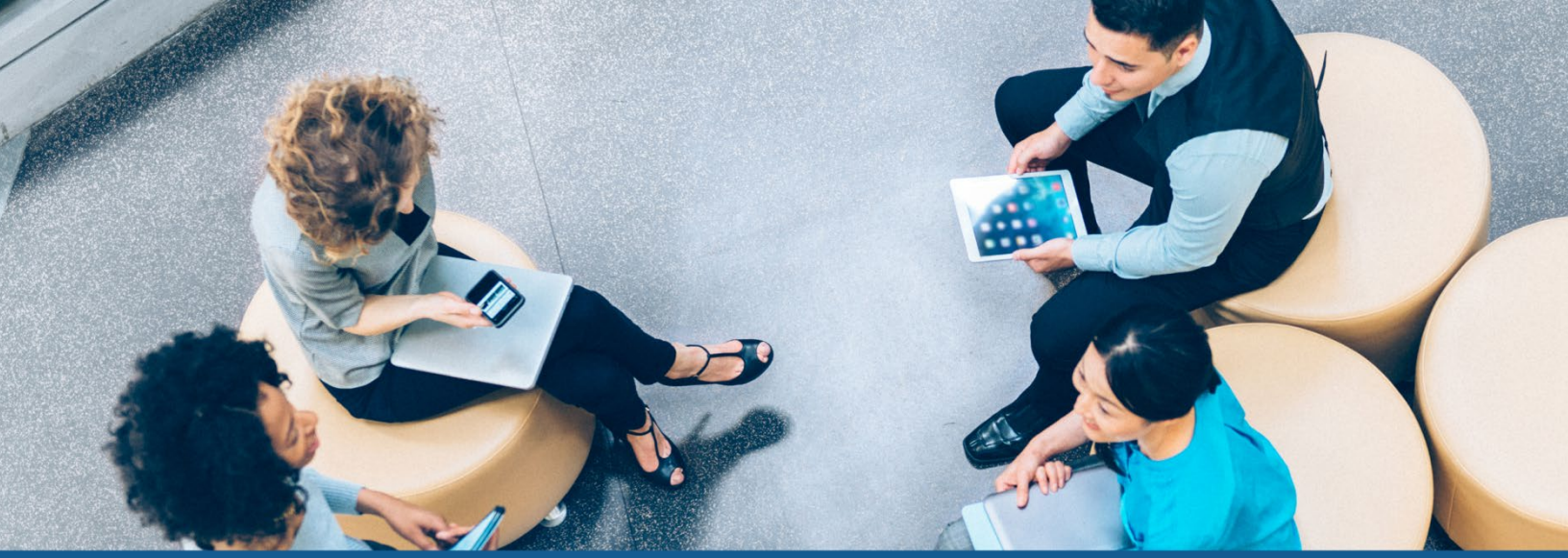

What's New in HR Law

Much Needed Relief for Ontario Employers: Court Upholds "Just Cause" Clause, Distinguishing Waksdale

September 30, 2021

Bottom Line

In the recent decision of *Rahman v Cannon Design Architecture Inc.*, the Ontario Superior Court of Justice was tasked with determining whether the "just cause" provision of an employment agreement was unenforceable in the face of the Court of Appeal's decision in *Waksdale v. Swegon North America Inc*. ("Waksdale").

In *Waksdale*, the Court of Appeal held that the just cause language of the employment agreement was contrary to the Ontario *Employment Standards Act, 2000* ("ESA") for allegedly permitting termination without notice in circumstances broader than those contemplated by the ESA.

Justice Sean F. Dunphy distinguished the *Waksdale* decision, finding that it is not necessary or appropriate to apply a strict or adverse construction to the phrase "just cause" in every case, particularly where the employer and the employee had equal bargaining power in the negotiation of the employment agreement.

Background

The plaintiff, Farah Rahman, was employed with the Defendant, Cannon Design Architecture Inc. ("Cannon Design") for just over four (4) years. The plaintiff's employment was terminated on April 30, 2020. At the time of termination, the Plaintiff was 61 years old and earned $185,000 per year plus benefits and eligibility to participate in a discretionary bonus plan.

The terms of the plaintiff's employment with Cannon Design were governed by a written employment agreement, which was presented to the plaintiff during the interview and hiring stage in 2016. The employment agreement contained a termination provision which provided for payments of not less than "*the advance notice and/or applicable payments, benefits continuation, and severance pay if applicable, equivalent to the minimum applicable entitlements contained within the Ontario Employment Standards Act, 2000, as amended or any applicable successor legislatio*n."

This latter point was repeated in the next sentence, which stated that "*for greater certainty, Cannon Design's maximum liability to you for common law notice, termination pay, benefits continuation, severance pay, or payment in lieu of notice shall be limited to the greater of the notice required in your Officer's Agreement or the minimum amounts specified in the ESA*."

The employment agreement also included a just cause termination provision that contained the following language:

> *"CannonDesign 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."*

The plaintiff was urged to seek independent legal advice prior to signing the offer of employment. The plaintiff did so, and with the help of her legal counsel, negotiated material improvements to the proposed terms of the without cause termination provision. This resulted in an enhanced benefit of two months' notice if the plaintiff was terminated within the first five years of employment, conditional upon her execution of a release in favour of the company. The plaintiff's lawyer did not raise any concerns regarding the language of the just cause termination provision, and the plaintiff accepted the revised employment agreement.

