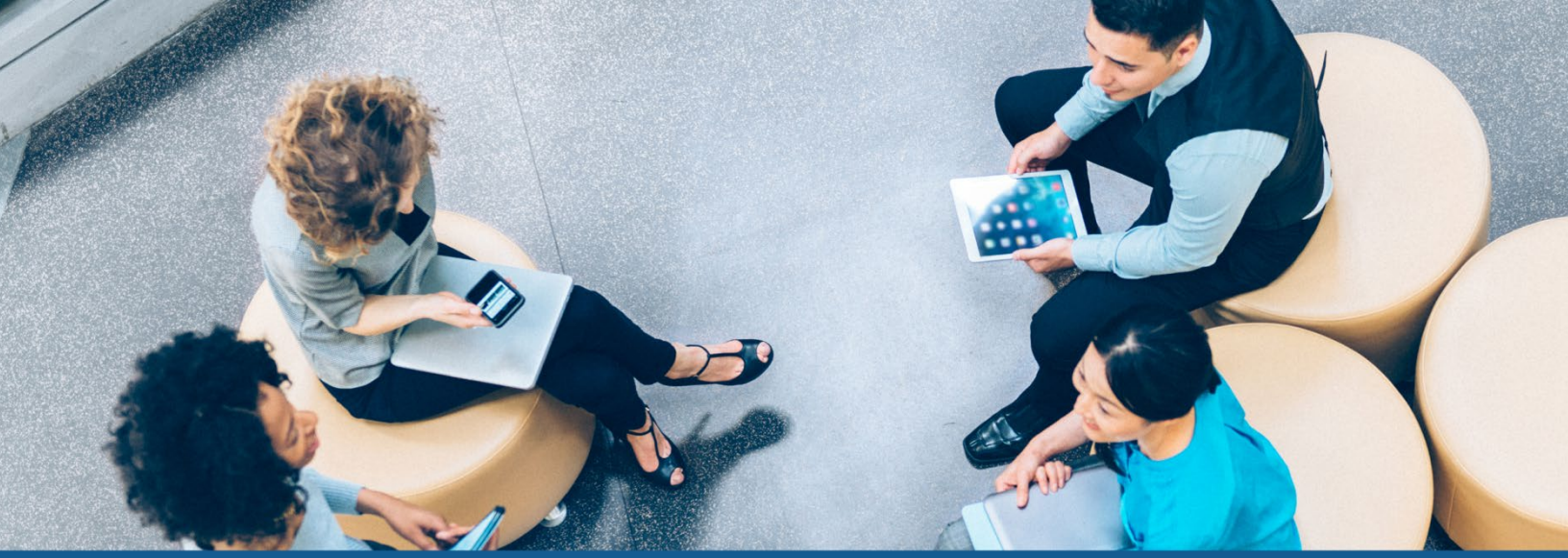

What's New in HR Law

The Pendulum Swings Again: Employee Sophistication Does *Not* Impact the Legality of a Termination Provision

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Bottom Line

In two recent decisions, *Livshin v The Clinic Network Canada Inc.* (*Livshin*) and *Campbell-Givons v Humber River Hospital* (*Campbell-Givons*) the Ontario Superior Court of justice was asked to determine whether the "just cause" provisions of two separate employment agreements were unenforceable in light of the Court of Appeal's decision in *Waksdale v Swegon North America Inc.* (*Waksdale*).

The Court in *Livshin* and *Campbell-Givons* took the opposite approach to that seen only weeks prior in *Rahman v Cannon Design Architecture Inc.* (*Rahman)*. Justice Black applied the decision in *Waksdale* and ruled that the "just cause" provisions were unenforceable. Notably, and in stark contrast to the analysis applied in *Rahman*, Justice Black determined that the sophistication of an employee is ***not*** relevant in determining the enforceability of a contractual termination provision.

Background

In *Waksdale* the Ontario Court of Appeal held that the just cause language of an employment agreement was contrary to the minimum standards set out in Ontario's *Employment Standards Act, 2000* (ESA). As discussed previously, this decision established if a "just cause" provision of

an employment contract is not compliant with the ESA, then an otherwise enforceable "without cause" provision will be rendered unenforceable, even where the employment contract contains a saving provision or severability clause.

As detailed in our earlier update, the Ontario Superior Court recently released the *Rahman* decision in which *Waksdale* was distinguished, and it was held that it was not necessary or appropriate to apply a strict or adverse construction to the phrase "just cause" in every case. *Rahman* also suggested that the context in which employment agreements are formed, including the intention of the parties, should be considered. In *Rahman* the employee was sophisticated, freely negotiated their employment agreement, and received independent legal advice. As a result, the Court found that the termination provision was not intended to contract out of the ESA, and was therefore enforceable.

In *Livshin* and *Campbell-Givons*, however, the Court declined to apply a similar line of reasoning.

Livshin

The Plaintiff, Steve Livshin, was employed by The Clinic Network Canada Inc. (TCN) on a fixed-term contract. Livshin was terminated with a year remaining under his fixed-term agreement due to a decline in business relating to the COVID-19 pandemic. Livshin was offered 24 weeks of termination pay in lieu of notice if he executed a full and final release in favour of TCN. Livshin declined to sign the release and, based upon its interpretation of the employment agreement, TCN paid the Plaintiff two weeks of termination pay.

