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Ontario courts revisit guidance on employment termination clauses

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Important update: On June 8, 2022, the Ontario Court of Appeal released a unanimous decision allowing the employee's appeal in the *Rahman* decision discussed in this article. Gillese J.A. writes:

[24] In my view, the motion judge erred in law when he allowed considerations of Ms. Rahman's sophistication and access to independent legal advice, coupled with the parties' subjective intention to not contravene the ESA, to override the plain language in the termination provisions in the Employment Contracts. By allowing subjective considerations to distort and override the wording of those provisions, the motion judge committed an extricable error of law reviewable on a correctness standard... It is the wording of a termination provision which determines whether it contravenes the ESA...

The clear decision of the Court of Appeal appears to cast significant doubt on the sophistication of the parties as a relevant factor in determining the enforceability of the termination clause in an employment agreement.

Two recent — and divergent — Ontario court decisions remind employers that negotiated employment agreements (even where the employee has the assistance of counsel) are not immune to close judicial scrutiny.

As background, the starting point for the judicial analysis in Ontario is the Court of Appeal's decision in *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158 (*Wood*). In that case, the Court emphasized the importance of employment and the vulnerability of employees upon termination when it listed the following considerations relevant to the interpretation and enforceability of termination clauses:

- When employment agreements are made, usually employees have less bargaining power than employers.
- Many employees are likely unfamiliar with the employment standards in the *Employment Standards Act, 2000* (the ESA) and the obligations the statute imposes on employers. As such, they may not seek to challenge unlawful termination clauses.
- The ESA is remedial legislation, intended to protect the interests of employees. For this reason, courts should favour an interpretation that "encourages employers to comply with

the minimum requirements" of the ESA and "extends its protections to as many employees as possible" over an interpretation that does not do so.

- Termination clauses should be interpreted in a way that encourages employers to draft agreements that comply with the ESA. If the only consequence employers suffer for drafting a termination clause that fails to comply with the ESA is an order that they comply, then they will have little or no incentive to draft a lawful termination clause at the beginning of the employment relationship.
- A termination clause will rebut the presumption of reasonable notice only if its wording is clear. Employees should know at the beginning of their employment what their entitlement will be at the end of their employment.
- Faced with a termination clause that could reasonably be interpreted in more than one way, courts should prefer the interpretation that gives the greater benefit to the employee.

Wood guidance applied with differing results

Late last year, the Ontario Superior Court of Justice contemplated the *Wood* guidance above in *Rahman v. Cannon Design Architecture Inc.*, 2021 ONSC 5961 (*Rahman*), and *Livshin v. The Clinic Network Canada Inc.*, 2021 ONSC 6796 (*Livshin*). Despite similar facts, *Rahman* and *Livshin* reached differing conclusions as to the significance of contracting with a sophisticated party represented by legal counsel.

In *Rahman*, Ms. Rahman sought summary judgment for wrongful dismissal following the termination of her employment. Ms. Rahman had occupied a reasonably senior role and, prior to her hiring, had engaged in negotiations with her prospective employer that yielded material improvements to the terms of her employment. She specifically obtained pre-hire legal advice with a focus on the termination provisions in the agreement, which she argued at trial were void for failure to meet ESA minimums.

The Superior Court of Justice disagreed. Justice Dunphy found that the contract provided in "clear and unambiguous terms" that Ms. Rahman would receive no less than the ESA minimums upon termination. Additionally, as "a woman of sophistication and experience," Ms. Rahman had both successfully negotiated the terms of her employment agreement and had obtained targeted legal advice with respect to her rights therein. In the circumstances, Justice Dunphy concluded there could be no basis to suggest Ms. Rahman's situation reviewing and signing her employment agreement matched the concerns outlined in *Wood*. Subject to any subsisting disputes between the parties under the valid contract, the action was dismissed.

Justice Black, hearing *Livshin* a month after *Rahman*, also considered the enforceability of a termination clause in the plaintiff's employment agreement. On similar facts, however, Justice Black reached an opposite result. Like Ms. Rahman, Mr. Livshin was a sophisticated party represented by counsel who signed his employment agreement following a series of negotiations. At trial, certain provisions of Mr. Livshin's agreement were in dispute for alleged ESA violations. In particular, Mr. Livshin argued that the "termination for just cause" provision was too broad to meet the stringent standard set by the ESA and that, pursuant to *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391 (discussed in a previous post), this rendered the remaining termination provisions in the contract unenforceable.

Justice Black agreed with Mr. Livshin: the termination provisions of Mr. Livshin's contract

violated the ESA and were unenforceable. That Mr. Livshin was a sophisticated party represented by counsel in the negotiations leading to his contract could not change the result. Referencing *Wood*, Justice Black could "see no reason why the [termination] clause at issue had to be drafted in a way that on its face contravene[d] the ESA." Judgment was held in the plaintiff's favour.

Takeaway

Rahman and *Livshin* make clear that Ontario courts will continue to review employment agreements diligently — and in painstaking, technical detail — for compliance with the ESA. Employers looking to onboard talent in a competitive market should remain mindful that even sophisticated employees represented by legal counsel may challenge the enforceability of the termination clause in their employment agreement.

If you have questions about these decisions, or require assistance with drafting or reviewing employment agreements before, during or after negotiations with job candidates or existing employees, please contact a member of the Osler team.