MANAGEMENT
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Employment and Labour Law Update

Perfection not the standard in legal drafting when parties' intentions clear and reasonable – Ontario Court

Luiza Vikhnovich
416.217.2251
lvikhnovich@sherrardkuzz.com

In September of this year, Ontario's Superior Court of Justice released its decision in *Rahman v Cannon Design Architecture Inc.*,[1] signalling what employers hope is a return to a more pragmatic approach to the interpretation of employment agreements.

Rahman is the most recent in a line of decisions since *Waksdale v Swegon North America Inc.*,[2] in which the Court of Appeal for Ontario held that a "for cause" termination provision that violates the *Employment Standards Act* ("ESA"), will invalidate an otherwise enforceable "without cause" termination provision in the same agreement. The court would not "sever" the invalid provision, despite the agreement containing an enforceable term stating any invalid provision should effectively be ignored (a 'severability' clause). Instead, the court held the two termination provisions must be read together, such that if one was invalid they both were. The court was not moved by the fact that the employment in that case had been terminated without cause – in other words, the employer never sought to rely on the invalid, for-cause provision.

In *Rahman*, the court rejected *Waksdale's* all-or-nothing approach of contractual interpretation, preferring a *context-driven approach* which allows the court to consider the intentions of the parties, their relative sophistication and bargaining strength, whether they were represented by counsel, the language of the contract, and whether the contract is unconscionable or contrary to public policy.

It remains to be seen whether *Rahman* will be adopted by other courts. If it is, this will be welcome news for employers and the reliability of written employment contracts, in general.

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What happened in *Rahman*?

Farah Rahman was employed as "Principal" of Cannon Design Architecture Inc. She made $185,000 annually and was entitled to a discretionary bonus. At the time of her dismissal, Rahman was 61 years old and had just over four years service. Rahman sued for wrongful dismissal and brought a motion for summary judgment.

The summary judgment motion primarily addressed the validity of the termination provisions in Rahman's employment contract. They stated 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 clearly stated that Rahman would be entitled to no less than her minimum entitlements under the ESA (a 'saving' provision).

Throughout the negotiation of the employment contract Rahman was represented by counsel. She even negotiated changes to the termination provisions. Despite this, in her motion for summary judgment, Rahman sought to strike down the very provision she had negotiated, arguing the "just cause" language fell below the ESA minimum standard of "wilful misconduct".

Relying on *Waksdale*, Rahman argued the entire termination provision in her employment agreement should fall, allowing her to claim common law reasonable notice which would have amounted to considerably more.

The motions judge rejected Rahman's argument and the all-or-nothing approach in *Waksdale*, preferring to consider the broader context in which the agreement had been struck. He 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*".

As for the parties' intentions, the judge wrote, "*[e]ven if hypothetical circumstances might be posited where the … Agreement might provide for a lower payment than the required ESA minimum, the agreement was quite clear that the ESA minimum would at all events be paid. There is no ambiguity at all on that account, particularly in the case of a plaintiff who had independent legal advice*"…

"*[T]here can be no suggestion that Ms. Rahman was not adequately informed of both the nature of the statutory and common law rights that were the subject of the negotiations and the impact of the contract proposed by the employer on those rights… Perfection is certainly not the standard required of legal advice in this context.*"

The judge also noted that, unlike in previous decisions that had come before the courts, in this case the employer did not have an employment policy that allowed dismissal in circumstances that fell below the standard required by the ESA.

Best practices for employers

The long-term impact of *Rahman* remains to be seen.[3] In the meantime, employers should keep the following in mind:

- It may be easy to overlook whether an employee signs an employment agreement with the benefit of independent legal advice. However, having that advice can strengthen the employer's position if and when the employee later seeks to overturn a negotiated agreement. Particularly (though not exclusively) for high earning employees, independent legal advice is a best practice.
- Words matter, so it is important to work with counsel who will draft language that clearly and unambiguously reflects the parties' intentions, complies with the law, and includes a proper saving provision. Particularly in recent years, employment law across Canada has fluctuated greatly, making it all the more important to work with a lawyer who is an expert in this area.

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- Pulling an employment template off the internet should be avoided for a variety of reasons, including the high likelihood the document will be neither legally accurate (jurisdiction and substance) nor appropriately reflect the parties' intentions.
- Workplace policies may provide additional evidence of the parties' intentions in the employment agreement. As such, employers should review their workplace policies regularly to ensure they do not inadvertently provide for less than the minimum employment standards.

To learn more, and for assistance, contact the team at Sherrard Kuzz LLP.

[1] 2021 ONSC 5961
[2] 2020 ONCA 391
[3] At the time of writing, an appeal had not been filed.

DID YOU KNOW?

In 2021, across Canada, the job vacancy rate was greatest in accommodation and food services (< 12.2%), followed by arts, entertainment and recreation (< 8.4%), followed by agriculture, forestry, fishing and hunting (< 7.0%). The lowest job vacancy rate over that same period was shared by utilities and education (<1.5%). All other industries hovered within the 3-6% range. Statistics Canada

Permanent Residency Requirement Does Not Discriminate Based on Citizenship - Ontario Court

Arash Farzam-Kia
416.217.2250
afarzam-kia@sherrardkuzz.com

In our November 2018 newsletter, we wrote about *Haseeb v Imperial Oil Limited*,[1] in which the Ontario Human Rights Tribunal held that a conditional job offer that required a candidate to be a permanent resident in Canada discriminated on the ground of citizenship, contrary to Ontario's *Human Rights Code*.

