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## • ONTARIO COURT ADDRESSES ENFORCEABILITY OF TERMINATION PROVISION IN DIRECTOR'S EMPLOYMENT CONTRACT •

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On August 28, 2023, the Ontario Superior Court of Justice released its decision in *Ramcharan v. Wesdome Gold Mines Ltd.*, [2023] O.J. No. 3900, 2023 ONSC 4643. The decision awarded the plaintiff employee six months of reasonable notice after determining that the termination provisions in his employment agreement were void.

### BACKGROUND FACTS

The defendant employer was a Toronto-based mining, exploration and development company. The employee was hired as a Director of Sustainability on April 2, 2018, pursuant to a written employment agreement.

On November 1, 2019, the employer terminated the plaintiff on a without cause basis and provided him two weeks of pay in lieu of notice in accordance with his minimum entitlements under the *Employment Standards Act, 2000 (ESA)*.

At the time of his termination, the employee was 49 years old and had approximately one-and-a-half years of service. His compensation included a base salary of CA\$164,800, eligibility to earn a discretionary bonus, eligibility to participate in stock option grants, entitlement to RRSP matching to 5% of wages, extended health and disability benefits and four weeks of vacation.

### TERMINATION PROVISION UNENFORCEABLE

The Court held that the employee was entitled to common law notice as the termination provision in his employment agreement was unenforceable because it did not comply with the requirements of the ESA.

The termination provision in the employment agreement provided:

This Agreement and your employment with the Company may be terminated at any time for just cause, without prior notice or any payment in lieu of notice or payment of any kind whatsoever, either by way of anticipated earnings or damages of any kind, by advising you in writing.

The Company may at any time terminate this Agreement and your employment, in accordance with the *Employment Standards Act*, (Ontario) (the "ESA"). The provisions of this paragraph will not apply in circumstances where you resign from employment or are terminated for cause.

Relying on recent case law, the Court noted that while the common law permits an employer to dismiss an employee without notice or pay in lieu of notice for "just cause," the ESA requires employers to provide employees with their statutory termination pay and severance pay (if applicable), unless the employee has engaged in the statutory exemption of "wilful misconduct, disobedience or wilful neglect of duty" as outlined in Ontario Regulation 288/01 (the Regulation). This is a higher standard than the common law test for "just cause." As such, there may be circumstances where an employee's behaviour constitutes "just cause" under the common law but does not constitute "wilful misconduct, disobedience or wilful neglect of duty" and thus the employee remains entitled to their minimum termination entitlements under the ESA.

In this case, the “for cause” termination provision was unenforceable because it improperly removed the employer’s requirement to provide statutory notice or pay in lieu of notice without reference to the statutory exemption pursuant to the Regulation:

[46] The termination provision for cause did not restrict its application to situations governed by s. 2(1)(3) and s. 9(1) of the Regulation, and in the result the provision purports to apply to all dismissals for “cause” regardless of whether there was “wilful misconduct, disobedience or wilful neglect”. Moreover, the termination provision expressly stated that the provision of the paragraph related to Wesdome terminating the agreement or the plaintiff’s employment in accordance with the ESA did not apply in circumstances where the employment is terminated “for cause”.

In reaching its decision, the Court referred to the Ontario Court of Appeal’s seminal decision of *Waksdale v. Swegon North America Inc.*, [2020] O.J. No. 2703, 2020 ONCA 391, and subsequent cases which ruled that both the with cause and without cause termination provisions in an employment agreement must be read as a whole when determining their enforceability. Specifically, if a “with cause” termination provision was illegal for failure to comply with the ESA, this would render all provisions related to termination in the employment contract as unenforceable.

#### OUTCOME

Although the employee in this case was dismissed without cause and received his statutory entitlements under the ESA, the Court ruled the without cause

termination was invalid because, for the reasons outlined above, the “for cause” termination provision in his employment contract was unenforceable. Accordingly, the employee was entitled to common law reasonable notice.

#### TAKEAWAY FOR EMPLOYERS

The consequences of the Court of Appeal’s decision in *Waksdale* continue to reverberate across Ontario’s workplaces. Employers should review their employment contracts to ensure that the contractual termination provisions comply with the ESA in all circumstances.

*[Fatimah Khan is an associate in Dentons Canada’s Employment and Labour group. She represents employers in both the private and public sectors on a wide range of issues in labour relations and employment law. This includes advising on employment contracts and workplace policies, employee terminations, wrongful dismissal actions, grievance arbitration and human rights and accommodation matters.]*

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