CITATION: Rahman v. Cannon Design Architecture Inc., 2021 ONSC 5961
COURT FILE NO.: CV-20-00643549-0000
DATE: 20210915

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
FARAH RAHMAN Plaintiff (Moving Party)	*Stephen J. Moreau*, for the Plaintiff (Moving Party)
– and –	
CANNON DESIGN ARCHITECTURE INC., THE CANNON CORPORATION AND CANNON DESIGN LTD., DEFENDANTS (RESPONDING PARTIES) Defendants	*David A. Whitten* and *Nadia Halum Arauz*, *and Simone Ostrowski* for the Defendants
	HEARD at Toronto: August 30, 2021

REASONS FOR JUDGMENT

S.F. DUNPHY J.

[1] The plaintiff seeks summary judgment for a wrongful dismissal claim. While there are no allegations of cause, the parties do not agree whether a genuine issue requiring a trial with respect to the claim has been raised nor whether it is in the interests of justice for me to exercise the enhanced fact-finding tools prescribed by s. 20.04(2.1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

Overview of facts

[2] The plaintiff Ms. Farah Rahman was employed by Cannon Design Architecture Inc. (or “Cannon Design”) as a “Principal” on February 16, 2016 pursuant to a written employment agreement. Her base salary in her last year of employment was $185,000

plus benefits and eligibility in a discretionary bonus plan allocated at year end and 75% of which was paid in deferred share units themselves vesting over a period of years.

[3] The defendant is a subsidiary of The Cannon Corporation based in the United States. Cannon Design has a single Canadian office in Toronto and is the sole Canadian subsidiary operation of The Cannon Corporation.

[4] Subsequent to the initial COVID-19 lockdown, the parent company of the plaintiff's employer instituted enterprise-wide lay-offs and salary reductions, including at its Canadian subsidiary. In the case of Ms. Rahman's employment category, this resulted in a 10% reduction beginning on April 6, 2020, reducing Ms. Rahman's base salary to $166,500.

[5] On April 30, 2020, Ms. Rahman's employment was terminated. Her employer had been searching for a suitable replacement for several months (there is disputed evidence regarding Ms. Rahman's knowledge of that fact) and her termination was announced when the new hire decision was finalized. Cause has not been alleged. Her period of employment was thus just two months over four years in duration. She was 61 years of age at the time of the termination of her employment. She remained unemployed at the time of the hearing of this motion.

Issues to be decided

[6] The plaintiff named both her Canadian employer and its parent and affiliate (the last two defendants) as co-defendants. The joint employer issue was pursued only in passing in oral argument by the plaintiff and touched upon without much more detail in her factum. The written record as to who her employer was (the first defendant Cannon Design) is crystal clear. Given the involvement of reasonably sophisticated parties on both sides before the employment relationship began and the assistance Ms. Rahman had from counsel prior to signing her employment documents on February 11, 2016, I cannot find that there is a serious issue for trial that any of the last two co-defendants may be considered an employer jointly with Cannon Design.

[7] The mere fact of a corporate structure involving a parent and multiple subsidiaries does not entail a finding of joint employer. Cannon Design was the operating subsidiary in Canada, the entity that offered her employment and the one that paid her. It is a subsidiary within a business grouping that clearly shares a degree of integration in its operation – that too is nothing unusual and does not by itself justify a joint employer finding. That aspect of the plaintiff's claim for summary judgment must be dismissed and the claim as regards the first two defendants dismissed. The plaintiff has failed to adduce facts sufficient to justify a finding that either of the last two defendants was her employer and I find no triable issue has been raised in that regard. All references in these reasons to her employer reference the first defendant Cannon Design.

[8] The following issues have been determined by me in connection with this summary judgment motion:

a. Are the termination provisions of the employment agreement valid?

b. Are there any genuine issues raised for trial?

Analysis and discussion

(a) Are the termination provisions of the employment agreement valid?

[9] The plaintiff takes the position that the termination provisions of her written employment agreement are void because they allegedly violate the minimum standards of the *Employment Standards Act, 2000*, S.O. 2000, c 41. The alleged violations of the *ESA* arise from (i) a "just cause" termination provision that allegedly permits termination without notice in circumstances beyond those permitted by the *ESA*; (ii) the notice provisions purport to pay base salary only during the notice period; (iii) lack of severance pay in the Officer's Agreement; (iv) insufficient notice provisions in future; and (v) stripping of bonus entitlement even if fully earned.

