WeirFoulds LLP

Waksdale Strikes Back: Ontario Court of Appeal Overturns Rahman; Employee Sophistication Cannot Save Deficient Termination Clause

June 29, 2022

By Seth Holland, Daniel Wong

Recently the Ontario Court of Appeal in its decision *Rahman v Cannon Design Architecture Inc.,* 2022 ONCA 451, confirmed that employee sophistication and involvement in negotiation of an employment agreement is not relevant when assessing whether a termination provision is legally enforceable and compliant with the *Employment Standards Act, 2000 ("ESA").*

In *Rahman,* the Court of Appeal overturned a September 2021 decision of the Ontario Superior Court of Justice, which we wrote about previously, in which the motion judge relied on findings that the employee was a "sophisticated" individual and had received legal advice before signing the agreement as factors in upholding a termination clause in the employee's employment agreement.

Many employers saw the Superior Court decision as a new hope for the enforceability of termination clauses that contained slight deficiencies but were nonetheless a product of negotiations between an employer and employee both aided by legal advice. However, the Court of Appeal decision in *Rahman* now confirms that in Ontario a termination provision that is non-compliant with the ESA in any manner is not legally enforceable to limit an employee's entitlement to common law reasonable notice.

Facts

Ms. Rahman was a former employee of CannonDesign, starting in February 2016 and holding a senior role with the organization. CannonDesign is a corporate group that includes Cannon Design Architecture Inc ("CDAI"), Cannon Design Ltd., and Cannon Corporation.

Ms. Rahman was subject to two separate employment agreements. First, an Offer Letter printed on CannonDesign letterhead offering her employment with CDAI. Second, an Officer Agreement between Ms. Rahman and Cannon Corporation. As a condition of employment Ms. Rahman was required to own 10,000 shares in Cannon Corporation. Both agreements contained termination provisions that provided for termination of Ms. Rahman's employment for cause and without cause.

Relevant to the findings in this case, Ms. Rahman was urged by CannonDesign to seek, and ultimately did receive, independent legal advice before signing both employment agreements.

After four years of service, Ms. Rahman's employment was terminated on April 30, 2020 on a without cause basis. The employer relied upon the contractual termination provisions and provided Ms. Rahman with four weeks of pay in lieu of notice. Ms. Rahman brought an action for wrongful dismissal against the three companies within the CannonDesign corporate group asserting that all three constituted her common employer.

Motion Court Decision

After commencing the wrongful dismissal action, Ms. Rahman brought a motion for summary judgment asking the court to declare that the termination provisions in her agreements were void for violating the ESA, and that all three companies were her common employer.

Central to Ms. Rahman's argument regarding the validity of the agreements were the termination with cause provisions. The Offer Letter stated that it superseded all other agreements and was ultimately found to be the operative agreement for purposes of termination amounts. The termination with cause provision in the Offer Letter read as follows:

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.

Ms. Rahman, relying on a 2020 Court of Appeal decision in *Waksdale v Swegon North America,* 2020 ONCA 391, argued that this language violated the ESA. Importantly, the ESA provides a higher threshold employers must establish to dismiss an employee without providing termination or severance pay than simply "just cause". The term "just cause" generally refers to the broad common law concept that contemplates a range of employee misconduct that can give rise to a termination without any obligation to pay termination entitlements. Under the ESA there concept of "just cause" is not used; rather, an employer may only dismiss an employee based on the employee's conduct without termination or severance pay upon demonstrating that the employee engaged in "wilful misconduct, disobedience or wilful neglect of duty that is not trivial and not condoned by the employer". Accordingly, a contract that allows the employer to dismiss the employee for "just cause" without notice or pay has the potential of providing the employee with less than the minimum entitlements of the ESA; this was Ms. Rahman's argument.

