

# COURT OF APPEAL FOR ONTARIO

CITATION: Dufault v. Ignace (Township), 2024 ONCA 915

DATE: 20241219

DOCKET: COA-24-CV-0303

Nordheimer, Copeland and Madsen JJ.A.

BETWEEN

Karen Dufault

Plaintiff (Respondent)

and

The Corporation of the Township of Ignace

Defendant (Appellant)

Jordan Lester and Jeremy Kirk, for the appellant

Jonathan Pinkus and Lior Samfiru, for the respondent

Heard: December 6, 2024

On appeal from the order of Justice Helen M. Pierce of the Superior Court of Justice, dated February 16, 2024, with reasons reported at 2024 ONSC 1029.

## REASONS FOR DECISION

### Introduction

[1] The appellant appeals from the order of the motion judge that granted the respondent's summary judgment motion, and ordered the appellant to pay the respondent \$157,071.57 in damages for wrongful dismissal.

[2] The parties agreed that the case was appropriate for summary judgment. The primary issue on the summary judgment motion was whether the termination clauses in the employment contract complied with minimum standards provided for in the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (the “*ESA*”).

[3] The respondent argued before the motion judge that both the “for cause” and “without cause” termination clauses in the employment contract were illegal and unenforceable, as they purported to contract out of the minimum standards set by the *ESA*.

[4] The appellant argued that the wording of the contract complied with the *ESA* and that the respondent had been paid the damages she was entitled to under the *ESA*.

[5] The motion judge found that both the “for cause” and “without cause” termination clauses were unenforceable on the basis that they did not comply with the minimum standards set in the *ESA*.

[6] On appeal, the appellant renews the argument that both termination clauses are consistent with the minimum standards set by the *ESA*.

[7] The appellant also argues that in the event this court concludes that the “for cause” termination clause is void for non-compliance with the *ESA* minimum standards, but the “without cause” clause does not contravene the *ESA* minimum standards, the “for cause” clause should be severed and the “without cause”

clause preserved. There is no dispute that the respondent's termination was on a "without cause" basis. In making the argument that the "for cause" termination clause can be severed, the appellant submits that we should reconsider and decline to follow our court's prior decision in *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391, 446 D.L.R. (4<sup>th</sup>) 725. As is discussed below, in *Waksdale*, this court held that the termination provisions in an employment contract must be read as a whole, with the result that illegality in one termination provision for failing to meet *ESA* minimum standards invalidates all of the termination provisions: at paras. 9-14.

[8] Pursuant to the court's *Practice Direction Concerning Civil Appeals*, the appellant requested that the court convene a five-judge panel to reconsider *Waksdale*. The Associate Chief Justice denied the request to convene a five-judge panel.

### **Analysis**

[9] The motion judge found that several aspects of both the "for cause" and "without cause" termination clauses failed to comply with the minimum standards in the *ESA*. As a result, the clauses were unenforceable.

[10] We decide the appeal solely on the basis of one aspect of the "for cause" termination clause. We agree with the motion judge's finding that the clause purports to allow the appellant to terminate the respondent for "cause", without

notice or pay instead of notice, and defines “cause” more broadly than the narrow exception in the *ESA* which allows for termination without notice or pay instead of notice for “wilful misconduct”. As such, it fails to comply with the minimum standards set by the *ESA*.

[11] The parties agree that because the motion judge’s decision about the validity of the “for cause” termination clause involves the interpretation of the employment contract, the standard of review is palpable and overriding error: *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158, 134 O.R. (3d) 481, at para. 43. The appellant does not argue that there is an extricable error of law in the motion judge’s interpretation of the “for cause” termination clause.

[12] Laskin J.A. summarized the law regarding the interpretation of employment contracts in *Woods*, at paras. 28, 44-51. Three points are of particular importance for this appeal. First, the *ESA* is remedial legislation, intended to protect the interests of employees. As a result, courts should favour an interpretation of the *ESA* that encourages employers to comply with its minimum standards over an interpretation that does not do so.

[13] Second, termination clauses should be interpreted in a way that encourages employers to draft agreements that comply with the *ESA*. If the only consequence for an employer of drafting a termination clause that does not comply with *ESA* minimum standards is an order that they comply, employers will have little

incentive to draft a lawful termination clause at the start of the employment relationship.

[14] Third, the interpretation of a termination clause and whether it meets the minimum standards set out in the *ESA* is based on the wording of the clause. Thus, even if the employer complies with the *ESA* minimum standards at the time of termination, that compliance does not have the effect of remedying a termination provision that does not comply with the *ESA* minimum standards in a contract entered into at the beginning of the employment.

[15] The “for cause” termination clause in this case provides as follows:

**4.01** The Township may terminate this Agreement and terminate the Employee’s employment at any time and without notice or pay in lieu of notice for cause. If this Agreement and the Employee’s employment is terminated with cause, no further payments of any nature, including but not limited to, damages are payable to the Employee, except as otherwise specifically provided for herein and the Township’s obligations under this agreement shall cease at that time. For the purposes of this agreement, “cause” shall include but is not limited to the following:

(i) upon the failure of the Employee to perform the services as hereinbefore specified without written approval of Municipal Council and such failure shall be considered cause and this Agreement and the Employee’s employment terminates immediately;

(ii) in the event of acts of wilful negligence or disobedience by the Employee not condoned by the Township or resulting in injury or damages to the Township, such acts shall be considered cause and this

Agreement and the Employee's employment terminates immediately without further notice. [Emphasis added.]

