***"). Those entitlements include termination pay, and depending upon their length of service, severance pay, among other things. Employers are not permitted to contract out of the terms of the *ESA*.

An employee who is terminated on a without cause basis is also "presumptively" entitled to common law "reasonable notice". Reasonable notice is determined by judges on a case-by-case basis, and it tends to be a much more generous form of entitlement compared to entitlements under the *ESA*. Reasonable notice is a "presumptive" entitlement in the sense that the parties can contract out of it, in writing. This is a major reason why employers rely upon employment agreements. Properly drafted employment agreements allow employers an opportunity to limit reasonable notice exposure when the employment relationship comes to an end by waiving the employee's right to claim reasonable notice entitlements.

The issue in *Waksdale* was that the employment agreement contained a with cause termination provision which attempted to contract out of the *ESA*. The employee in *Waksdale* argued that the termination provisions, read as a whole, were unenforceable since the with cause provisions offended the *ESA*.

Indeed, the employer in *Waksdale* conceded that the with cause termination provisions were invalid. Moreover, the employer argued that the illegal with cause provisions were irrelevant because the employee was dismissed on a without cause basis. The employer added that the employee received all of his *ESA* entitlements, and that he was not entitled to any reasonable notice because of the written waiver in the employment contract.

Ontario's Court of Appeal sided with the employee, and held that it did not matter that the employee was terminated on a without cause basis and received all of his *ESA* entitlements. The fact that the with cause terms were invalid was enough to invalidate all of the termination provisions in the employment contract. Consequently, this meant that the reasonable notice waiver was invalid, thus entitling the employee to his common law reasonable notice.

Waksdale demonstrates how employment law in Ontario is not a static area of law, and that employers should periodically review and update their employment contracts. Employers can seek support at Lawrences Lawyers for employment contract drafting, review, and updating. Furthermore, we are also capable of assisting employers with any questions or issues they may have regarding their workforce.

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