The disputed provision read as follows:

> ***Termination by the Company for Just Cause*** – The Company has the right, at any time and without notice, to terminate your employment under this Agreement for just cause.

Livshin argued that the "just cause" provision of the employment agreement was overbroad, violated the ESA, and thereby rendered the entire termination clause unenforceable. On this basis, Livshin claimed he was entitled to payment for the balance of the fixed term of the employment contract.

TCN argued that the "just cause" provision was not in violation of the ESA, but that if it was, the termination provision should nevertheless be enforced as Livshin was a sophisticated employee who had freely negotiated his employment contract, in the context of a commercial transaction, and while represented by counsel.

Justice Black ruled in favour of Livshin, finding that the "just cause" provision was in violation of the ESA and, as such, voided the entire termination clause. The judge further found that the severability clause of the employment agreement did not save the termination provision. Livshin was awarded payment for the balance of the time remaining under his fixed-term contract.

Notably, Justice Black ruled that the sophistication of the plaintiff was not a relevant consideration in determining the enforceability of the termination provision:

> As such, and notwithstanding the relative sophistication of the plaintiff and his representation by counsel in the Share Purchase, in my view there is no compelling reason why TCN should be permitted to rely on termination provisions that do not comply with the *ESA*.
>
> …
>
> In any event, there are no such imperatives here. While Livshin may be more sophisticated than many employees, and notwithstanding that he was represented by counsel, I can see no reason why the clause at issue had to be drafted in a way that on its face contravenes the *ESA*. Further, in my view the goal that employers be encouraged to draft clauses that comply with the *ESA* trumps the suggestion that Livshin may have been better able than many or most employees to recognize the potential peril.

It is worth noting that the Court in *Livshin* did not consider the decision in *Rahman*, as the decision in *Rahman* was rendered after arguments had been heard in *Livshin*.

Campbell-Givons

A similar decision was issued by Justice Black in *Campbell-Givons* only a little over a week after the release of *Livshin*.

In this case, the Plaintiff, Lorna Campbell-Givons, was a 61 year old Senior Labour Relations Specialist who worked for Humber River Hospital (HRH) for a period of 19 months before her employment was terminated without cause. Upon termination, Campbell-Givons was provided with three weeks' pay in lieu of notice, which HRH maintained was the amount to which she was entitled under her contract of employment.

Campbell-Givons, however, asserted that the "for cause" termination provision in her contract ran afoul of the ESA and therefore rendered the entire termination clause unenforceable. The "for cause" termination provision in this instance outlined nine non-exhaustive scenarios in which HRH would not provide notice of termination. Among the scenarios included in the provision were "demonstrated incompetence", "any material breach", "any conduct which in the reasonable opinion of the President and CEO of the hospital…tends to bring…disrepute", and "any other act or omission which would amount to cause".

Campbell-Givons argued that none of the above-mentioned scenarios would amount to wilful misconduct, disobedience, or wilful neglect of duty, which is the standard that must be met to disentitle an employee to termination and severance pay under the ESA. Ultimately, the Court agreed.

Justice Black dismissed HRH's argument that the setting in which it operates and, in particular, the fact that as a public hospital its dealings often involve heightened sensitivity, was an important contextual consideration when assessing the enforceability of the termination provision. Justice Black, however, held that the enumerated scenarios in the "for cause" termination provision

should not be viewed differently in a hospital setting as compared to any other workplace, particularly in the absence of evidence to substantiate the heightened importance or sensitivity allegedly involved.

In this case, Justice Black also specifically considered the decision in *Rahman* and had the following to say in respect of the analysis applied by the Court in that earlier decision:

> The fundamental determination, in my view, is whether or not the clause or clauses in issue violate the ESA. If it does, then the clause(s) is void, and cannot be used as evidence of the parties' intention.
>
> It is also problematic, in my opinion, to engage in a detailed analysis about the level of sophistication of an employee and whether or not they had time and opportunity to obtain legal advice. A termination clause cannot comply with the ESA for some employees but violate the ESA for others. It either violates the ESA or does not, and it either enforceable or not. It is a straightforward matter for an employer to incorporate clauses in an employment agreement that comply with ESA standards, and when that is not done the court should not be asked to rewrite the language of the termination provisions to achieve compliance.

Justice Black ultimately ruled that the termination provision in Campbell-Givons' employment contract was void and unenforceable, and set her common law notice entitlement at 4.5 months.

Check the Box

While the decision in *Rahman* provides some hope for employers that exceptions to the Court of Appeal's ruling in *Waksdale* may be recognized, the decisions in *Livshin* and *Campbell-Givons* make it clear that there is no guarantee a judge will consider the sophistication of the employee or the context in which an employer operates when assessing whether a termination provision is enforceable. Employers must therefore continue to take care when drafting employment agreements and ensure that termination provisions comply with the ESA.

Need More Information?

For more information or assistance, contact Andrew Failes at 647-598-0513, or your regular lawyer at the firm

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