The motion judge disagreed with Ms. Rahman's argument, interpreting the termination provision in the Offer Letter as complying with the ESA and upholding it as valid. Despite technically breaching the ESA, the motion judge held that the termination provision should be enforced given that Ms. Rahman was a "woman of experience and sophistication" and had received legal advice before signing her employment agreements. The motion judge found the evidence indicated the parties' subjective intent was to comply with the ESA given the minimum standards were referenced several times throughout Ms. Rahman's employment agreements.

The motion judge also held that CDAI alone had employed Ms. Rahman and rejected that the three corporations within CannonDesign were her common employer. The motion judge found that CDAI alone had offered employment to Ms. Rahman and was the entity that paid her, and stated that CDAI was merely a subsidiary within CannonDesign which in itself did not justify a common employer finding.

Court of Appeal Decision

Ms. Rahman appealed the motion judge's decision to the Court of Appeal, which allowed the appeal and overturned both findings of the motion judge.

First, the Court of Appeal found that the motion judge erred in enforcing the termination provisions in the Offer Letter, holding that it is only the wording of a termination provision that determines whether it contravenes the ESA, not external circumstances. In making this finding, the Court of Appeal confirmed that negotiations outside the four corners of the employment agreement or subsequent conduct of the parties cannot save a termination provision that is otherwise noncompliant with the ESA.

The Court of Appeal held that because the just cause provision in the Offer Letter did not provide for payment of termination or severance pay where an employee's conduct amounted to just cause at common law, but did not meet the ESA's higher standard of "wilful misconduct, disobedience or wilful neglect of duty", the termination clauses were unenforceable and did not limit Ms. Rahman's

termination entitlements.

The Court of Appeal also held that all three companies of CannonDesign were a common employer of Ms. Rahman, finding that the motion judge made "palpable and overriding factual errors" in finding otherwise. The Court of Appeal considered a number of factors that indicated the companies were interrelated and showed that CannonDesign as a whole intended to create an employment relationship with Ms. Rahman, notably:

- common branding and association on letterhead and company websites,
- supervisory relationships and regular meetings intertwining between the companies, and
- a common bonus pool between Ms. Rahman and non-CDAI employees within the CannonDesign group in which Ms. Rahman's compensation was partially determined by the annual performance of Cannon Corporation.

Takeaways

The Court of Appeal decision in *Rahman* is a reminder to employers that where different corporate entities are closely related and impact upon an employee's employment, including through advertising or branding, reporting obligations, or compensation, each corporate entity may be found joint and severally liable for any termination entitlements the employee may have.

Rahman also doubles down on the Court's 2020 holding in *Waksdale* that an employment agreement must provide for all minimum entitlements required by the ESA in all circumstances. Any shortcomings in the contractual language that can result in the employee with less than the ESA, or could be interpreted as such, will very likely invalidate the agreement and entitle the employee to common law reasonable notice.

Further, *Rahman* confirms that evidence related to the subjective intent of the parties, sophistication of the parties, or the receipt of legal advice before signing the employment contract will not save a termination provision that otherwise breaches the ESA.

Given the recent insistence from courts on strict adherence with employment standards, employers must be hyper-vigilant in drafting employment agreements to ensure that all contractual provisions, not just termination provisions, meet the minimum requirements of applicable employment standards legislation. Failure to do so can result in significantly higher payouts when an employee is dismissed.

For assistance with the review or preparation of employment agreements or advice on any other employment law matter for your organization, please feel free to contact Daniel Wong or Seth Holland of WeirFoulds' Employment Law Group.

For more information or inquiries:

Seth Holland

Toronto
416.947.5004

Email:
sholland@weirfoulds.com

Seth Holland is a Partner in the Employment and Labour Law Practice Group at WeirFoulds LLP.

Daniel Wong

Toronto
416.947.5042

Email:
dwong@weirfoulds.com

Daniel Wong is Chair of the Firm's Employment & Labour Practice Group with a practice that is focused on employment and labour relations.

WeirFoulds LLP

www.weirfoulds.com

Toronto Office
4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office
1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035