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TERMINATION CLAUSE FOUND TO BE VOID AND UNENFORCEABLE BY THE COURT OF APPEAL

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A. INTRODUCTION

On December 17, 2019, the Court of Appeal for Ontario (the "Court") released its decision in *Rossman v Canadian Solar Inc* ("*Rossman*"),[1] holding that the motions judge did not err in finding the termination clause in an employment agreement (the "Termination Clause") to be void and unenforceable.[2] In this case, the Court reiterated several important employment law principles, which included highlighting the importance of the need of certainty for employees to know when their employers may terminate an employment relationship, and also giving reasons for the distinction made by the courts in interpreting employment contracts as being different from other commercial agreements. In finding the Termination Clause to be void and unenforceable, the Court agreed with the motions judge that (i) on its face, the Termination Clause showed an intention to contract out of the notice provisions of the *Employment Standards Act, 2000* ("*ESA*");[3] and (ii) the Termination Clause was clearly ambiguous, despite the presence of a saving provision. This *Bulletin* provides a review of the principles outlined by the Court, and its reasoning in *Rossman*, which will have relevancy to charities and not-for-profits ("NFPs").

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[1] 2019 ONCA 992 (CanLII), <http://canlii.ca/t/j45fl> [*Rossman*].
[2] For the motions judge's decision, see *Rossman v Canadian Solar Inc*, 2018 ONSC 7172 (CanLII), <http://canlii.ca/t/hwm5b>.
[3] SO 2000, c 41.

B. BACKGROUND

The appellant, Canadian Solar Inc. and Canadian Solar Solutions Inc. (collectively, "Canadian Solar") hired the respondent, Noah Rossman ("Rossman"), as its Regional Sales Manager in May 2010, later transferring him to a project management role in August 2012. Each of these positions involved the parties entering into two separate employment agreements. However, each of these agreements contained the same Termination Clause, an excerpt of which is as follows:

> **9. Termination of Employment**
>
> 9.01 The parties understand and agree that employment pursuant to this agreement may be terminated in the following manner in the specified circumstances:
>
> ...
>
> (c) by the Employer, after the probation period, in its absolute discretion and for any reason on giving the Employee written notice for a period which is the greater of:
>
> (i) 2 weeks, or
>
> (ii) In accordance with the provisions of the *Employment Standards Act (Ontario)* or other applicable legislation, or on paying to the Employee the equivalent termination pay in lieu of such period of notice. The payments contemplated in this paragraph include all entitlement to either notice of pay in lieu of notice and severance pay under the *Employment Standards Act Ontario*. In the event the minimum statutory requirements as at the date of termination provide for any greater right or benefit than that provided in this agreement, such statutory requirements will replace the notice or payments in lieu of notice contemplated under this agreement [the "Saving Provision"]. . . **Benefits shall cease 4 weeks from the written notice** [the "Benefits Clause"].[4]

In February 2014, Rossman was terminated without cause and commenced an action against Canadian Solar, seeking damages for wrongful dismissal and payment of commissions owed. The parties brought competing motions for summary judgment, and of relevance to this appeal was the issue of the enforcement of the Termination Clause, which was raised by Canadian Solar and was also at play on Rossman's cross-motion for summary judgment. On this issue, the motions judge granted partial judgment in Rossman's favor and "found the Termination Clause to be void and unenforceable for the following reasons:

[4] *Rossman*, *supra* note 1 at para 5 [underlined emphasis in original; bolded emphasis added].

> This final sentence ["Benefits shall cease 4 weeks from the written notice"] is clearly either ambiguous as it flies in the face of the rest of the provision or it is an attempt to contract out of the minimum standards under the *ESA* by limiting benefits to four weeks regardless of the term of employment."[5]

The motions judge also determined that Rossman was entitled to five months of reasonable termination notice by applying common law principles. This case arose from Canadian Solar's appeal of the motions judge's granting of partial judgment in Rossman's favor, and the only issue on appeal was whether the motions judge erred in finding the Termination Clause to be void and unenforceable.

