Without-cause provisions in peril after court decision

After a recent Court of Appeal decision in Ontario, employers may want to take a good look at their employment contracts and without-cause termination provisions to see if they're still up to snuff, finds **John Dujay**

A recent Court of Appeal ruling in Ontario may require many employment contracts to be changed after a justice found the illegality of one clause negatively affected the entire agreement.

The case, *Waksdale v. Swegon North America*, hinged on the enforceability of a termination for just cause clause in employment contracts.

Benjamin Waksdale was hired as director of sales for Swegon North America on Jan. 8, 2018 for about $200,000 per year. The company terminated his employment without cause on Oct. 18 and paid him two weeks' salary in lieu of notice.

Waksdale then sued for wrongful dismissal and challenged the termination-for-cause provision, saying it breached his minimum requirements under the Employment Standards Act (ESA). Neither the ruling of the lower court or the Court of Appeal reproduced the provision because both parties agreed early on that it contravened the act.

In allowing the appeal, the appeal court said an employment agreement must be interpreted as a whole and not on a piecemeal basis.

"The correct analytical approach is to determine whether the termination provisions in an employment agreement read as a whole violate the ESA. Recognizing the power imbalance between employees and employers, as well as the remedial protections offered by the ESA, courts should focus on whether the employer has, in restricting an employee's common law rights on termination, violated the employee's ESA rights."

It's going to be a frustrating decision for employers, "especially those who have spent a lot of time and resources updating their without-cause termination provisions in recent years," says Talia Bregman, an associate at Bennett Jones in Toronto. "But even if the without-cause provision is perfect, this case creates some risk that what you thought was a perfect without-cause termination provision is no longer enforceable."

Employers may feel blindsided

Employers may feel blindsided by this ruling, says Stuart Rudner, founder of Rudner Law in Toronto.

"Most employers probably don't keep up to date on these developments; they've got employment contracts that they think will protect them in the event of dismissal. At some point, they're going to find out that it's not worth the paper it's printed on," he says.

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"This will have tremendous impact on employment law and employers because I think the vast majority of termination clauses that I see are probably now unenforceable."

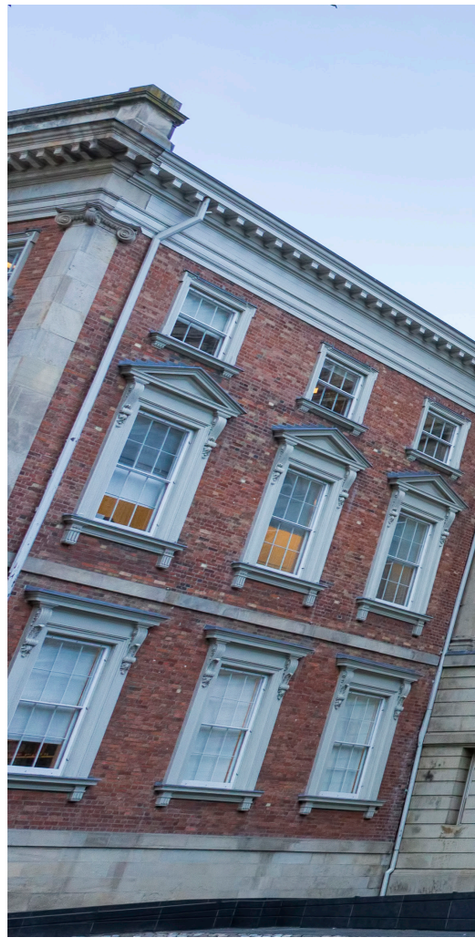
The ruling may give employees more ammunition during terminations and allow them to challenge more clauses, says George Hamzo, associate lawyer at Lerners Lawyers in London, Ont.

"My suspicion is that many more termination provisions and contracts will be ruled to be invalid based on the Court of Appeals decision. Certainly, more employees will be more willing to challenge certain termination provisions than they otherwise would have been," he says. "It's a big deal for employers because it has the potential to be quite costly."

Generally, to be considered legal, employees can be fired for just cause and receive no severance pay or notice if they commit an egregious action, says André Nowakowski, a partner at Miller Thomson.

"For example, if there's something in the for-cause definition that captures an item that would not be considered to be willful misconduct, disobedience or willful neglect, then that's the sort of item that would have to be removed from the contract because, at this point, based on the Court of Appeals decision, it creates a real risk of invalidity of the termination clause as a whole," he says.

"It is certainly a bit of a nuanced approach, but, for example, there might be employment contracts that say something like 'Just cause includes being charged for a criminal offence.' Well, just being charged for a criminal offence may not even come close to being willful misconduct, disobedience or willful neglect. What the Court of



