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What will follow in the wake of *Waksdale*?

A case comment for legal, management and human resources professionals

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The Court of Appeal for Ontario released its decision in *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391 (CanLII) on June 17, 2020. It voided a contractual term limiting an employee's termination pay. The employee thus won a chance to claim higher damages than he and his employer had originally bargained.

Legal commentators have since characterized *Waksdale* as "monumental." They claim that it has "dramatically altered the landscape" and predict that "the impact of this case will be felt for years to come." One commentator said that "all Ontario employers need new employment contracts." And one firm has gone so far as to state that:

— As a result of *Waksdale*, thousands of companies in Ontario may no longer be able to rely upon termination clauses in their current employment agreements to limit the amount of severance pay owed to terminated employees.

This case comment respectfully challenges such conclusions. Of course, any Court of Appeal decision must be taken seriously and treated with respect. But, as explained below, *Waksdale* does not develop new law. Rather, it applies well-settled principles to a unique set of facts. Further, *Waksdale*'s dicta do not reasonably support the view that, going forward, thousands of Ontario employment contracts are void, or even at risk of being voided. *Waksdale* is thus not as revolutionary as some have suggested.

Background

In *Waksdale* the employer admitted, without explanation, that the contract's "just cause" termination provision violated the *Employment Standards Act*, 2000 ("ESA"). In turn, the Court of Appeal found that the admitted taint of this provision required voiding a companion clause that stipulated the employee's "without just cause" termination pay entitlement. The issue of the just cause provision's illegality was not argued or judicially decided.

Despite this, *Waksdale* has led some to make a logical leap. Their major premise is that all just cause provisions are void as being contrary to the ESA, even if *Waksdale* did not make such a finding. The minor premise is the reasoning in *Waksdale* that an illegal just cause provision will void an otherwise valid without just cause provision. And the conclusion drawn is that there is now increased risk of voided termination provisions across Ontario. However, this syllogism is flawed because the major premise itself is not a settled issue.

At the core of the major premise in the "Waksdalian thesis" is the idea that common law just cause is easier to prove than its statutory equivalent. Under the ESA, employees do not get termination or severance pay when they are "guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer" (the "ESA standard")[1]. Thus, the argument goes, the ESA standard requires employee intent, which both distinguishes it from, and makes it more onerous than, the common law standard. On this thinking, just cause provisions must be void because they deny employees statutory termination pay on a lower standard than the ESA requires.

1 This wording is taken from sections 2 (termination pay) and 9 (severance pay) of Ontario Regulation 288/01 under the ESA. In all other Canadian common law jurisdictions, the test under employment standards legislation is "just cause," except Newfoundland and Labrador and Nova Scotia. In Newfoundland and Labrador, pursuant to s. 53 (1) (a) of the *Labour Standards Act*, RSNL 1990, c L-2., termination pay is not owed if "the employee has wilfully refused to obey a lawful instruction of the employer, or has committed misconduct or been so neglectful of duty that the interest of the employer is adversely affected, or has otherwise been in breach of a material condition of the contract of service that in the opinion of the director or the Labour Relations Board considering and deciding a complaint made under this Act warrants summary dismissal". In Nova Scotia, under s. 72 of the *Labour Standards Code*, RSNS 1989, c 246 the threshold is "guilty of wilful misconduct or disobedience or neglect of duty that has not been condoned by the employer".

This case comment examines this thesis and argues that its theoretical underpinnings are not sound. In particular, the intent requirement under the ESA standard does not by that fact alone make it a more onerous standard than common law just cause. Further, common law just cause cannot be established without proof of employee intent to commit a workplace infraction, despite passing assertions to the contrary in some cases. If these contentions are valid, then the decades-old drafting practice of including broadly worded just cause provisions in employment contracts should not be lightly abandoned by employer advocates. Further, the courts should not accept that just cause provisions necessarily violate the ESA or invalidate companion provisions dealing with termination entitlements in cases of dismissal without just cause.

Waksdale was a "corrective appeal," not a "law-making appeal"

The plaintiff in *Waksdale* brought an action for wrongful dismissal and then moved for summary judgment. He argued that he was entitled to damages because the employer had not given him reasonable notice of dismissal at common law.