C. ANALYSIS

The Court found that the motions judge did not err in finding the Termination Clause to be void and unenforceable. The Court held that the "Termination Clause was void at the outset, which alone suffices to dispose of the appeal. Even if that were not the case, the Termination Clause contains genuine ambiguity, and is therefore void and unenforceable."[6]

In doing so, the Court started its analysis by reiterating some fundamental employment law principles, which can be summarized as follows:[7]

Employees need to know with certainty when their employment may be terminated;

1. There is a longstanding presumption at common law that an employer cannot terminate an employment without reasonable notice;

2. The above-stated presumption may be rebutted if the employment agreement clearly, whether impliedly or expressly, specifies another notice period;

3. However, in Ontario, while parties are free to contract to any notice period, they may only do so as long as they meet the minimum employment standards set out in the *ESA*;

[5] *Ibid* at para 11.
[6] *Ibid* at para 15.
[7] See *ibid* at paras 16-24.

4. If the contractual notice period does not meet the minimum standards set out in the *ESA*, the presumption is not rebutted and the employee is entitled to reasonable notice, or pay in lieu of notice under common law;

5. Employers are obligated to follow these minimum standards and not contract out of them, unless a contractual provision provides a greater benefit to the employee;

6. In situations of conflicts between the minimum *ESA* standards and a contractual provision within a termination clause, it is not open to courts to strike out the offending provision, and the entire termination clause is considered void and unenforceable;

7. It is well-established that courts interpret employment and commercial agreements differently because (i) work is the most fundamental aspect of the human condition, and (ii) employees are most vulnerable when terminated, and most in need of protection. Both of these reasons enunciate the importance of enforceability and interpretation of a termination clause;

8. In cases of ambiguity, additional principles apply, such as requiring a court to undertake an objective analysis to determine whether two reasonable interpretations of a termination clause exist to show there is genuine ambiguity present and the *contra proferentem* rule would apply, allowing the court to adopt an interpretation in the employee's favor (not applicable for competing interpretations).

Next, the Court provided its reasoning for why the Termination Clause in this case was void and unenforceable, as follows: (i) employer's intention to contract out of the *ESA*; (ii) ambiguity of the Termination Clause; and (iii) policy rationale.

First, in agreeing with the motions judge, the Court found that on its face, the Termination Clause, and in particular the Benefits Clause, "flies in the face of the *ESA*" and its notice provisions.[8] Because the employment agreement was for an indefinite period, s. 57(h) of the *ESA* requires that employees be "entitled to a notice period of eight weeks for employment of eight years or more, to determine its validity

[8] *Ibid* at para 26.

and enforceability."[9] Despite the Benefits Clause providing beyond the ESA requirements for terminations within the first three years of employment, the Court reasoned that the impugned provision could not be saved with the "benefit of hindsight [as] the Termination Clause 'must be read as a whole and in the context of the circumstances as they existed when the agreement was created'."[10]

Second, the Court found the Termination Clause to be ambiguous, and the Saving Provision was not sufficient to erase the ambiguity because of the presence of the Benefits Clause. The Court found that the Saving Provision could not "reconcile a conclusory provision that is in direct conflict with the *ESA* from the outset"[11] because the Benefits Clause was neither future facing, nor expressing an intention to conform to the *ESA*. Additionally, the Court also found that the Benefits Clause was ambiguous and, thus, void and of no effect, because when Rossman signed the 2012 employment agreement, "he could not have known with certainty whether the minimum statutory requirements would apply to the four-week benefits period, especially if he were terminated after four (or more) years of employment."[12] However, it is a longstanding employment law principle that at the beginning of their employment, employees know what their entitlements would be when their employment ends.

Third, the Court provided policy rationale in coming to its decision. In doing so, the Court stated the importance of employees to know their employment conditions with certainty, especially entitlements related to termination, which is a time of great stress and uncertainty. Further, the Court reasoned that saving provisions cannot save employers that attempt to contract out of the minimum standards set out in the *ESA*, especially given the unequal bargaining power that already exists in employment relationships that may further be exploited, and serve to disregard the *ESA*'s purpose, which is "to protect employees and to ensure that employers treat them fairly upon termination."[13]

[9] *Ibid* at para 19.
[10] *Ibid* at para 28 [emphasis in original], citing *Dumbrell v Regional Group of Companies Inc*, 2007 ONCA 59 at para 53.
[11] *Ibid* at para 35.
[12] *Ibid* at para 38.
[13] *Ibid* at para 40.

D. CONCLUSION

This case serves as an important reminder for employers, including charities and NFPs, that while the *ESA* allows for some flexibility in contracting for different notice periods on termination of employees, the minimum standards set out in the *ESA* must be met. Further, termination clauses may not contain any ambiguities or run contrary to the purpose of the *ESA*, which seeks to ensure the protection of employees, especially upon termination. Employment contracts, and particularly termination clauses, must be carefully drafted so as to be enforceable.

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