



Waksdale, Can We Turn the Tables?

The [Waksdale v. Swegon North America Inc.](#) decision, which we reported on [here](#) (and many times thereafter), opened the floodgates to ongoing scrutiny of employers' termination clauses in their employment contracts. However, there was recently an unsuccessful but unique attempt by an employer to utilize the rule in *Waksdale* to support their position in a wrongful dismissal case. Unfortunately, their argument was rejected by the Ontario Superior Court of Justice, a decision that was upheld by the Ontario Court of Appeal in [Kopyl v. Losani Homes \(1998\) Ltd.](#), but it is a creative argument to note.

a) Ontario Superior Court of Justice

The employee was hired on a one-year fixed-term contract. Just over six months into the contract, the employer terminated the employee on a without-cause basis and paid her four weeks' salary (as opposed to her salary for the remainder of the term of the contract). The employee argued that their termination clause was void because it contravened the *Employment Standards Act, 2000* (ESA), which was not denied by the employer. As a reminder, the rule in *Waksdale* says that where one termination clause in an employment contract contravenes the ESA, all the termination clauses in the contract are not enforceable.

The employer argued that the clause establishing the one-year limit to the contract (the **“Fixed-Term Clause”**) was, in effect, a termination clause. Thus, because the termination clauses in the contract were void, the Fixed-Term clause was also void. If the Court agreed with the employer, then the employee's damages would be restricted to common law reasonable notice. In this case, common law reasonable notice would have been less than paying the employee to the expiry of the fixed-term.

The Court disagreed with the employer, finding that the invalidity of the termination clause did not affect the validity of the Fixed-Term Clause. In arriving at this decision, the Court relied on [Howard v. Benson Group Inc. \(The Benson Group Inc.\)](#) (see [here](#) for our prior report of this decision). The Court found that the plaintiff employee was wrongfully terminated and was owed a payment equivalent to her salary and benefits for the unexpired portion of the term of her employment contract.

b) Ontario Court of Appeal

The employer appealed the decision of the Ontario Superior Court of Justice, claiming that the judge failed to properly apply the rule in *Waksdale*. The Ontario Court of Appeal found that (1) the Superior Court correctly applied the *Benson Group*



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Inc. decision; and (2) the *Waksdale* decision did not apply to this case because it did not refer to the *Benson Group Inc.* decision nor did it refer to the conversion of a fixed-term contract into one terminable on reasonable notice. The appeal was dismissed.

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