

Ontario Court Upholds Termination Provision: Reasonably Sophisticated Employee Sought Legal Advice Before Signing Contract

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Rahman v Cannon Design Architecture Inc. is, without question, a helpful wrongful dismissal decision for employers.

In this case, the plaintiff, a former employee of Cannon Design Architecture Inc., urged the Ontario Superior Court to follow the decision of the Ontario Court of Appeal in *Waksdale v Swegon North America* and find the termination provisions in her employment agreement unenforceable.

The Court declined to do so in this case for reasons including that the employee was reasonably sophisticated and had the benefit of a lawyer to negotiate the employment contract.

The Facts

The plaintiff commenced employment with Cannon Design in a senior role in February 2016. Due to the business impacts of COVID-19, the plaintiff's employment was terminated without cause in April 2020. At the time of termination, the plaintiff was 61 years old, had four years and two months of service, received \$185,000 per year plus benefits, and participated in a discretionary bonus plan.

The plaintiff's employment was governed by the terms of an employment contract, which the plaintiff negotiated with the assistance of a lawyer before joining for Cannon Design.

The employment contract contained the following "just cause" termination clause:

Cannon Design maintains the right to terminate your employment at any time and without notice or payment in lieu thereof, if you engage in conduct that constitutes just cause for summary dismissal.

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The contract also contained a “without just cause” termination clause, stipulating that if the plaintiff was terminated within the first five years of employment, she would receive the greater of her statutory minimum termination entitlements required by *Ontario’s Employment Standards Act, 2000* (ESA) and two months’ notice conditional upon her executing a release in favour of Cannon Design. This clause was negotiated by the parties. The “without just cause” clause in the executed contract provided the plaintiff with an enhanced entitlement to that contained in the original offer.

Further, the contract contained a “saving provision”, confirming that in no circumstance would the plaintiff receive less than her minimum termination entitlements required by the ESA or any other applicable legislation.

The Findings

The plaintiff argued that the termination provisions in the executed employment contract were unenforceable thereby entitling her to common law reasonable notice, rather than her more modest contractual termination entitlements. One of the bases for this argument was the fact that the “just cause” clause permitted termination without notice in circumstances that arguably extended beyond those permitted by the ESA. This argument was successful in the *Waksdale* case. For an overview of the *Waksdale* decision, see our [Insight](#) on that decision.

In response to the plaintiff's position regarding the implications of the “just cause” clause, the Court found that there was “no basis to apply a strict or even adverse construction approach” to the termination provision given the context of the case, including the following facts:

- The plaintiff received independent legal advice prior to negotiating and executing her employment contract, including in respect of the termination provisions. The plaintiff’s lawyer did not take issue with the “just cause” portion of the termination provision at the time the parties were negotiating the agreement.
- The plaintiff’s negotiation of her employment contract resulted in a material improvement in the termination provision from its original form.
- According to the Court, the plaintiff and Cannon Design were both “reasonably sophisticated” parties who entered into the employment contract freely and “in the absence of any particular disparity in bargaining power.” The plaintiff was being hired into a reasonably senior role at a significant salary and was “a woman of experience and sophistication.”
- The evidence suggested the parties had a mutual intent to comply with the minimum standards set out in the ESA and there was notably no evidence that the parties intended through use of the phrase “just cause for summary dismissal”, to permit Cannon Design to terminate the plaintiff’s employment without notice or pay in lieu of notice for conduct falling below the ESA standard of wilful misconduct.¹

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Further, the Court made several notable observations regarding the interpretation of termination clauses that may have application beyond the facts of this case, among them that:

- It is not necessary to enumerate the ESA minimum standards exhaustively – particularly when they are subject to periodic change. Referentially incorporating the ESA minimum standards can be sufficient.
- Every contract must be interpreted with a view to giving expression to the mutual intention of the parties as expressed in the words used by them. That intent is inferred from an examination of the surrounding circumstances.
- If the contractual termination provisions are void, they must be void for all purposes and not merely at the election of one side or the other. An employer cannot claim a termination clause that provides a greater benefit than is required by the ESA is unenforceable because of an alleged ambiguity after the fact, and neither can an employee.
- The Court noted that “uncertainty in the application of the law to fairly negotiated employment agreements will only have the unintended consequence of causing employers to forego efforts to offer severance benefits beyond the ESA minima for fear that any steps beyond the limited bounds of the ESA will carry an unacceptable level of risk of being found invalid with the resulting potential for common law liability far in excess of what either side expected at the time the contract was agreed to. Doubtless this is already occurring to some degree. Over time, there are no winners in such a world.”

This last observation appears to signal the Court’s recognition that the recent trend in the case law of holding employers to a perfection standard in contract drafting when the mutual intentions of the parties are clear is undesirable for both parties. If followed in subsequent decisions, this observation may signal the beginning of a more balanced and contextual assessment of the enforceability of termination clauses in employment contracts.

Takeaways for Employers

This decision emphasizes that the enforceability of any termination clause will depend on the specific wording of the provision and the context in which the employment contract in question was entered into by the parties. Prudent employers should:

- Seek legal advice on their employment contracts, including the termination provisions. Employment contract provisions should be clear and unambiguous. Both the contract language and the employer’s practices should either accord with the ESA or provide a greater benefit.
- Ensure their employment contracts contain an ESA “saving provision” to minimize the risk that an arguably deficient provision will otherwise be invalidated.
- Strongly encourage employees to seek independent legal advice before entering into the

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employment contract and provide employees with sufficient time to do so.

- Maintain records of communications with prospective employees and their lawyers during employment contract negotiations including any changes made to the termination clause because of such negotiations.

¹ Ontario Regulation 288/01 under the ESA stipulates that an employee “who has been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer” is not entitled to notice of termination, termination pay or severance pay.

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