The motions judge dismissed the plaintiff's motion and action. He found that the plaintiff's termination entitlements had been legally limited to those set out in the ESA under a contractual clause addressing "termination of employment with notice" (i.e. without just cause). Such without just cause termination clauses are widespread in Ontario, and it is settled that they are legal and enforceable so long as they evince a clear intention to displace an employee's common law rights and do not seek to give the employee less than his or her statutory termination entitlements.[2]

The motions judge also considered whether the legal interplay between the above clause and another clause in the contract dealing with "termination for cause" (i.e. just cause) would impact on the conclusion reached. It is a common and longstanding drafting practice in Ontario to include a termination for cause provision in written employment contracts. The wording of such clauses varies, but generally they state that an employee dismissed for just cause – the parameters of which are defined in case law – is not entitled to termination pay. In *Waksdale*, there was such a provision and the employer admitted that it was not enforceable because it did not respect the termination rules under the ESA. The reasons for this admission are unclear. The plaintiff argued that the admitted illegality of the termination for cause provision tainted the termination of employment with notice provision such that it, too, was unenforceable. The motions judge rejected this argument, accepting that the two clauses were distinct. Thus, the invalidity of the former did not impact on the validity of the latter.

The Court of Appeal found that this was a reversible error. After noting that there was no issue that the termination for cause provision breached the ESA, the Court of Appeal wrote, at paragraph 10 of its decision:

> — ... 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. While courts will permit an employer to enforce a rights-restricting contract, they will not enforce termination provisions that are in whole or in part illegal. In conducting this analysis, it is irrelevant whether the termination provisions are found in one place in the agreement or separated, or whether the provisions are by their terms otherwise linked. Here the motion judge erred because he failed to read the termination provisions as a whole and instead applied a piecemeal approach without regard to their combined effect.

Accordingly, the Court of Appeal set aside the motion judge's order and remitted the matter to him to determine the amount of the employee's damages.

This finding accords with well-settled principles of contract interpretation. As labour and employment lawyers Jeffrey Sack and Peter M. Neumann have noted at section 3.2.3 in their eText on Wrongful Dismissal and Employment Law:

> — A cardinal rule of the constructions of contracts is that the various parts of the contract are to be interpreted in the context of the intention of the parties as evident from the contract as a whole. See, for example: *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, 1993 CanLII 145 (SCC), [1993] 1 S.C.R. 12; *Campeau v. Desjardins Financial Security Life Assurance Co.*, 2005 MBCA 148 (CanLII), 201 Man.R. (2d) 119 (C.A.); *Gaudette v. Prince Edward Island,* [2002] P.E.I.J. No. 47 (S.C.) (QL); *Consolidated-Bathurst Export v. Mutual Boiler Ins.*, 1979 CanLII 10 (SCC) and *Stevens v. Sifton Properties Ltd.*, 2012 ONSC 5508 (CanLII).

Further, the ESA policy-based rationale noted above was simply the application of principles previously enunciated by the Court

2 *Machtinger v. HOJ Industries Ltd.*, 1992 CanLII 102 (SCC), [1992] 1 S.C.R. 986

of Appeal that were expressly noted as such in the *Waksdale* decision.[3] In this light, *Waksdale* is best seen as a "corrective appeal," a decision in which settled legal principles are applied to established facts, as opposed to a "law-making appeal."

More importantly, *Waksdale* expressly notes that the invalidity of the termination for cause provision was admitted by the employer. There was no judicial determination of this point based on the arguments of the parties. And there was no finding that standard termination for cause provisions would be found to be contrary to the ESA in all future cases.

Are "termination for cause" provisions really at risk of being invalidated by the courts?

Even if *Waksdale* did not decide that, going forward, all termination for cause provisions will be seen as violating the ESA, the question remains: what will happen when an employment contract contains a typical termination for cause provision but it is not admitted that the provision violates the ESA?

As a starting observation, it should be obvious that one employer's admission cannot bind other employers in future cases. It should also be obvious that the admission made in *Waksdale* is not a sound basis, whether in logic or in principle, for a court in a future case to conclude that a typical termination for cause provision violates the ESA.

So, what support is there, if any, for the argument that typical termination for cause provisions in employment contracts are contrary to the ESA? And, on a related point, how solid is the principled foundation of whatever support there may be for this proposition?

Recently, in *Alarashi v. Big Brothers Big Sisters of Toronto*, 2019 ONSC 4510 (CanLII) ("*Alarashi*"), the Ontario Superior Court of Justice rejected the argument that a termination for cause provision was contrary to the ESA, and found that this would amount to a strained interpretation of the parties' true contractual intentions.