[10] Some additional factual background is needed to place these positions in their proper context.

[11] Ms. Rahman was hired by the defendant with a start date of February 16, 2016. Her hiring was preceded by a period of interviewing and negotiations. After a number of interviews, a written first offer letter dated February 3, 2016 was sent to the plaintiff from Cannon Design and attaching a separate more general "Officer's Agreement" that would form a part of the proposed terms of hiring. The Officer's Agreement dated September 21, 2015 was the more general policy document while the offer letter was specific to the plaintiff. The offer letter provided that in the event of any conflict between the Officer's Agreement and the offer letter, the offer letter would govern.

[12] The offer letter itself provided for payments not less than the "advance notice and/or applicable payments, benefits continuation, and severance pay if applicable, equivalent to the minimum applicable entitlements contained within the Ontario *Employment Standards Act, 2000*, as amended, or any applicable successor legislation". This latter point is repeated in the next sentence in the offer letter which provides "[f]or greater certainty, CannonDesign's maximum liability to you for common law notice, termination pay, benefits continuation, severance pay, or payment in lieu of notice shall be limited to the greater of the notice required in your Officer's Agreement or the minimum amounts specified in the *ESA*".

[13] The offer letter thus provides in clear and unambiguous terms that payments the employee shall receive on termination will be no less than the minimum amounts required under the *ESA* even if the Officer's Agreement" might purport in some circumstances to provide for a lower payment. The offer letter is neither unconscionable nor contrary to public policy in any way. It was freely entered into between two reasonably sophisticated parties in the absence of any particular disparity in bargaining power.

[14] Ms. Rahman was urged to seek independent legal advice to consider the terms of the offer of employment made to her and she followed that advice. As I shall relate in somewhat more detail below, the legal advice she received focused particularly upon the termination provisions in the offer letter and clearly underlined the contrast between the mandatory minimum provisions of the *ESA* which cannot be waived, the more generous implied terms under the common law and placed the proposed terms of employment offered to Ms. Rahmen in this context.

[15] In the context of this case and the contract between these parties, the clearly expressed priority of the offer letter relative to the Officer's Agreement and the twice repeated express affirmation of the mandatory requirement to pay the *ESA* minimum amounts on termination at all events is a complete answer to all but the first of the five objections raised by the plaintiff to the enforceability of the written employment agreement in this case. Even if hypothetical circumstances might be posited where the Officer's 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.

[16] The plaintiff's position is that the language governing termination of employment for cause violates the *ESA* by reason of the potential to interpret such provision so as to permit termination without notice in situations where the *ESA* would not authorize it. The relevant provision of the offer letter reads 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.

[17] As noted, Ms. Rahman sought independent legal advice regarding the terms of the offer of employment made to her. While there is dispute as to whether Ms. Rahman waived privilege with respect to the advice obtained, there is no such dispute with regard to the February 8, 2016 letter her lawyer wrote raising particular issues regarding the termination language of the proposed employment agreement. This letter was forwarded Ms. Rahman to Cannon Design as part of the pre-employment negotiations and resulted in material improvements to the proposed terms of employment as regards severance within the first five years.

[18] Among other things, the lawyer's letter contained a summary of the termination entitlements under the *ESA* and a caution that the *ESA* provisions represent a statutory minimum that the parties can neither contract out of nor waive. The lawyer's letter raised no concerns regarding the just cause termination language contained in the offer letter.

[19] There 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. It is clear that Ms, Rahman sought and received legal advice about her rights at common law and under

the *ESA* in relation to the possible future termination of her employment. It is clear that she knew or ought to have known of the binding nature of the minimum standards in the *ESA* which cannot be reduced or waived by contract and that she understood that the common law standards in relation to termination of employment are potentially much more generous than both the *ESA* minimum standards and the termination benefits proposed in the offer letter. She was being hired into a reasonably senior role at a significant salary and was a woman of experience and sophistication. Her situation on reviewing and signing the employment agreement was poles apart from the situation that more commonly obtains in circumstances described by the Court of Appeal in *Wood v. Fred Deeley Imports Ltd*., 2017 ONCA 158 at para. 28.

