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Waksdale strikes again

Ontario Court of Appeal reaffirms strict interpretation of termination language

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In 2021, the Ontario Superior Court of Justice appeared to signal a return to a more pragmatic and flexible approach to the interpretation of termination language in an employment agreement in it decision *Rahman v. Cannon Design Architecture Inc*, 2021 ONSC 5961. Rather than focus exclusively on contractual language, the court considered the context in which an agreement was negotiated and found the language enforceable as against the employee.

The decision represented a moderation of the strict approach adopted by the Ontario Court of Appeal in *Waksdale v. Swegon North America Inc*, 2020 ONCA 391, in which the court held that the termination language alone determined whether a provision complied with the law, not the circumstances in which it was negotiated.

While *Rahman* was a good news decision for employers, it was short-lived. In July 2022, the Ontario Court of Appeal allowed the employee's appeal (2022 ONCA 451) and affirmed that if the plain language of a termination provision does not comply with minimum employment standards, the provision is unenforceable, regardless of the context in which it was negotiated.

Lower court rejected all-or-nothing approach

Farah Rahman was employed as a "principal" by Cannon Design Architecture. Her employment agreement contained both a "just cause" and "without cause" termination clause. The without cause language entitled the employer to terminate Rahman's employment by providing her with only the minimum entitlements under the Ontario Employment Standards Act, 2000 (ESA).

The just cause language stated that the employer could terminate Rahman's employment at any time, without notice or pay in lieu, if there was "just cause for summary dismissal." The contract also contained a saving provision stating that, in any event, Rahman would be entitled to no less than her minimum entitlements under the ESA. Rahman negotiated this contract with the assistance of a lawyer.

Rahman was dismissed on a without cause basis. She was provided with four weeks' notice, in accordance with her employment agreement and the ESA.

Rahman sued for wrongful dismissal and brought a motion for summary judgment. Relying on *Waksdale*, Rahman argued that the termination provisions in her employment agreement were invalid because the just cause language provided for less than her entitlements under the ESA. Namely, the language disentitled Rahman to any payments upon termination, including termination and severance pay.

However, under the ESA an employee will only be disentitled to these statutory payments if there is "wilful misconduct" – a threshold higher than just cause. As such, Rahman argued, the entire termination provision in her employment agreement was void and she was entitled to reasonable notice at common law.

The court rejected Rahman's argument and the all-or-nothing approach in *Waksdale*, preferring to consider the broader context in which the agreement was struck, including the intention of the parties. In the context of this case,

where the parties were both sophisticated and represented by counsel, the court found “no basis… to imply into the general phrase ‘just cause for summary dismissal’ a standard below the ESA standard of wilful misconduct absent any evidence that such represents a reasonable construction of the intention of the parties in the context of the employment agreement in question.”

Termination provisions read as a whole: Court of Appeal

The Court of Appeal allowed Rahman’s appeal and reaffirmed the following:

- Termination language itself determines whether a provision complies with the ESA, not the circumstances in which it was negotiated. The Superior Court therefore erred in permitting context to override plain language.
- The plain language of a just cause provision violates the ESA if it does not account for the fact that an employee is only disentitled to ESA termination entitlements if they engage in “wilful misconduct,” a higher standard than just cause.
- Termination provisions are to be read as a whole. Accordingly, the invalidity of just cause language will invalidate without cause language.

Lessons learned

In this case, Rahman was not dismissed for cause, so the offending just cause provision was never relied on by the employer. Furthermore, there was no suggestion the without cause provision was invalid, and the contract had a saving provision which made it clear the parties intended to comply with the ESA.

However, because the Court of Appeal held that the two termination provisions must be read as a whole, the unenforceability of the just cause provision rendered the without cause provision unenforceable as well.

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