[16] Section 55 of the *ESA* and s. 2(1)3 of the regulation on *Termination and Severance of Employment*, O. Reg. 288/01 (the "*Regulation*"), create an exception to the requirement under the *ESA* that an employer must provide notice prior to the termination of an employee or pay instead of notice: *Render v. ThyssenKrupp Elevator (Canada) Limited*, 2022 ONCA 310, at paras. 72-74, 78; *Rahman v. Cannon Design Architecture Inc.*, 2022 ONCA 451, at para. 27. The exception allows for termination without notice or pay instead of notice in circumstances of employee misconduct, defined as follows: "Any employee who has been guilty of wilful misconduct, disobedience or wilful neglect of duty that it not trivial and has not been condoned by the employer."

[17] This court has held that a high level of employee misconduct is required to fall within the exception in s. 2(1)(3) of the *Regulation* – more than is required for just cause dismissal at common law. The level of misconduct required to come within the wilful misconduct exception in the *Regulation* has been characterized by this court as conduct that is done by the employee "deliberately, knowing they are doing something wrong" and as "being bad on purpose": *Render*, at paras. 79-80; *Rahman*, at para. 28.

[18] The impact of the notice and termination pay provisions of the *ESA* and the limited exception in s. 2(1)3 of the *Regulation* is that where some form of common

law or contractually defined cause for termination exists, but which falls short of the high level of misconduct required to come within the scope of s. 2(1)3 of the *Regulation*, a terminated employee is entitled either to notice or pay instead of notice as required by the *ESA: Rahman*, at para. 29.

[19] In this case, the “for cause” termination clause purports to allow the appellant to terminate the respondent’s employment without notice or pay in lieu of notice in circumstances that are broader than the exception in s. 2(1)3 of the *Regulation*. Two aspects of the clause make this clear.

[20] First, the language in the partial definition of “cause” in clause 4.01(i) – “the failure of the Employee to perform the services as hereinbefore specified” – is a lower standard of misconduct than that set out in s. 2(1)3 of the *Regulation*. A “failure to perform services” does not require the level of wilful misconduct prescribed s. 2(1)3 of the *Regulation* as interpreted in *Rahman* and *Render*. We reject the appellant’s argument that the language of “failure of the Employee to perform services” is narrower than the wilful misconduct standard in the *Regulation*.

[21] Second, the clause provides an inclusive definition of “cause” (“shall include but is not limited to the following”). Thus, not only does the partial definition in clause 4.01(i) encompass conduct broader than the wilful misconduct standard in s. 2(1)3 of the *Regulation*, the fact that the definition is not “limited” to the list of

examples below purports to permit the employer to deem other conduct as “cause” allowing for termination without even *ESA* notice or pay instead of notice. We reject the appellant’s submission that the “shall include but is not limited to” language restricts the definition of “cause” in the contract.

[22] Thus, we see no error in the motion judge’s finding that the “for cause” termination clause provides for a lower standard of employee misconduct than that set out in s. 2(1)3 of the *Regulation*. The “for cause” termination clause purports to deny notice or pay instead of notice where the grounds for termination do not meet the high standard of wilful misconduct required under s. 2(1)3 of the *Regulation*. As such, the “for cause” termination clause in the employment contract fails to meet the minimum standard provided for in the *ESA*: *Rahman*, at para. 29.

[23] In *Waksdale*, this court held that the termination provisions in an employment contract must be read as a whole. If one termination provision in an employment contract violates the *ESA* minimum standards, all termination provisions in the contract are invalid: at paras. 9-14. This holding in *Waksdale* was followed in *Rahman*, at para. 30.

[24] As a three-judge panel, we are precluded from reconsidering the holding in *Waksdale*. Following the holding in *Waksdale*, because the “for cause” termination clause in the employment contract is void as contrary to the *ESA* minimum standards, all termination provisions in the contract are invalid: *Waksdale*, at paras.

9-14; *Rahman*, at para. 30. Although the termination of the respondent was without cause, whether or not the “without cause” termination provision is itself contrary to the *ESA* minimum standards is irrelevant. Both termination clauses are invalid and unenforceable.

[25] Given our conclusion that the “for cause” termination clause of the employment contract is unenforceable as contrary to the *ESA* and that, pursuant to *Waksdale*, this renders all of the termination provisions unenforceable, it is not necessary to consider the appellant’s arguments that the motion judge erred in finding the “without cause” termination clause also unenforceable as contrary to the *ESA*, and we expressly do not rule on that submission. The appellant argued that the motion judge’s findings in relation to the “without cause” termination clause may affect other employment contracts. In our view, resolution of the issues the appellant raises regarding the “without cause” termination clause should be left to an appeal where it would directly affect the outcome.

[26] As the termination clauses are unenforceable, the motion judge was correct in finding that the respondent was entitled to damages based on the end date of the fixed-term employment contract.

## Disposition

[27] The appeal is dismissed. As agreed by the parties, the respondent is entitled to her costs of the appeal in the amount of \$15,000 inclusive of disbursements and applicable taxes.

“I.V.B. Nordheimer J.A.”  
“J. Copeland J.A.”  
“L. Madsen J.A.”