[20] Perfection is certainly not the standard required of legal advice in this context. Given the privilege objections raised by the plaintiff on her examination, I cannot infer that the information she had when negotiating and ultimately signing her employment agreement was anything less than complete and thorough. While the plaintiff took objection to a generalization in the letter regarding common law notice periods, the letter correctly qualified that generalization as a rule of thumb only and described the broader context-driven approach of the common law. In these circumstances, it was reasonable for her employer to infer that she had access to and received competent legal advice regarding the contract she was being asked to consider and sign including the nature of her statutory and common law rights in the absence of such contract and the impact of the proposed contract on those statutory and common law rights.

[21] As originally drafted, the Officer’s Agreement provided for one month’s working notice with an enhanced notice period applying only after five years of employment and subject to certain conditions including the provision of a release. The lawyer’s letter noted that the enhanced benefit only applied after five years, was ambiguous as to whether working notice was intended in that case and contained ambiguous restrictions regarding applying for reemployment elsewhere. Alternative language was suggested to deal with these concerns, proposing notice of one month per year of service in exchange for a full release in the event of termination by the company for any reason at any time and clarifying the reemployment restrictions.

[22] While not accepting Ms. Rahman’s proposed changes, Cannon Design did amend the offer letter to include an enhanced benefit of two months’ notice in the event of termination by the company within the first five years conditional upon receipt of a release. The changes were not all that Ms. Rahman requested, but they did represent a material improvement to the terms of the initial offer and, potentially, a benefit significantly beyond the minimum notice provisions of the *ESA*.

[23] Upon receipt of the revised proposed language, Ms. Rahman thanked Cannon Design for the changes and attended the office the following day to execute the required documents (February 11, 2016).

[24] The plaintiff urges me to conclude that the termination provision of this employment agreement is entirely unenforceable because the “just cause” termination provision would

allegedly permit termination without notice in circumstances broader than those contemplated by the *ESA*: *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391 (CanLII). The plaintiff also noted that the same phrase "conduct that constitutes just cause for summary dismissal" contained in this employment agreement was also considered in *Ojo v Crystal Claire Cosmetics Inc*., 2021 ONSC 1428 (CanLII) and declared to be an invalid attempt to contract out of the *ESA* in that case.

[25] I cannot agree that *Ojo* represents a conclusive and binding determination that the general phrase "conduct that constitutes just cause for summary dismissal" must in every contract and in every context be construed as authorizing dismissal in circumstances that would contravene the *ESA* and the regulations thereunder.

[26] There is no basis to apply a strict or even adverse construction approach to the termination provisions of this employment contract in the context of this case where:

a. the termination provisions were the object of specific negotiation with the benefit of time and independent legal advice between reasonably sophisticated parties with neither compulsion nor marked disparity in bargaining power;

b. the negotiations resulted in material improvements for the benefit of the prospective employee in excess of *ESA* minima; and

c. the offer letter contains an explicit "for greater certainty clause" recognizing that the employer's "maximum liability … for common law notice, termination pay, benefits continuation, severance pay, or payment in lieu of notice" shall be limited to the greater of the notice required in the Officer's Agreement or the minimum amounts specified in the *ESA*.

[27] The *mutual* intent to comply with the minimum standards of the *ESA* is clear in this case. As Iacobucci J. observed in *Machtinger v. HOJ Industries Ltd*., 1992 CanLII 102 (SCC), [1992] 1 SCR 986 (at para. 35):

> [a]bsent considerations of unconscionability, an employer can readily make contracts with his or her employees which referentially incorporate the minimum notice periods set out in the Act or otherwise take into account later changes to the Act or to the employees' notice entitlement under the Act. Such contractual notice provisions would be sufficient to displace the presumption that the contract is terminable without cause only on reasonable notice.

[28] The twice-repeated language of this contract quite explicitly follows the standard suggested by *Machtinger* and referentially incorporates the *ESA* minimum standards. It is not necessary to enumerate them exhaustively in the contract, particularly when they are subject to periodic change. Every contract – including this one – must be interpreted with a view to giving expression to the *mutual* intention of the parties as expressed in the words used by them. That intent is inferred from an examination of the surrounding

circumstances. Conclusions reached in another case – particularly one such as *Ojo* post-dating this contract – are of limited assistance in construing the intention of these parties to this agreement in this context.

