BIRD RICHARD
LAWYERS FOR EMPLOYERS

EMPLAWYERS' UPDATE

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Ontario Court of Appeal Terminates another Termination Clause

The Ontario Court of Appeal has ruled that another termination clause in an employment contract is unenforceable. In *Waksdale v. Swegon North America Inc.,* the Court was asked to determine the legal impact of an illegal termination *for cause* provision on an otherwise enforceable termination *without cause* provision. The Employer admitted that the "*with cause*" termination provision was unenforceable, but argued that the provision had no bearing on the case since it was a termination without cause.

The case does not provide any information as to the specific reasons why the for cause provision was unlawful, but it could be that the provision failed to address the concept of "*willful misconduct*" which is necessary under the Ontario *Employment Standards Act, 2000 ("ESA")*, to avoid statutory termination pay and severance pay, which represents a higher standard than just cause under the common law.

The motion judge dismissed a motion for summary judgment by the employee on the basis that the termination without cause provision in the employment agreement was a standalone, unambiguous, and enforceable clause, which provided as follows:

> *You agree that in the event that your employment is terminated without cause, you shall receive one week notice or pay in lieu of such notice in addition to the minimum notice or pay in lieu of such notice and statutory severance pay as may be required under the Employment Standards Act 2000 as amended. All reimbursement for business expenses shall cease as of the date of termination of your employment, however, you shall be reimbursed for legitimate business expenses that have been incurred and submitted to the Company but not as yet paid you to that date. The terms of this section shall continue to apply notwithstanding any changes hereafter to the terms of your employment, including, but not limited to, your*

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> *job title, duties and responsibilities, reporting structure, responsibilities, compensation or benefits.*

There was no dispute that the Employer complied with the *ESA* and the above termination without cause provision by providing the employee with 2 weeks' pay in lieu of notice. He had been employed for less than a year. The difficulty for this Employer was that the termination *for cause* provision was illegal. The Court was asked to consider whether the illegality of the termination *for cause* provision invalidated the termination *without cause* provision.

The Employer argued that where there are two discrete termination provisions that apply to two different situations and that in this case, the termination for cause provision was not applicable. The Employer argued that Courts should consider whether one provision impacts the other and determine if they are entangled in any manner — if not, the Employer argued that there is no reason why the invalidity of one clause should impact on the enforceability of the other.

The Court of Appeal rejected the argument. It held that the contract must be read as a whole, and not on a piecemeal basis. According to the Court of Appeal, the correct approach is to look at the termination provisions as a whole to determine if they violate the *ESA irrespective of the actual circumstances of the termination*. It did not matter that the Employer did not rely on the termination for cause provision because the Court had to determine the enforceability of the provisions at the time the contract was executed, not at the time of the termination.

The Employer also argued that the severability clause ought to be applied to "sever" the illegal clause from the contract. The provision provided:

> *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.*

The Court of Appeal rejected this argument also, and held that the severability clause does not have any effect on clauses of a contract that have been made void by statute and in light of the findings that the entire agreement must be considered as a whole to determine its enforceability.

In our view, the Court of Appeal decision is flawed and open to challenge to the Supreme Court of Canada. To ignore the actual circumstances surrounding the termination seems to ignore an important contextual element that ought to have some bearing on the analysis. In this case, the severability clause could have been given effect to reflect the fact that the illegal clause was not applicable to the facts before the Court. If a clause has no application to the circumstances before the Court, it is an odd result that an otherwise enforceable, clearly drafted, termination without cause provision should be set aside as invalid.

In a recent decision from the Ontario Superior Court, *Alarashi v. Big Brothers,* the Court noted that the "*with cause*" termination that had no applicability to the circumstances before the Court since the employee was terminated without cause and the provision did not apply in the context of that specific termination. In this case, the Superior Court reviewed the termination for cause language and held that it was enforceable. Ultimately, the termination without clause in this case was also deemed to be unlawful because it provided for termination pay *or* severance pay. The *ESA* provides that in certain cases an employee may be entitled to both termination pay *and* severance pay, so that clause could be applied in a manner that excluded one of termination pay or severance pay and was, therefore, unenforceable. The Court noted that it should not strain to find ambiguity capable of invalidating a termination clause if there is no ambiguity to be found.

Employers must draft termination clauses with tremendous caution and precision. Any and all ambiguity will be resolved in favour of the employee which could render termination provisions in employment agreements unenforceable. Based on this decision from the Court of Appeal, Employers should review the entire termination provision in employment agreements, including both the termination for cause language and termination without cause language, with a view to ensuring compliance with the *ESA* viewed as a whole. This decision may be appealed by the Employer to the Supreme Court of Canada. We will keep you up-to-date if there are any additional developments.

