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Case study: Waksdale v. Swegon North America

By **Frank Portman**

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Law360 Canada (February 7, 2024, 8:59 AM EST) -- In the landmark 2020 employment case, *Waksdale v. Swegon North America Inc.* [2019] O.J. No. 5021, a short-service employee was dismissed without cause. The provision in his employment contract that stipulated the conditions under which the employee could be terminated "for cause" without any compensation went beyond the circumstances in the *Employment Standards Act* (ESA), 2000, and disentitled the employee to termination and severance pay in some circumstances which the ESA required an employee be paid.

However, the provision under which he was dismissed without cause complied with the ESA's minimum requirements.

The employee argued that because the "just cause" provision breached the ESA, both it and the "without cause" provision should be unenforceable, with the result that the employee should receive full common law reasonable notice, which was greater than what the contract provided several times over.

The Court of Appeal agreed, finding that a flaw in one provision in an employment contract dealing with termination invalidates all provisions of that contract that deal with termination.

As an executive employment lawyer, I was co-counsel at the initial summary judgment hearing, at which the employer was successful in having the claim dismissed.

However, at the Court of Appeal, in a hearing in which I was not involved, the Court of Appeal unexpectedly reversed the summary judgment.

Problems, challenges

Many executives' contracts entitle them to significant severance packages upon termination. Most companies put in language disentitling them to those packages in the event the executive does not meet the company's expectations in various ways.

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However, that language can easily go too far if it does not comply with the ESA. Many contracts, particularly pre-dating 2020, suffer from this exact flaw.

Approach, solution

If an executive's employment contract suffers from such a flaw at the time that executive is dismissed, the employer will lose any protection from the termination clause. This means that the executive can claim more than what the contract permits.

It will also provide a mechanism for the executive to claim additional benefits that companies often exclude from termination clauses, such as pro-rated bonuses, stock options and grants, and other equity participation mechanisms which can be significant.

In one case, *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26, the lack of an enforceable termination clause permitted an executive to benefit from a million-dollar bonus arising from the sale of the company some 14 months after he was dismissed.

Given that the contractual flaw is endemic in executives' employment contracts, particularly those pre-dating 2020, any executive faced with a dismissal is well advised to consult legal counsel before accepting a severance package, even one that looks like it may be mandated by contract.

Lessons learned

1. Employment contracts may not be able to do what they purport to do. In other words, it is extremely difficult to "opt out" of standard entitlements mandated by the ESA in Ontario.

2. Executives who have been dismissed may have significant entitlements beyond what their employment contract provides.

3. Executives should only accept a severance package, even one that appears to comply with their contract, after seeking advice from an experienced executive employment lawyer specializing in executive compensation issues.

Frank Portman is an employment lawyer at Massey LLP. His specialty is executive employment law where he assists presidents, vice-presidents and other C-level executives and the organization seeking to hire their talents, to complete the deal through effective executive employment contracts.

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