[29] There is no basis in this case 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. There is no evidence of any policy or practice of Cannon Design authorizing summary dismissal of employees for cause in circumstances beyond the limited circumstances enumerated in the *ESA* and its regulations. The *Oosterbosch v. FAG Aerospace Inc.*, 2011 ONSC 1538 (CanLII) case relied upon in *Ojo* made no generalized findings regarding "just cause for summary dismissal". *Oosterbosch* considered a *specific* set of written employment policies that clearly *did* authorize dismissal in circumstances beyond the "wilful" standard required by the *ESA*.

[30] There is no basis for me to infer in this contract an intention to characterize non-wilful misconduct as amounting to "just cause for summary dismissal" and I cannot in fairness do so. If none of the parties to the contract at its inception – having turned their minds to the very subject of *ESA* minimum standards applicable on termination and their priority – took objection to the general "just cause for summary dismissal" language used it would be entirely illogical to infer nevertheless an intent to contract out of well-known and long-standing minimum standards in the jurisdiction in which they were operating. The language employed in no way requires such an illogical interpretation and there is no evidence of an existing non-conforming policy.

[31] The offer letter, properly and fairly construed in its true context, does not violate the minimum standards of the *ESA* in the case of "just cause for summary dismissal". The *ESA* mandates no such result nor does a fair and reasonable construction of the agreement.

[32] There is a second reason why the termination provisions must be upheld. Section 5(1) of the *ESA* provides that any attempt to contract out of or waive an employment standard is void. However, this provision is made "subject to subsection (2)" which provides as follows:

> 5(2) If one or more provisions in an employment contract or in another Act that directly relate to the same subject matter as an employment standard provide a greater benefit to an employee than the employment standard, the provision or provisions in the contract or Act apply and the employment standard does not apply.

[33] The employment contract in this case provides a benefit clearly in excess of the relevant employment standard. In the event of termination without cause within the first five years, the employee is entitled to a second month of pay. The entitlement is not unconditional – the employee must agree to provide a release among other things. There

is no question of compulsion – the employee may elect to receive the second month or (as happened here) may decline to provide the required release defaulting to the *ESA* minimum amounts.

[34] Although optional, this is a benefit the employee is entitled to receive if the employee agrees to comply with the applicable conditions and it is a benefit significantly in excess of the *ESA* minimum standard applicable to an employee let go with less than five years' service. The employer has no discretion.

[35] The defendants fairly point out that the construction of the law contended for by the plaintiff here, if carried to its logical conclusion, could result in employers seeking to deprive employees of bargained-for severance benefits that exceed the common law standard.

[36] If the contractual termination provisions are void, they must be void for all purposes and not merely at the election of one side or the other. Is a CEO with a rich and closely-negotiated severance package to be deprived of it because the employer can point to an alleged ambiguity in the "just cause" termination clause after the fact?

[37] Uncertainty in the application of the law to fairly negotiated employment agreements will only have the unintended consequence of causing employers to forego efforts to offer severance benefits beyond the *ESA* minima for fear that *any* steps beyond the limited bounds of the *ESA* will carry an unacceptable level of risk of being found invalid with the resulting potential for common law liability far in excess of what either side expected at the time the contract was agreed to. Doubtless this is already occurring to some degree. Over time, there are no winners in such a world.

[38] I find that the termination provisions of the offer letter are valid and therefore govern the termination of the employment of Ms. Rahman.

[39] I am not aware that there is any dispute between the parties regarding the calculation of the amounts due to Ms. Rahman under her employment agreement if same were found to be valid and binding (as I have found it to be) and that this finding is dispositive of the proceeding. If there are issues in the calculation of those entitlements, the parties may approach me through my assistant within thirty days of the release of these reasons with a short written summary (from each) of the areas where they have been unable to agree and I will either rule on the disputed amounts based upon the written record and those submissions or I will advise the parties if I require oral submissions or further clarification.

(b) <u>Having regard to my findings in the answering the previous four issues, are there any genuine issues raised for trial?</u>

[40] On the facts of this case, my finding in relation to the enforceability of the termination provisions of the offer letter is sufficient to dispose of this action. There is no dispute regarding the entitlement of the plaintiff in that event and I have found no genuine issue for trial on that issue. The plaintiff strenuously urged upon me that I should be well-

placed to dispose of all of the issues in this case based upon the record before me and I have found that I am able to do so as regards the question of the validity of the termination provisions of the employment agreement.