Supreme Court of Canada allows Uber Driver Class Action for Minimum Wage

On June 26, 2020, the Supreme Court of Canada rendered a landmark decision which has opened up the door for an enormous class action lawsuit by Uber drivers for minimum wage.

To become an Uber driver, individuals were required accept a standard services agreement which provided that they were independent contractors and that any dispute was to be resolved by arbitration in the Netherlands. David Heller commenced a class action lawsuit to for alleged violations of the Ontario *Employment Standards Act, 2000.*

In November 2018, Ontario's Court of Appeal ruled that Uber's clause amounted to an attempt to contract out of

the *Employment Standards Act, 2000*, because it required the resolution of any dispute by mediation or arbitration in the Netherlands, which deprived the individual of the right to pursue a complaint to the Ministry of Labour for matters such as vacation pay or unpaid wages. The clause also required an upfront administrative fee of $14,500 USD, just to participate in the arbitration, which the Court considered to be unconscionable, given the inequality of bargaining power between the parties and the improvident cost of arbitration. The Ontario Court of Appeal ruled that the class action could proceed in Ontario because of the unfair arbitration clause.

In rendering this decision, the Supreme Court has modified and arguably watered down the test for unconscionability. The last major decision in Ontario from the Court of Appeal in *Phoenix Interactive Design Inc. v. Alterinvest II Fund LP* described the test as follows:

1. A grossly unfair and improvident transaction;
2. A victim's lack of independent legal advice or other suitable advice;
3. An overwhelming imbalance in bargaining power caused by the victim's ignorance of business, illiteracy, ignorance of the language, blindness, deafness, illness, senility, or similar disability; and
4. The other party's knowingly taking advantage of this vulnerability.

The Supreme Court specifically rejected this test after Uber tried to advance it. In doing so, the Court decided that there was no requirement to "knowingly" take advantage of the other person's vulnerability in order to meet the threshold. The Court stated that there were two elements necessary in order to find unconscionability: (1) an inequality of bargaining power and (2) whether there is a resulting improvident provision.

The Supreme Court determined that there was inequality of bargaining power between Uber and the driver because the clause was part of a standard form contract, there was a significant gap in terms of sophistication between the parties, and the driver could not be expected to appreciate the financial and legal implications of the clause. The Court determined it was improvident because in order to get to arbitration, it required $14,500 USD in administrative fees.

For employers, there are a couple of takeaways. The decision is limited to a determination that the class action can proceed forward in the Ontario Courts because the arbitration clause is not valid. There were no findings in respect of whether or not the driver was an employee or an independent contractor, which is a threshold requirement to make a claim under the Ontario *Employment Standards Act, 2000*. Moreover, the Supreme Court does not prohibit arbitration clauses in employment agreements, although the decision means that employers must be very careful when including an arbitration clause. Arbitration clauses can be a useful and cost effective means of resolving employment disputes, but it is important that the provisions are balanced and do not take away an employee's right to advance claims under the Ontario *Employment Standards Act, 2000*.

COVID-19: A Summary of Legislated Changes Related to the Emergency

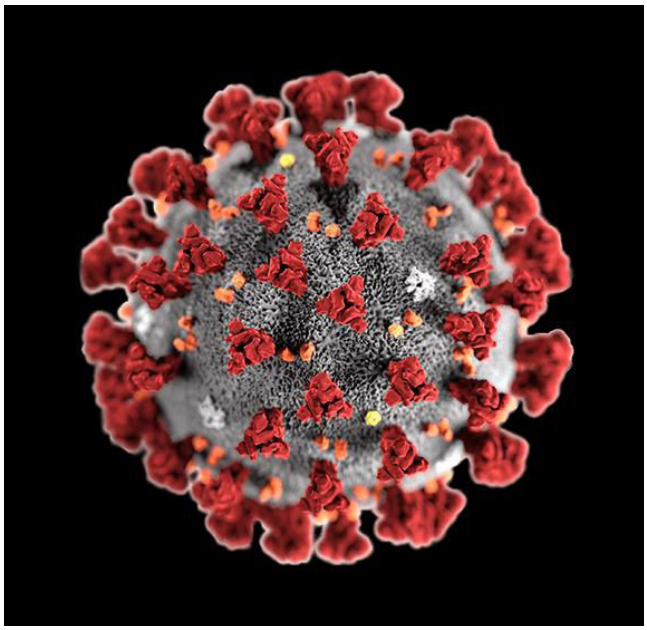
COVID-19 has resulted in a flurry of changes to legislation throughout Ontario and Canada. In order to stay on top of the changes, we have provided a summary of the changes to Ontario and the Federal legislation below:

Ontario

Ontario modified the *Employment Standards Act,* 2000 ("*ESA*"), by implementing the *Emergency Leave: Declared Emergencies and Infectious Disease Emergencies*. This resulted in amendments to section 50.1 of the *ESA* pertaining to emergency leave. Generally speaking, an employee that requires leave as a result of the prescribed circumstances as outlined below are entitled to a job protected, unpaid leave of absence during the period of the emergency declaration, which has most recently been extended to July 15, 2020. This will almost certainly be extended. On Tuesday July 7, 2020, the government introduced new legislation, Bill 195, which would give it the power to extend the emergency declaration for additional periods of thirty (30) days. If the Bill is passed, the Ontario Government will also have the power to keep extending the thirty (30) day period for one (1) year.

An employee is entitled to take a COVID-19 leave if unable to perform the duties of his or her position because the employee is:

- under medical investigation, supervision or treatment for COVID-19;
- acting in accordance with an order under the *Health Protection and Promotion Act;*
- in isolation or quarantine in accordance with public health information or direction;
- directed by the employer not to work due to a concern that COVID-19 could be spread in the workplace;
- needed to provide care to someone for a reason related to COVID-19 such as a school or child care closure; or
- prevented from returning to Ontario because of travel restrictions.



An employee who takes COVID-19 leave is entitled to reinstatement to the same job he or she held before the leave commenced, or a comparable job if the job no longer exists. Despite this statutory obligation, an employer is entitled to terminate an employee if the termination is for reasons that are entirely unrelated to the fact that the employee was required to take the leave.

On May 29, 2020, the Ontario government passed Regulation 228/20 *Infectious Disease Emergency Leave,* which amended the *ESA* further. The Regulation provided, in part, relief for employers from termination and severance pay obligations where there has been a temporary reduction of hours or an elimination of an employee's hours of work. The changes are retroactive to March 1, 2020 and continue during the declared emergency leave. The Regulation specifically provides that reduction or elimination of hours of work due to the pandemic shall not constitute constructive dismissal. It remains to be seen whether a Court will interpret these legislative changes as protection against allegations of constructive dismissal under the common law. It is notable that these legislative changes do not apply to unionized employees.

Federal

Canada Labour Code

On March 25, 2020, the Federal government passed Bill C-13, *COVID-19 Emergency Response Act,* containing various measures designed to deal with the pandemic. It included a change to 239.01 of the *Canada Labour Code* and provided for an unpaid leave of up to sixteen (16) weeks for employees who could not work, or were not available to work because of reasons related to COVID-19. The leave came into force on March 25, 2020.

The leave requires that an employee give written notice to the employer as soon as possible with respect to the reasons for the leave and the intended length. Employers are able to require a written declaration in support of the leave.

Employers are not permitted to dismiss, suspend, lay-off, demote or discipline an employee because they take the leave. Benefits are required to be continued during the period of leave, and vacation was able to be interrupted in order to take COVID-19 Leave. In addition, parental leave was also able to be interrupted as a result of COVID-19 leave.

Canada Emergency Response Benefit ("CERB")

As part of Bill C-13, the government also introduced the *Canada Emergency Response Benefit Act*. This allowed employees and any workers who had made at least $5000.00 in the previous year, to qualify for a monthly payment of $2,000.00. In order to qualify, the worker must have stopped working for reasons related to COVID-19 for at least 14 consecutive days within a four-week period for which they were to receive payment, and not received income whether from employment, self-employment, employment insurance, or allowances under a provincial plan because of pregnancy. Any employee who quit their employment voluntarily is not eligible for CERB.

Due to unintended consequences of workers failing to return to work after businesses were permitted to re-open, the Federal Government has introduced new legislation (Bill C-17) that will amend the *Canada Emergency Response Benefit Act* and will place some reasonable limitations on the entitlement to this benefit which may encourage workers to return to the workplace. In particular, a worker will not eligible for an income support payment if they

1. fail to return to work when it is reasonable to do so and the employer makes a request for their return;
2. fail to resume self-employment when it is reasonable to do so; or
3. decline a reasonable job offer when they are able to work.

The legislation has not yet been passed. These changes will be welcomed by employers given that the economy is starting to re-open and the Federal Government has just announced that it will extend CERB to August 29, 2020.

We will continue to keep you updated as to any important legislative changes. If you have any additional questions with respect to any of the legislative changes that have been made in response to the pandemic, please contact us.