The Court's Decision: With Cause Provision Upheld

At the summary judgment motion, the plaintiff argued that the termination provisions of her employment agreement were unenforceable, citing five arguments: (1) the just cause termination provision allegedly permitted termination without notice in circumstances beyond those permitted by the ESA; (2) the notice provisions of the termination provision purported to pay base salary only during the notice period; (3) the Officer's Agreement was silent on severance pay; (4) there were insufficient notice provisions in future; and (5) the employment agreement stripped the plaintiff of her bonus entitlement even if fully earned.

Justice Dunphy readily rejected arguments #2-5 based on the express language of the employment agreement, which twice repeated the fact that the ESA minimums would be paid in any and all events.

Turning to argument #1, Justice Dunphy found that there was "no basis to apply a strict or even adverse construction approach to the "just cause" termination provision" based on the following factors:

1. the plaintiff received independent legal advice;
2. the termination provisions were specifically negotiated between two reasonably sophisticated parties, noting the plaintiff was hired into a senior role at a significant salary such that there was no marked imbalance of bargaining power;
3. the plaintiff's negotiation of her employment agreement resulted in a material improvement to the notice provision of the termination clause;
4. the employment agreement contained an explicit "for greater certainty clause" which limited the employer's maximum liability to the greater of the notice required in the agreement, or the minimum amounts specified in the ESA;
5. there was a mutual intent to comply with the minimum standards of the ESA, which was inferred from an examination of the surrounding circumstances.

Turning to the intention of the parties, the court found that there was no basis to conclude that the phrase "just cause for summary dismissal" was intended to fall *below* the ESA's higher standard of "wilful misconduct." There was no evidence that Cannon Design had a practice or policy of dismissing employees for cause in circumstances beyond the limited ones enumerated in the ESA.

Justice Dunphy also found the termination clause to be enforceable because of sections 5(1) and 5(2) of the ESA. Section 5(1) of the ESA provides that any attempt to contract out of an employment standards is void, but section 5(2) holds that if an employee is being given a greater benefit than the employment standard, the provisions of that contract apply. In this case, the termination provision of the employment contract provided a benefit clearly in excess of the ESA.

It is clear from the Court's reasons that Justice Dunphy placed considerable weight on the facts that the plaintiff: (i) negotiated improved terms of her employment agreement, (ii) received independent legal advice before signing the agreement, and (iii) was a sophisticated party in a senior role. Notably, at paragraph 19 of his decision, Justice Dunphy wrote:

> [19] There can be no suggestion that Ms. Rahman was not adequately informed of both the nature of the statutory and common law rights that were the subject of the negotiations and the impact of the contract proposed by the employer on those rights. It is clear that Ms. Rahman sought and received legal advice about her rights at common law and under the ESA in relation to the possible future termination of her employment. It is clear that she knew or ought to have known of the binding nature of the minimum standards in the ESA which cannot be reduced or waived by contract and that she understood that the common law standards in relation to termination of employment are potentially much more generous than both the ESA minimum standards and the termination benefits proposed in the offer letter. She was being hired into a reasonably senior role at a significant salary and was a woman of experience and sophistication. Her situation on reviewing and signing the employment agreement was poles apart from the situation that more commonly obtains in circumstances described by the Court of Appeal in *Wood v. Fred Deeley Imports Ltd*., 2017 ONCA 158 at para. 28.

Check the Box

The *Rahman* decision is the first decision in Ontario to challenge the strict and adverse conclusion of *Waksdale*.

This decision emphasizes that one must look beyond a strict interpretation of an employment agreement and should consider the context in which the agreement was formed, which includes the intention of the parties. The fact that the plaintiff in this case was sophisticated, freely negotiated the employment agreement and received independent legal advice was persuasive to the court's determination that the termination provision was not intended to contract out of the ESA.

This case also underlines the importance of maintaining records of any communications and negotiations leading up to the formation of the employment agreement, as they may provide helpful evidence of the intentions of the parties when interpreting the contract.

While this is a welcome decision for employers, the construction of binding and enforceable employment agreements that effectively limit a company's termination liabilities has become increasingly difficult in recent years. Employers are well advised to seek legal advice when drafting employment contracts, and pay particularly close attention to construction of their termination provisions.

Need more information?

For more assistance with the preparation of enforceable employment contracts, or for advice and representation in respect of wrongful dismissal litigation, please contact Sara Yousefi at 416-993-4987, or your regular lawyer at the firm.

Filion Wakely Thorup Angeletti LLP
management labour and employment law

ADVOCATES for EMPLOYERS of CANADA

Proud member of L&E GLOBAL
an alliance of employers' counsel worldwide

Toronto
Bay Adelaide Centre
333 Bay Street, Suite 2500,
PO Box 44
Toronto, Ontario M5H 2R2
tel: 416.408.3221
fax: 416.408.4814
toronto@filion.on.ca

London
620A Richmond Street, 2nd Floor
London, Ontario N6A 5J9
tel: 519.433.7270
fax: 519.433.4453
london@filion.on.ca

Hamilton
1 King Street West, Suite 1201
Box 57030
Hamilton, Ontario L8P 4W9
tel: 905.526.8904
fax: 905.577.0805
hamilton@filion.on.ca