What's New in HR Law

The Termination Clause Saga Continues: *Rossman v. Canadian Solar Inc.*

January 15, 2020

Bottom Line

In a recent decision, the Ontario Court of Appeal ("ONCA") held that a termination clause containing language aimed to "save" or "cure" the provision was insufficient because the termination clause otherwise attempted to contract out of the minimum standards in *Employment Standards Act, 2000* ("*ESA*"). The ONCA decided that the termination clause was void and of no effect.

Facts

In 2010, Noah Rossman was told that his employment was being transferred from DAI Inc. to Canadian Solar Solutions Inc. ("CSSI"), a company that worked closely with his former employer. Accordingly, in May 2010, and later in 2012, Mr. Rossman entered into two (2) new employment contracts with CSSI as a regional sales manager and project manager, respectively. Each employment contract contained the following termination clause language:

9. Termination of Employment

9.01 The parties understand and agree that employment pursuant to this agreement may be terminated in the following manner in the specified circumstances:

…

(c) by the Employer, after the probation period, in its absolute discretion and for any reason on giving the Employee written notice for a period which is the greater of:

(i) 2 weeks, or

(ii) In accordance with the provisions of the Employment Standards Act (Ontario) or other applicable legislation, or on paying to the Employee the equivalent termination pay in lieu of such period of notice. **The payments contemplated in this paragraph include all entitlement to either notice of pay in lieu of notice and severance pay under *the Employment Standards Act* Ontario. In the event the minimum statutory requirements as at the date of termination provide for any greater right or benefit than that provided in this agreement, such statutory requirements will replace the notice or payments in lieu of notice contemplated under this agreement.** The Employee agrees to accept the notice or pay in lieu of notice as set out in this paragraph as full and final settlement of all amounts owing by the Employer on termination, including any payment in lieu of notice of termination, entitlement of the Employee under any applicable statute and any rights which the Employee may have at common law, and the Employee thereby waives any claim to any other payment or benefits from the Employer. **Benefits shall cease 4 weeks from the written notice.**

As noted by the ONCA, the termination clause language lacked clarity and was ambiguous: Although the clause stated that Mr. Rossman would receive "minimum standard requirements" upon termination (the "Saving Provision"), it also limited entitlement benefits to four weeks upon termination (the "Benefit Provision"). Of course, the *ESA* provides that notice of termination may continue for up to eight (8) weeks and benefits must be continued for that period of time.

In 2014, after three (3) years of employment, Mr. Rossman's employment was terminated without cause. At the time of termination, he was thirty-three (33) years old earning an annual salary of $82,500.00 with benefits and a bonus plan. Shortly after, Mr. Rossman commenced an action for wrongful dismissal.

Summary Judgment Motion

At first instance, on a motion for summary judgment, Justice Labrosse held that the issue of the enforceability of the termination clause could be properly addressed in a summary judgement motion. According to Justice Labrosse, the termination clause was void and unenforceable for two (2) reasons: (i) the Benefit Provision was either ambiguous or an attempt to contract out of the minimum standards under the *ESA* by limiting benefits to four weeks regardless of the term of employment; and (ii) the Saving Provision did not "cure" the rest of the termination clause.

As such, Justice Labrosse granted partial summary judgment in favour of Mr. Rossman, who was entitled to pay in lieu of reasonable notice in the amount of five (5) months. CSSI appealed.

Ontario Court of Appeal Dismisses Appeal

In December 2019, the ONCA upheld Justice Labrosse's decision and agreed the termination clause was either void at the outset, or, alternatively, contained a genuine ambiguity which rendered it void.

First, the ONCA reviewed the seminal cases on contractual interpretation in employment law reinforcing the importance of work, vulnerability of employees, and the remedial nature of the *ESA* which led the Court to affirm that termination clauses that can be interpreted in more than one way should be interpreted with a view that gives the greater benefit to the employee.

Second, and turning to the termination clause issue, the Court found that the termination clause was void at the outset since the Benefit Provision contravened the notice provisions of the *ESA*. On this point, CSSI argued that the Benefit Provision complied with the *ESA* since it provided a greater benefit to Mr. Rossman's specific circumstances (although he was only entitled to three (3) weeks' notice under the *ESA* based on his service, the Benefits Provision provided him with four (4) weeks' notice). In rejecting this argument, the ONCA found that the Benefit Provision had the *potential* to violate the *ESA* rendering it void and it was that *potential* that was relevant to the analysis.

Third, the Court held that the termination clause was ambiguous and could not be "cured" by the Saving Provision since the Benefit Provision was not future facing and did not express an intention to conform to the *ESA*.

Lastly, the Court noted policy reasons for its decision stating that allowing employers to contract out of the *ESA* exploits vulnerable employees who hold unequal bargaining power in contract negotiations, and flouts the purpose of the statute.

Check the Box

While this decision arguably marks a shift from the ONCA's previous employer-friendly position on "saving provisions", it is consistent in its reasoning that termination provisions must not attempt to contract out of the *ESA*.

This case highlights the importance of well-drafted employment contracts. Employers should ensure that termination clauses do not, even inadvertently, contract out of the *ESA* by providing

less than minimum entitlements to employees. As this case demonstrates, where an ambiguity in the termination clause exists, it will be resolved in favour of an employee.

In addition, employers should take note that a "catch-all" savings provision may not "save the day", depending on how it is drafted. A termination clause which contravenes the *ESA* **and** contains a savings provision may not be enforced by courts even where an employee is not actually impacted by an alleged breach of the *ESA*.

Date: December 17, 2019

Forum: Ontario Court of Appeal

Citation: *Rossman v. Canadian Solar Inc.*, 2019 ONCA 992

Need more information?

If you need more information about employment contracts, please contact Janeta Zurakowski at 905-972-6876 or your regular lawyer at the firm.

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