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New Hope for Employers for "Just Cause" Termination Provisions: *Rahman v Cannon Design Architecture Inc.*

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In *Rahman v Cannon Design Architecture Inc.*, 2021 ONSC 5961 ("*Rahman*"), Justice Dunphy of the Superior Court of Ontario rejected the plaintiff's argument that a "just cause" termination provision in her employment contract amounted to an attempt to contract out of the *Employment Standards Act,* 2000 ("*ESA*") in light of the relative equality of bargaining power between the parties and their mutual intention to comply with the *ESA*. In doing so, Justice Dunphy distinguished the Ontario Court of Appeal's landmark decision in *Waksdale v Swegon North America* and gave hope to employers about the ability to rely on termination provisions in an employment agreement.

Background

Farah Rahman was employed by Cannon Design in February 2016 pursuant to a written employment agreement negotiated with the assistance of her lawyer.

The original employment offer presented to Ms. Rahman contained a "just cause" clause that, in part, stated:

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

and

[In the event of termination without cause, Cannon Design will provide you with] 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 legislation …[f]or 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 Officer's Agreement provided for, among other things, one month's working notice of termination without cause.

Following negotiations, Ms. Rahman and Cannon Design entered into an employment agreement containing the above "just cause" clause, as well as a clause that provided Ms. Rahman with an enhanced notice period of two months' conditional upon her executing a release if she was terminated within the first five years of employment.

Cannon Design terminated Ms. Rahman without cause on April 30, 2020. At the time of termination, Ms. Rahman was 61 years old, with four years and two months of service, and earned $185,000 per year plus benefits and eligibility for a discretionary bonus.

Ms. Rahman commenced a wrongful dismissal claim against Cannon Design.

The Issue

Ms. Rahman argued that the termination provision in the employment agreement was void and unenforceable for five reasons:

1. The "just cause" termination provision permitted termination without notice in circumstances beyond those permitted by the *ESA*;
2. The negotiated termination provision only required her base salary to be continued over the notice period;
3. The Officer's Agreement was silent on severance;
4. There were insufficient notice provisions in future; and
5. The employment contract stripped the plaintiff of her bonus entitlement even if it was fully earned.

Justice Dunphy was tasked with determining whether the termination provision was in fact void and unenforceable, thereby entitling Ms. Rahman to common law reasonable notice.

Analysis

Regarding the "just cause" portion of the clause, Justice Dunphy declined to interpret the employment agreement *contra proferentum* the employer and instead held that there was "no basis to apply a strict or even adverse construction approach to the termination provisions." In doing so, Justice Dunphy relied on the following facts:

- Rahman had the benefit of legal advice prior to signing the contract;
- The contract was entered into between two reasonably sophisticated parties in the absence of inequality in bargaining power;
- The legal advice received focused particularly on the termination provisions, and Ms. Rahman's lawyer did not object to the "just cause" provision;
- The negotiations had resulted in improvements to the termination provision for the benefit of Ms. Rahman; and
- The agreement included language that stated the employer's liability would be the greater of the employee's entitlements under the *ESA* and the written employment agreement.

Justice Dunphy rejected the remainder of the plaintiff's arguments on the plain wording of the termination clause and the equal bargaining power between the parties. Significantly, Justice Dunphy emphasized that the employment agreement expressly affirmed that *ESA* minimums would be paid in all events. As a result, even if the Officer's Agreement had provided for a lower payment than required by the *ESA*, there was no ambiguity, especially for an employee who has received independent legal advice prior to entering into the agreement, that the *ESA* minimum would still be paid. Such "saving clauses" are rarely enforced by the Courts in relation to termination provisions which otherwise appear to breach the *ESA*.[1] *Rahman* is a potentially significant development in employment law: by relying on Ms. Rahman's sophistication and representation by legal counsel to permit the "saving clause" to save the termination provisions, Justice Dunphy deviated from the approach taken in similar cases. It remains to be seen whether this decision will be appealed, and, if it is, how the Court of Appeal will respond to this approach.

Lessons for Employers

Justice Dunphy's decision in *Rahman* provides the following lessons for employers:

- The enforceability of termination provisions will depend on both the wording of the clause, and the context in which the employment agreement was entered into (including the employee's relative sophistication and bargaining power and whether the employee was represented by counsel);

- "Saving clauses" may be effective in cases where the employee is sophisticated and is represented by counsel, as long as it can be said that the parties mutually intended to abide by the *ESA* and mutually understood that the employee would always receive at least their *ESA* minimum entitlements.
- Employers should maintain records of communications with a prospective employee and their lawyer during employment contract negotiations; and
- Employers should seek legal advice about their employment contracts and urge employees to do the same.

For more information on the topic discussed in this update, or for legal advice regarding this topic or any other employment law matter, please contact a member of WeirFoulds' Employment Law Group.

[1] *Rossman v Canadian Solar Inc.*, 2019 ONCA 992.

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