HUNTER-LIBERATORE-LAW

The Inescapable Rule of *Waksdale*

Last year, we wrote about the growing list of decisions in which the courts found termination clauses to be invalid and therefore unenforceable on the basis of the "rule of *Waksdale*", which arises out of the Ontario Court of Appeal's ("ONCA") decision in *Waksdale v. Swegon North America*. However, one decision, *Rahman v. Cannon Design Architecture Inc.,* did not result in a finding that the termination provision was invalid due to the sophistication of the parties and the intention to comply with the minimum standard. On June 8, 2022, the ONCA overturned that decision, removing the possibility of a "sophisticated party" exception to the rule of *Waksdale*.

Also in May 2022, the Ontario Superior Court of Justice ("ONSC") added to the list of decisions following *Waksdale*, with their recent decision in *Gracias v. Dr. David Walt Dentistry*. The ONSC's finding in *Gracias* shows the continuing trend of the courts overturning termination clauses even where there is any possibility of non-compliance. It does not matter whether a non-compliant clause has any application to the circumstances of the termination.

The two cases are summarized below.

a) *Rahman v. Cannon Design Architecture Inc.* (ONCA)

- **Facts**

The appellant employee, Farah Rahman ("Ms. Rahman"), was employed as a Senior Architect at Cannon Design Architect (the "employer" or the "Company") for over four (4) years. Her employment was terminated without notice or cause, and she was provided with four (4) weeks of base salary.

Ms. Rahman brought an action against three defendants (she claimed they were her common employers) for damages for wrongful dismissal. In her action, she claimed that the termination provisions in her employment contracts (she had more than one employment contract) were void because they conflicted with the *Employment Standards Act, 2000* (the "ESA").

Ms. Rahman signed two employment contracts: (1) an Offer Letter (with Cannon Design); and (2) an Officer Agreement (with Cannon Corporation).

The Offer Letter provides that:

- No notice will be given if there is just cause to terminate. The Company "maintains the right to terminate [Ms. Rahman's] employment at any time and without notice or payment in lieu thereof, if [Ms. Rahman] engage[s] in conduct that constitutes just cause for summary dismissal".

- **Ontario Superior Court of Justice**

In rejecting the argument that the termination for cause provisions violate the ESA, the ONSC considered that:

- Ms. Rahman had independent legal advice about the offer of employment, her rights at common law and under the ESA in relation to possible future termination of her employment;
- Ms. Rahman was a "woman of experience and sophistication"; and
- The parties' subjective intention was to comply with the ESA minimum standard.

- **Issues**

The ONCA considered two issues, the second of which is beyond the scope of this article. The relevant issue was whether the ONSC judge erred in finding that the termination provisions of the employment agreements govern the termination of Ms. Rahman's employment.

- **Ontario Court of Appeal**

The ONCA found that the ONSC erred when it allowed considerations of Ms. Rahman's sophistication and access to independent legal advice, as well as the parties' subjective intentions, to override the plain language in the termination provisions in the employment contracts. **It is the wording of the termination provisions which determine whether they contravene the ESA – even compliance with ESA obligations on termination does not have the effect of saving a termination provision that violates the ESA.**

The ONCA found that the "operative just cause provision" is the one in the Offer Letter, which states that the Company maintains the right to terminate Ms. Rahman's employment without notice or payment in lieu thereof if she engages in conduct that constitutes just cause for summary dismissal.

The ONCA stated that **ESA notice and termination must be given for all terminations, *even those for just cause*, except for "prescribed employees"** (*see* section 55 of the ESA). The disentitlement provision is in the *Termination and Severance of Employment* regulation under the ESA, which provides that

employees are prescribed for the purposes of section 55 of the ESA if they are **guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and had not been condoned by the employer**.

The issue with the operative just cause provision is that there is nothing written that limits the scope to just cause terminations for wilful misconduct. On its plain wording, the operative just cause provision gives the Company the right to terminate Ms. Rahman's employment without notice or payment in lieu, for conduct that constitutes just cause alone. As such, it contravenes the ESA and is void.

The ONCA then considered the "rule of *Waksdale*", which holds that if a termination provision in an employment contract violates the ESA, all the termination provisions in the contract are invalid. In this case, given that the just cause provision is void, all the termination provisions in the employment contracts are void and cannot be relied upon by the employers.

b) *Gracias v. Dr. David Walt Dentistry* (ONSC)

- **Facts**

The plaintiff employee, Sonia Gracias ("Ms. Gracias"), was employed as a Dental Hygienist at Dr. David Walt Dentistry Professional Corporation (the "employer" or "Walt Dentistry") on a full-time basis for a period of five (5) months and twenty-one (21) days. Upon dismissal (without cause), Ms. Gracias was provided with one-week's pay in lieu of notice per her entitlements under the ESA. Ms. Gracias brought an action for, among other claims (which she eventually abandoned), common law damages for a wrongful dismissal in the amount of $43,750 ($6,250/month) based on a notice period of seven (7) months. She submitted that she was entitled to common law damages in lieu of notice because the restrictions in her employment contract were unenforceable because her employment contract unlawfully contracted out of the ESA.

The relevant parts in the employment contract are as follows:

> 15. **Your employment may be terminated without cause for any reason upon the provision of notice equal to the minimum notice (or pay in lieu of notice) and severance (if applicable), as required to be provided under the terms of the *Employment Standards Act*.** If your employment is terminated without cause, the Employer will continue your benefit coverage (if any) for such period as the *Employment Standards Act* shall require. By signing below, you agree

that upon receipt of your entitlements under the *Employment Standards Act*, no further amounts shall be due and payable to you, whether under the Employment Standards Act, any other statute, or at common law. In no circumstances will you receive less than your entitlements to notice, severance (if applicable), and benefits continuation (if any), pursuant to the *Employment Standards Act*.

21. You agree that you will ensure that your direct or indirect personal interests do not, whether potentially or actually, conflict with the Employer's interests...**A failure to comply with this clause above constitutes both a breach of this agreement and cause for termination without notice or compensation in lieu of notice.**

22. Confidential Information – You recognize that in the performance of your duties, you will acquire detailed and confidential knowledge of our business, patient information, and other confidential information, documents, and records...**In the event that you breach this clause while employed by the Employer, your employment will be terminated without notice or compensation in lieu thereof, for cause. This provision shall survive the termination of this Agreement.**

24. You are not permitted to use the internet, update Facebook, or perform any social networking on the internet during office hours, unless you are on your lunch or a break...**A breach of this provision will result in disciplinary action, up to and including termination for cause.**

[Emphasis added]

- **Decision**

In this case, the Court found that the termination without cause provision was lawful. However, the termination for cause provisions contract out of the ESA and are void. Per the case law (see *Kashaba*; *Plester*), an employee is entitled to the benefits of the ESA, even if they are terminated for cause, *unless the employee has been guilty of wilful misconduct, disobedience, or wilful neglect of duty that is not trivial and has not been condoned by the employer*. Here, the termination for cause provisions would deny Ms. Gracias any notice and her benefits under the ESA *for conduct that may not amount to wilful misconduct*. Therefore, the termination for cause provisions in the employment contract are not compliant with the ESA, and Ms. Gracias is entitled to her common law entitlements for a dismissal without cause.

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