[41] This case raised several other issues none of which I have been required to address. These include issues regarding the true character of the plaintiff's employment, whether and for how long the plaintiff knew that her employer was in the process of finding her replacement, whether she agreed to step aside when her replacement was found and whether the plaintiff has mitigated her damages reasonably.

[42] While I have concluded that summary judgment can appropriately tackle the construction of the employment contract and its termination provisions, the same conclusion most emphatically does not apply to the evidence in relation to the other matters raised. I wish to be clear that the evidence in those other areas was voluminous, frequently conflicting and the issues raised are fundamentally inappropriate for disposition by way of summary judgment. The resources of our court are stretched to their limits as it is and cannot accommodate this type of "motion in a box" litigation where multi-day trials are sought to be compressed into two or three hours of oral presentation along with an open-ended invitation to browse through thousands of pages of emails, contracts, transcripts etc. without the benefit of a trial narrative or an interactive review in open court. This task is all the more unmanageable in a digital world where what used to fill boxes of documents can be uploaded with a few mouse clicks and very frequently arrives shorn of any impediments like a working index or useable hyperlinks that enables a given document to be located within 200 pages of its location in an unsorted pile.

Disposition

[43] For the foregoing reasons, I find as follows:

a. The action is dismissed as against the second and third defendants.

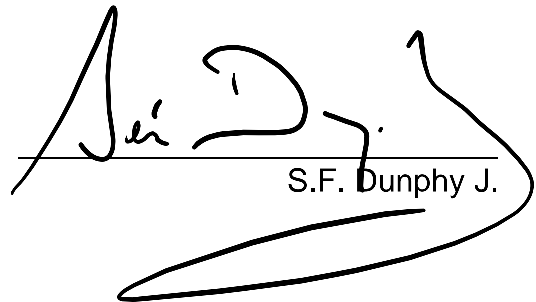
b. The termination provisions of the employment agreement between the plaintiff and Cannon Design entered into on February 11, 2016 do not contravene the *ESA* and thus are both valid and govern the termination of the employment of Ms Rahman on April 30, 2020.

c. If there are any subsisting disputes between the parties as to whether Ms. Rahman has received her full entitlements under that contract and/or under the *ESA* having regard to these reasons, I am directing the parties to discuss these matters over the next thirty days. If they have not managed to resolve their disagreements, they shall each provide me with a short written argument summarizing their position on each such amount in dispute with reference to the written record before me. I shall either resolve the dispute based upon the written record and such argument or I shall advise the parties whether I require a further attendance before me to resolve the matter.

d. Subject to the resolution of the accounting questions referenced in (c) above, the plaintiff's action is also dismissed.

[44] I directed the parties to ensure that their outlines of costs were exchanged immediately after the close of oral argument on this motion. I generally make such orders as I find that it is always most helpful to the process for both parties to focus on what their reasonable expectations as regards costs may be *before* they have much idea which way their case is likely to go. I have given the parties a period of thirty days to resolve any accounting issues that may need resolution regarding the precise amounts paid or payable to Ms. Rahman having regard to my finding concerning the validity of the written employment agreement. I am extending that same ruling to the question of costs. The parties are to resolve costs or exchange their written positions on the matter between themselves such that I am in a position to receive the written submissions of BOTH sides after the end of that thirty day period. Both counsel are sufficiently experienced to work out a common-sense schedule for getting there without my help. What I am expecting to receive after thirty days is either (a) nothing – in which case I will assume the parties have resolved all that they need to resolve without further input from me, whether or not an appeal is intended; or (b) a set of written arguments from both sides on the issue of costs and on any accounting issues not resolved.

[45] If the parties agree that they need more time to put those submissions together or to resolve the issues, I do not need to be consulted beyond a short note to my assistant indicating whatever deadline the parties have agreed to. I do not expect any such consent extensions to be very lengthy, however. If a hard deadline of January 1, 2022 cannot be met, I expect to be consulted.



S.F. Dunphy J.

Date: September 15, 2021

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Defendants

REASONS FOR JUDGMENT

S.F. Dunphy J.

Released: September 15, 2021