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The Vendor as Employee: Wrongful Drafting Leads to Claim for Wrongful Dismissal (*Livshin v. The Clinic Network*)

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Introduction

There are many circumstances where a vendor of a business may remain involved with the business following the closing of the sale transaction. Purchasers often want a vendor to assist with the transition of goodwill and otherwise provide familiarity with the operations. Vendors may also benefit from remaining involved in two ways: i) by receiving a higher purchase price than they otherwise would by not being involved; and ii) by continuing to receive income, whether through a consulting agreement or an employment agreement. *Livshin v. The Clinic Network Canada Inc.*, 2021 ONSC 6796 ("***Livshin***") is a reminder that employers will be held to the highest standard of compliance with their statutory obligations regardless of the level of sophistication of, or legal advice received by, their employees.[2]

Background Facts

In *Livshin*, the plaintiff sold all the issued and outstanding shares of the corporation which operated a medical practice. The transaction stipulated that the plaintiff remain involved with the business for a fixed term of three years as an employee following closing, and the parties entered into an employment agreement ("**Employment Agreement**"). Notwithstanding the fixed term, the Employment Agreement also permitted the employer to terminate: (a) with just cause; and (b) without just cause but in compliance with a certain schedule of payments and the *Employment Standards Act, 2000* (Ontario) ("**ESA**").

Following a decline in business due to the COVID-19 pandemic, the plaintiff was laid-off in March 2020. This was then deemed to be an infectious disease emergency leave and the employment was terminated in August 2020. The plaintiff was offered 24 weeks of termination pay in lieu of notice as set forth in the Employment Agreement, which was reduced to two weeks of termination pay when the plaintiff refused to sign a full and final release presented by the defendant, as required by the Employment Agreement.

The plaintiff argued that the entire termination provision was invalid and could not be relied upon by the defendant employer because the "just cause" provision did not comply with ESA standards. This argument was supported by recent case law to such effect.[3] The defendant employer argued that given the context which involved two sophisticated parties represented by counsel in the negotiation of various agreements, including the Employment Agreement, that the plaintiff did not require "protection" from the court as a traditional employee under

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[2] *Livshin v. The Clinic Network Canada Inc.*, 2021 ONSC 6796.
[3] *Waksdale v. Swegon North America Inc.*, [2020] O.J. No. 2703, 2020 ONCA 391, 446 D.L.R. (4th) 725 [*Waksdale*].

the ESA. Thereby, in the absence of a power imbalance, the parties were sophisticated enough to contract out of the statutory termination entitlement.

Ultimately the defendant employer's argument was denied by the court since it was inconsistent with recent authorities stating that all the termination provisions of an employment agreement must comply with the *ESA*, even if there is no power imbalance between the parties.[4] As a result, the court struck the whole termination provision in the Employment Agreement and awarded the plaintiff employee the 20 months' notice remaining in the term of his Employment Agreement.

If the just cause provision in the termination section of the Employment Agreement had been drafted in accordance with the ESA, then the plaintiff employee would likely have accepted the original offer of 24 weeks together with the release, failing which the defendant employer would have had to provide only two weeks' salary and benefits as a form of notice.

Livshin serves as a further warning that the sophistication of the parties does not provide a basis for circumvention of the *ESA* in the employment context.

[4] *Wood v. Fred Deeley Imports Ltd.* (2017), 134 O.R. (3d) 481, [2017] O.J. No. 899, 2017 ONCA 158; *Waksdale*.