Since then, Imperial Oil was successful in its judicial review of that decision, with the majority of the court dismissing the human rights application.[2] The decision provides helpful discussion of the protected ground of citizenship, and reminds us that while the reasons of a decision-maker under 'quasi-constitutional' legislation, such as the Code, will be afforded deference, it may be struck down if not reasonable.

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What happened?

Muhammad Haseeb was an international engineering student. He was eligible for a post-graduate work permit allowing him to work in Canada for a three-year term. He was also part of a special immigration program that allowed him to be processed for permanent resident status while working in Canada. He anticipated he would be able to obtain permanent resident status within the three-year period.

Imperial Oil was recruiting for engineers and Haseeb applied. He was aware Imperial Oil required a successful applicant to have Canadian citizenship or permanent resident status,[3] so he lied and said he was able to permanently work in Canada. Haseeb was offered the job on the condition he provide proof he was able to permanently work in Canada. When he was unable to meet this requirement the offer was rescinded and he was invited to re-apply if his status changed. Haseeb filed an application with the Tribunal alleging Imperial Oil discriminated against him on the basis of citizenship.

The Tribunal's decision

Subsection 5(1) of the Code provides that "*Every person has a right to equal treatment with respect to employment without discrimination because of … citizenship…*".

Haseeb argued and the Tribunal agreed that the permanent residency requirement was discrimination on the basis of citizenship. In reaching this decision, the Tribunal expressly associated permanent residency with citizenship such that the former was necessarily subsumed under the latter.

The Divisional Court disagrees

The court held that permanent residency and citizenship are not the same. Each has its own legal meaning and it is not necessary to be a citizen in order to be a permanent resident. Indeed, a person who becomes a citizen of Canada "loses permanent resident status".[4]

According to the court, the crux of the Tribunal's error was that it failed to begin its analysis with the plain and ordinary meaning of the word "citizenship". Instead, because "citizenship" was not defined in the Code, the Tribunal assumed "citizenship" had a special meaning which the Tribunal needed to determine. This led the Tribunal to expand the definition of citizenship to include permanent residency, creating a new ground protected under the Code. This, the court said, the Tribunal could not do.

Lederer J, concluded: "*The failure to examine the plain and ordinary meaning of "citizenship" and "permanent residence" is a gap in the analysis undertaken by the HRTO. It leads to… the inclusion of "permanent residence" as a distinct and separate ground that can be the subject of direct discrimination.*"

Mew J, agreed, adding: "*If a Canadian employer is going to make a substantial investment in a professional employee who will be trained, nurtured and developed in the years following employment, it is reasonable to require the prospective employee to have a permanent and unrestricted right to accept and maintain employment in Canada. … But if it was the intention of the Legislature to brand such a policy as discrimination based on citizenship, it would have used terminology … to expand that term beyond its plain and ordinary meaning.*"

Note: The court cautioned - its reasoning was limited to the Tribunal's ruling that Imperial Oil's permanent residency requirement was a form of direct discrimination under the Code. The court did not rule out the possibility that permanent residency could amount to indirect discrimination if the facts supported such a finding. However, this argument was not before the Tribunal or court.

Lessons learned

The decision of the Divisional Court is important for two reasons:

First, it provides employers that rely on international workers a measure of comfort and predictability that permanent residency, appropriately required, could be a valid condition of employment.

Second, it reminds us that the court will not simply rubber stamp the decision of an administrative tribunal, even the HRTO that has been afforded a significant degree of deference under the Code. As the court noted "*(t)he broad impact of decisions made by the HRTO and the recognition that they reflect the fundamental values of our society, require that they be clear and precise in the analysis they present.*" The court will not fill in the gaps where the decision-maker's analysis fails to meet this standard.

To learn more, and for assistance, contact the team at Sherrard Kuzz LLP.

[1] 2018 HRTO 957
[2] 2021 ONSC 3868
[3] Imperial Oil maintained the reason for the permanent residency requirement was assurance that, once invested in and trained, an employee would be able to stay with the company for a long career.
[4] *Immigration and Refugee Protection Act*, SC 2001, c 27, s 46(1)(a)

HReview
Seminar Series

Please join us at our next HReview Breakfast Seminar:

Hello - Goodbye:

Best Practices When Hiring and Managing Departures

One of the by-products of the COVID-19 pandemic has been seismic movement in workplace talent. Studies suggest between 25-40% of workers will look to leave their jobs as the pandemic subsides. As a result, employers will need to address two issues simultaneously: the recruitment of new talent and protection of the business from departing employees.

1. Recruitment and Hiring

- Risks associated with 'poaching' an employee from an existing job.
- Can an employer consider a candidate's social media profile in the hiring process?
- How to address COVID-19 vaccination.
- Considerations if hiring into a work-from-home (remote)/hybrid arrangement.
- Key employment terms to introduce at the hiring stage.

2. Departing Employees

- Duties owed by a departing employee.
- Restrictive covenants and other key employment agreement terms.
- Ending employment during an employee's resignation notice period.
- Can an employee who quits due to a COVID-19 related work requirement (vaccination, remote work, *etc.*) successfully claim constructive dismissal?

DATE: **December 8, 2021; 9:00 a.m. – 10:30 a.m.**
WEBINAR: **Via Zoom** (registrants will receive a link the day before the webinar)
COST: Complimentary
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250 Yonge Street, Suite 3300
Toronto, Ontario, Canada M5B 2L7
Tel 416.603.0700
Fax 416.603.6035
24 HOUR 416.420.0738
www.sherrardkuzz.com
@SherrardKuzz

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