There, the termination without cause provision clearly evinced an intent that the employee would receive at least his ESA termination entitlements, and the termination for cause provision read:

- Your employment may be terminated for cause and without pay in lieu of notice at any time for serious breaches of the terms of this Agreement and/or [Employer's] policies set out in the Human Resources Manual, and/or for any cause recognized at law.

The Court wrote, at paragraph 39 of its decision:

- I find no language in this provision which is inconsistent with the ESA. In other words, given the intent of the parties to comply with the requirements of the ESA, it is appropriate to read this provision as enabling [the Employer] to terminate an employee only for cause where the "serious breach" of the employment agreement, the human resources manual and/or another law constituted willful misconduct. There is no indication in this language of a limit to rights that contradicts the ESA or of an intent to contract out of the ESA or waive ESA rights on termination.

On the other hand, in a case decided prior to *Alarashi*, *Khashaba v. Procom Consultants Group Ltd.*, 2018 ONSC 7617 (CanLII) ("*Khashaba*"), the Superior Court found that a termination for cause provision did not comply with the ESA.[4] The Court in *Khashaba* wrote:

- [52] The "Termination for Cause" provision of the Employment Agreement does not comply with the ESA as it allows for termination without notice or termination pay for conduct meeting the standard of just cause at common law, while the ESA requires the higher standard of "wilful misconduct".
- [53] *Plester v. Polyone Canada Inc.*, 2011 ONSC 6068, aff'd 2013 ONCA 47, considered the difference between wilful misconduct and just cause at common law, concluding that wilful misconduct is a higher standard. Wilful misconduct involves an assessment of subjective intent, whereas just cause is a more objective standard. Wilful misconduct is colloquially described as "being bad on purpose." Careless, thoughtless, heedless, or inadvertent conduct, no matter how serious, does not meet the ESA wilful misconduct standard. By contrast, common law just cause for dismissal may be found on the basis of prolonged incompetence, without any intentional misconduct. See also *Cummings v. Quantum Automotive Group Inc.*, 2017 ONSC 1785 at para. 37.

Khashaba's conclusion that the termination for cause provision violated the ESA was based on the premise that common law just cause is a lower standard than the ESA standard. This premise is itself based on the views that (i) wilful misconduct involves an assessment of subjective intent, whereas just cause is a more objective standard and (ii) common law just cause may be found in the absence of intent.

There are other administrative tribunal and Superior Court decisions which support these views. Examples include *8536350*

3 See paragraph 7 of *Waksdale*, citing *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158).

4 Interestingly, although the Court in this case found that the termination for cause provision violated the ESA, it also found that the termination without cause provision was enforceable, contrary to the later *Waksdale* decision of the Court of Appeal for Ontario.

Canada Inc. o/a The Joseph Esquega Health Centre v. Kayla Bachmann, 2016 CanLII 87900 (OLRB), at paragraphs 33-38[5] and *Oosterbosch v. FAG Aerospace Inc.*, 2011 ONSC 1538, which found that the employer had proven just cause at common law but not "wilful misconduct, disobedience or wilful neglect of duty" under the ESA.

However, these cases really do not sit on a higher level of analysis than that which was stated in the *Khashaba* decision. The core reasoning in this line of cases is to the effect that (i) an intent requirement under the ESA makes it a more exacting standard than common law just cause and (ii) just cause at common law does not require showing an employee's subjective intent.

These premises merit closer consideration to determine whether they remain sound today.

Does the intent requirement under the ESA standard make it more onerous than common law just cause?

The Court of Appeal's decision in *Minott v. O'Shanter Development Company Ltd.* 1999 CanLII 3686, [1999] O.J. No. 5 (ON CA) sheds light on whether the ESA standard's intent requirement makes it a more onerous standard than common law just cause. The case involved the termination of a maintenance worker who failed to report following a two-day suspension. The trial judge accepted that this was based on a misunderstanding on the part of the employee and the Court of Appeal found that there was sufficient evidence in the record to support that finding. However, at paragraphs 13 & 14 (Quicklaw version), the Court of Appeal wrote:

> — 13 But even if Minott knew that he was expected to work on November 14, yet wilfully refused to do so - and, admittedly, there is a good deal of evidence to support such a finding - his refusal did not give O'Shanter cause to dismiss him. O'Shanter argues that its actions should be judged against Minott's conduct for the entire week between November 8 and November 14, and not just in the light of his conduct on the 14th alone. Minott, however, had received a two-day suspension for his conduct up to November 12. I do not accept that Minott's wilful refusal to report to work for one further day can elevate conduct that warranted a two day suspension into just cause for dismissal.
>
> — 14 Wilfully missing a day's work might in a rare case justify dismissal. But it does not justify dismissal in this case, where Minott otherwise had a long record of loyal service and was not given any warning that his job was in jeopardy. I agree with Molloy J.'s observation that "[t]he decision to terminate employment, particularly one of a long-standing employee, is not one which should be taken lightly". Even looking at Minott's misconduct over the entire week of November 8, this "aberrant episode", as the trial judge called it, did not warrant his dismissal. Minott was not blameless for what occurred - a fact recognized by the trial judge - but his misconduct was not serious enough to justify his dismissal for cause. I would not give effect to this ground of appeal.

Thus, under the lens of the common law concept of just cause, there are cases when even truly wilful misconduct does not amount to just cause, when the misconduct is properly viewed in context.

Indeed, following the Supreme Court of Canada's decision in *McKinley v. BC Tel*, [2001] 2 S.C.R. 161, 2001 SCC 38, it is now settled that even proven dishonesty, which by definition must involve intent,[6] will not amount to just cause in all cases. Rather, even with intentional dishonesty, the circumstances, including the nature and seriousness of the dishonesty, may lead a court to decide that termination from employment is not a proportional response to the employee's misconduct.

Because there are cases in which the wilfulness standard under the ESA could be met, yet the common law standard of just cause would not be met, it follows that the intent requirement under the ESA standard does not, on its own, establish a higher standard than the common law standard of just cause.

Can common law just cause be found in the absence of intent to commit a workplace infraction?

The *Khashaba* decision states that just cause at common law may be found in the absence of an employee's intent. However, when one considers this assertion more closely, it is apparent that, in practice, any finding of just cause will necessarily be accompanied by a finding of actual or imputed intent. If this is so, then past assertions in the case law that common law just cause can be established without intent cannot be a sound theoretical basis for asserting that the common law just cause standard is less stringent than its statutory counterpart under the ESA.

5 Without fully reiterating the development of the jurisprudence in this area, the seminal case law interpreting the notion of "wilful misconduct" under the ESA was written by adjudicators under the pre-2000 ESA, and then the Ontario Labour Relations Board. This foundational case law was then adopted by the Superior Court. To illustrate this, compare the above passage from Khashaba with para. 37 of *8536350 Canada Inc. o/a The Joseph Esquega Health Centre v. Kayla Bachmann*, 2016 CanLII 87900 (OLRB), in which the OLRB cites an older Referee decision in *VME Equipment of Canada Ltd*, [1992] OESAD No. 230.

6 See *Lynch & Co. v. United States Fidelity & Guaranty Co.* (1970), 1970 CarswellOnt 826, [1971] 1 O.R. 28, 14 D.L.R. (3d) 294 (Ont. H.C.) at para. 23: "'Dishonest' is normally used to describe an act where there has been some intent to deceive or cheat. To use it to describe acts which are merely reckless, disobedient or foolish is not in accordance with popular usage or the dictionary meaning. It is such a familiar word that there should be no difficulty in understanding it." And see *Dagago v. Lawyers' Professional Indemnity Co.* 2011 CarswellOnt 15350, 2011 ONSC 4951 at para. 23.

Theft, fraud, violence, harassment, intimidation, and insubordination certainly are intent-based workplace infractions and, in many cases, breach of employer rules will be too. Even for matters that are traditionally considered as less serious, such as absenteeism, lateness, and poor performance, it is really impossible for such infractions to give rise to a finding of just cause without intent factoring in. As any experienced employment lawyer knows, and as is backed up by reams of case law, such lesser infractions can only amount to just cause following a course of progressive discipline. Moreover, for progressive discipline to be valid, it is trite that an employer must have put the employee on clear notice of expected conduct, the employee must be advised of the potential consequences of repeated failure to meet expected standards (i.e. suspension or termination) and the employee must be given a reasonable chance to improve. In general, multiple warnings are required before just cause will be found to exist. In light of this, it is difficult to see how an employee who - despite progressive discipline - continues to be late, continues to refuse to follow rules, and so forth, can be said to do so without intent. Even in cases of gross negligence amounting to just cause, the rationale is that the employee is imputed with knowledge (i.e. he or she "ought to have known better"). In short, with all due respect to the contrary view, the notion that just cause can be found without an element of intent is not well-founded, theoretically or in actual fact.