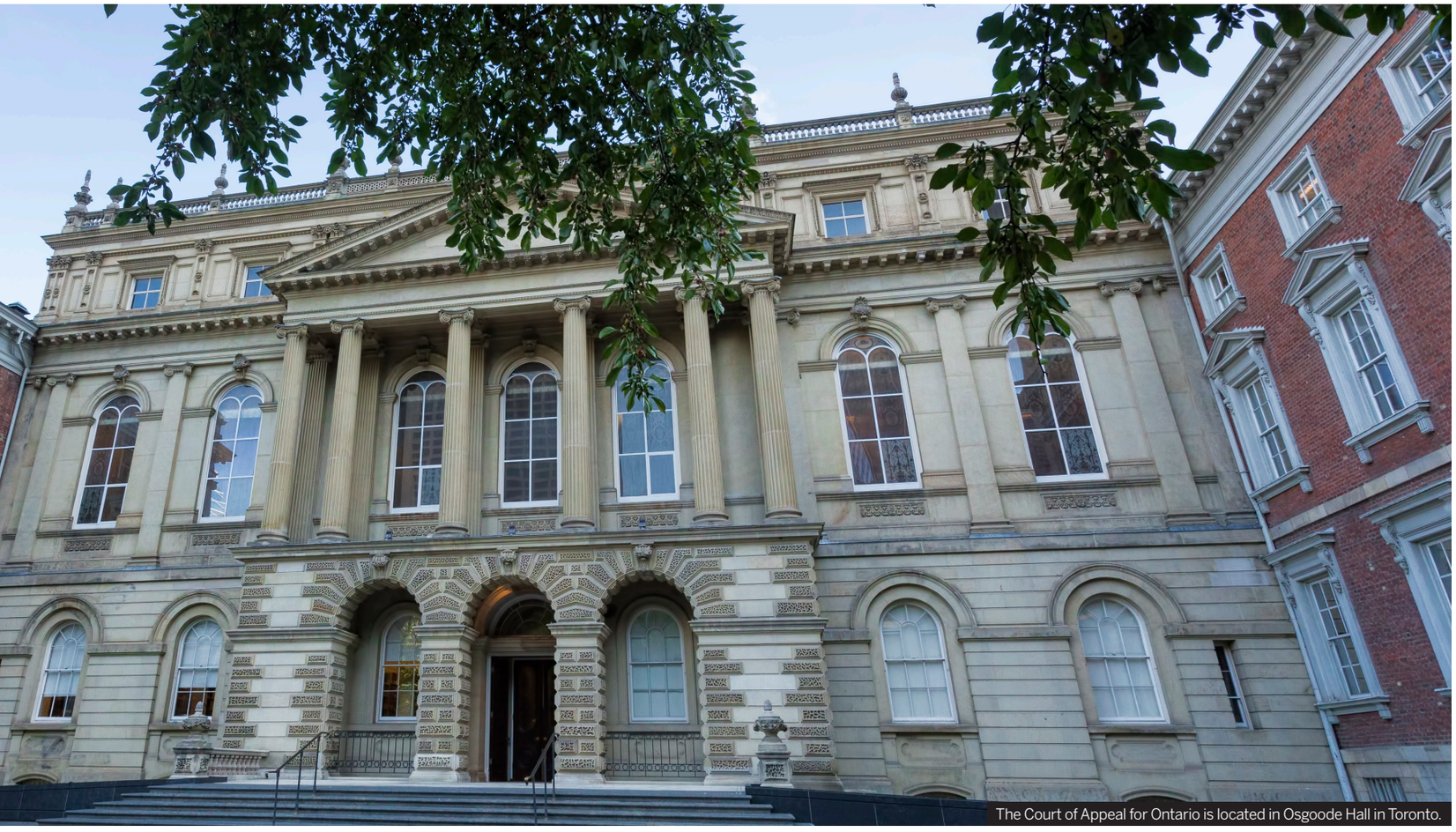
ONTARIO'S EMPLOYMENT STANDARDS

1 week
Minimum termination notice required, after 3 months of service

$2.5 million
Minimum employer payroll requiring severance pay

5 years
Minimum time employed before qualifying for severance

Source: Ontario government



The Court of Appeal for Ontario is located in Osgoode Hall in Toronto.

Appeal has... said is that, because the for-cause provision is not valid, it, therefore, breaches the Employment Standards Act."

Legal oversight always important

The message is clear for employers, especially those that are considering letting an employee go, says Hamzo.

"If you have an employee that you were thinking of terminating, it's always good practice — not simply because of this recent court decision — to have a lawyer take a look beforehand to determine whether or not that termination provision is enforceable in light of recent case law, because it has the potential to really lead to more liability on the part of the employer."

Despite sometimes explicit wording that exists in employment agreements, common law practice must also be considered, says Rudner.

"In common law, if you have just cause to fire someone, then they're not entitled to any notice or termination pay. But if you don't have just cause to terminate someone, then, in common law, everyone's entitled to reasonable notice. The common myth out there is that it's a month per year; our courts have said repeatedly that they're going to look at a number of factors: length of service, the person's age, their position, the nature of their employment and availability of similar jobs. The unofficial maximum is 24 months, so you can be looking at a substantial liability."

But the reality might surprise some employers, he says.

"If you think that you're limiting them to employment standards only, that could be eight weeks even for a long-term employee, as opposed to 24 months. A lot of employers are in for a really big surprise when they let somebody go and assume that they only owe the person eight weeks or less and, all of a sudden, they find that they owe them months, if not years."

Updating contracts

Will this ruling invalidate many employment contracts currently in place? It's difficult to know, says Nowakowski, but recent history says this might be true.

"Over the last several years, there have been various court decisions that have found without-cause termination provisions to be invalid because they violated the Employment Standards Act. Employers generally had focused on getting their termination clauses in shape to deal with the without-cause portion," he says.

"But now with the risk added of your for-cause provision [being] invalid and it makes everything invalid, it requires a second look at existing templates to see whether they may have much greater liability in a without-cause termination situation than they had anticipated."

When deciding to rewrite a contract, there's more to it than just having the employee signing it, says Bregman.

"If you have current employees [and] you're concerned that their termination clause provisions may no longer be enforceable, you could use a salary increase or a signing bonus or promotion — some forms of fresh consideration as an opportunity to get them on to new agreements. In Ontario, you can't make continued employment conditional on signing a new employment agreement; there has to be something new that you're offering in exchange for it."

There is also another way to future-proof employment agreements, says Rudner.

"Use the saving provision, which essentially provides that the employee will never get less than their entitlements under the Employment Standards Act, regardless of what the other clauses might say. If you do that properly, then you can protect yourself against any inadvertent breach of the act as it exists when you draft a clause but also against changes [to] the act, [which] may change over time." CHRR

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