The principal enforcer of the ESA is the Ontario Ministry of Labour, Training and Skills Development. Its interpretation of the ESA standard further reinforces the idea that common law just cause must also involve employee intent.

The Ministry has for years made known its views of the ESA standard through its Employment Standards Act Policy and Interpretation Manual (the "Manual"). Although this is non-binding persuasive authority, it is largely based on past case law interpreting the ESA standard. The Manual clearly states that, in all cases, for the ESA standard to apply, the concerned employee's misconduct must have an element of wilfulness to it. However, the Manual makes clear that the ESA standard can apply not only in cases of obvious wilfulness like theft and fraud, but also in cases of such things as failure to follow company policy, absenteeism and tardiness – even for repeated minor infractions – when the principles of progressive discipline have been respected. The ESA standard can also be met in cases of recklessness, when the employee "ought to have known" that his or her actions would cause a certain result. In other words, the wilfulness standard under the ESA is met in the same manner required to prove just cause at common law, despite assertions that there is some difference between the two standards.

Overall, there is no doubt that some cases assert that common law just cause is not as onerous as the statutory equivalent under the ESA. Further, although there is a split in the authorities, at least one case – *Khashaba* – has found that a typical just cause provision in an employment contract violated the ESA on that basis. However, the asserted distinctions between common law just cause and the ESA standard are ultimately illusory. They do not stand on a firm principled foundation. The intent requirement under the ESA standard does not make it a more onerous norm for employers to meet than common law just cause. In addition, the idea that common law just cause can be established without intent is not sound on closer analysis. Although certain wording differences exist between the common law test and the statutory test, in practice, and in the final analysis, the same sorts of employee infractions are essentially dealt with in an identical fashion under either standard.

Conclusion and take-aways

There should be little doubt that plaintiffs' lawyers will be advancing *Waksdale*-inspired arguments going forward. They will invoke it in demand letters, mediations and court proceedings. And there is little doubt as to the scope of what they are aiming for: the wholesale invalidation of decades of drafting practices affecting thousands of contracts, and higher termination costs than what employers expected under the plain terms of the contracts with their employees.

Because a broad-based "Waksdalian" assault on employment contracts appears inevitable, it does make sense that employers consult legal counsel about steps that can be taken to mitigate the related risks, both with respect to existing employment agreements and new ones being entered into.

That being said, in light of the foregoing analysis, *Waksdale* should not be seen as the portent of contractual calamity that some have made it out to be. *Waksdale* did not state that all just cause provisions offend the ESA. And there is good reason to doubt that common law just cause is a lower standard than its statutory equivalent.

Indeed, the holistic approach to contractual interpretation applied in *Waksdale* and *Alarashi* suggests that in future cases the legality of a termination for cause provision must be coloured by the legality of the companion clause addressing termination without cause. In both *Waksdale* and *Alarashi*, the termination without cause provision was valid. In *Alarashi*, this impacted the finding that the termination for cause provision was also valid. By contrast, in *Waksdale*, the termination for cause provision was admitted to be invalid. However, had this admission not been made, it would

seem to follow that the validity of the termination without cause provision would have bolstered the validity of the termination for cause provision.

Apart from these observations, there is the obvious question of how a generally worded just cause provision would necessarily offend the ESA. The parties' express intention that a just cause must exist to disentitle an employee to statutory termination and severance pay must mean that statutory norms need to be respected. It is inconceivable that an intent to avoid statutory norms could be interpreted as being just. In other words, far from offending the ESA, a broadly worded just cause provision would be consistent with the ESA.

Only the future will tell what the true consequences of *Waksdale* will be. Going forward, as has been the case for many years, termination provisions in employment contracts will have to be interpreted as a whole and outcomes will continue to be fact dependent, according to the contractual wording actually chosen by the parties. However, for the reasons stated above, employer advocates should not lightly admit that their client's standard termination for cause provision is invalid. Moreover, the courts should not be quick to acquiesce in this notion either. Although *Waksdale* may perhaps be seen as evolutionary, it certainly cannot be seen as revolutionary.

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