COURT OF APPEAL FOR ONTARIO

CITATION: Rahman v. Cannon Design Architecture Inc., 2022 ONCA 451
DATE: 20220608
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Gillese, Trotter and Harvison Young JJ.A.

BETWEEN

Farah Rahman

Plaintiff (Appellant)

and

Cannon Design Architecture Inc., Cannon Design Ltd. and
The Cannon Corporation

Defendants (Respondents)

Stephen Moreau and Kaley Duff, for the appellant

David A. Whitten, Simone Ostrowski and Nadia Halum, for the respondents

Heard: May 27, 2022

On appeal from the order of Justice Sean F. Dunphy of the Superior Court of Justice, dated November 18, 2021, with reasons reported at 2021 ONSC 5961, 2022 C.L.L.C. 210-007.

Gillese J.A.:

OVERVIEW

[1] Farah Rahman was employed by CannonDesign as a Senior Architect, Principal and Office Practice Leader for over four years. She was given four weeks of base salary when her employment was terminated, without notice or cause.

[2] Ms. Rahman sued Cannon Design Architecture Inc. ("**CDAI**"), Cannon Design Ltd., and The Cannon Corporation (the "**Respondents**"), claiming damages for wrongful dismissal (the "**Action**"). She then moved for summary judgment (the "**Motion**"), asking the court to declare that: (1) the termination provisions in her employment contracts were void because they conflicted with the *Employment Standards Act, 2000*, S.O. 2000, c. 41, (the "***ESA***"); and (2) the Respondents were her common employers.

[3] The motion judge interpreted the termination provisions as complying with the *ESA* and concluded that they governed Ms. Rahman's termination. The motion judge also concluded that Ms. Rahman had been employed by CDAI alone and dismissed the Action as against Cannon Design Ltd. and The Cannon Corporation.

[4] By order dated November 18, 2021 (the "**Order**"), the motion judge dismissed the Action and ordered Ms. Rahman to pay the Respondents costs of $80,000.

[5] Ms. Rahman appeals.

[6] I would allow the appeal. The plain wording of the contractual termination provisions runs afoul of the *ESA*. Accordingly, the provisions are void and cannot govern the termination of Ms. Rahman's employment. Further, in my view, the motion judge made palpable and overriding factual errors in concluding that Ms. Rahman had been employed by CDAI alone. The evidence is clear that the

Respondents were Ms. Rahman's common employers. As such, they are jointly and severally liable for any damages payable to Ms. Rahman.

BACKGROUND

[7] CDAI is incorporated in Canada. Cannon Design Ltd. is a corporation registered in Toronto, where its principal offices are located. The Cannon Corporation is a corporation registered in Delaware, with its principal offices in Buffalo. CDAI is a subsidiary of The Cannon Corporation. CannonDesign is the term that the Respondents use for the corporate group.

[8] There was a high level of integration among the Respondents. They all used the logo "CANNONDESIGN". That logo appeared on both public-facing documents, including CannonDesign's website, and internally. The Respondents operated on CannonDesign's "Single Firm Multiple Offices" business strategy. That strategy required all of CannonDesign's many offices, including the Toronto office, to be interdependent and work in conjunction with one another.

[9] After being asked to participate in a meeting with Robin Cibrano, an Executive Director employed by the US parent company, The Cannon Corporation, Ms. Rahman was invited to join CannonDesign. She began work on February 16, 2016, at CannonDesign's Toronto office.

[10] Before joining CannonDesign, Ms. Rahman signed two employment contracts (the "**Employment Contracts**"). The first was an offer letter printed on "CANNONDESIGN" letterhead, dated "February 3, 2016, Revised February 9,

2016" (the "**Offer Letter**") and signed by Mr. Cibrano, as Executive Director, Firm Development Leader. In the Offer Letter, she was asked to join CannonDesign, "a legal entity of [CDAI], as a Principal". The second was an agreement between The Cannon Corporation and Ms. Rahman, which was signed by the parties on February 11, 2016 (the "**Officer Agreement**"). The Officer Agreement is entitled "THE CANNON CORPORATION SENIOR VICE PRESIDENT AND PRINCIPAL OFFICER AGREEMENT".

[11] The Offer Letter refers to the Officer Agreement, stating that the latter "also forms the basis for your employment". It provides that in the event of conflict between it and the Officer Agreement, the Offer Letter will govern.

[12] As a condition of employment, Ms. Rahman was required to own 10,000 shares in The Cannon Corporation.

[13] The Offer Letter provides that, in the absence of just cause, CannonDesign's maximum liability "shall be limited to the greater of the notice required in your Officer's Agreement or the minimum amounts specified in the *ESA"*.

[14] There are two "just cause" provisions in the Employment Contracts, one in the Offer Letter and the other in the Officer Agreement. The Offer Letter provision states that no notice will be given if there is just cause to terminate. It 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.

[15] The just cause provision in the Officer Agreement states that "if the Employee is terminated for cause, Paragraph 3(a) applies". Paragraph 3(a) provides that Ms. Rahman would receive one month's notice.

[16] While the two provisions conflict, because of the stipulation in the Offer Letter that in such a situation, its terms prevail, it is the just cause provision in the Offer Letter that governs.

[17] When her employment was terminated, Ms. Rahman was CannonDesign's most senior Canadian employee. She had overall responsibility for ensuring the smooth operation of the Canadian operations, including leading the business planning and strategy for the Canadian operation.

[18] By letter dated April 30, 2020, CannonDesign terminated Ms. Rahman's employment without notice and without cause (the "**Termination Letter**"). The Termination Letter stated that, "[a]s outlined in [the Officer Agreement], you … will receive four (4) weeks of termination pay". Ms. Rahman did receive the four weeks of pay.

[19] Ms. Rahman brought the Action, claiming she was entitled to a longer period of reasonable notice prior to termination and damages for CannonDesign's failure to provide such notice.

[20] Before the Motion was heard, the parties exchanged extensive motion records and conducted cross-examinations. The bulk of the evidence dealt with the nature of Ms. Rahman's role, the pay she received, and her extensive but fruitless mitigation efforts over many months. The Respondents adduced substantial evidence showing they jointly employed Ms. Rahman. Despite denying that Ms. Rahman had an employment relationship with The Cannon Corporation and Cannon Design Ltd. in their Statement of Defence, the Respondents took no issue with being treated as common employers in their factum on the Motion.

[21] The motion judge interpreted the termination provisions in the Employment Contracts as requiring payment of the *ESA* minimum amounts and, accordingly, found them to be valid. He rejected the submission that the termination for cause provisions violate the ESA because: Ms. Rahman had independent legal advice about the offer of employment, and her rights at common law and under the *ESA* in relation to the 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 standards.

[22] The motion judge also concluded that CDAI alone had employed Ms. Rahman and so dismissed the Action as against Cannon Design Ltd. and The Cannon Corporation. The entirety of the motion judge's analysis of the common employer issue is found at paras. 6 and 7 of his reasons. He said that CDAI was her employer because CDAI was "the entity that offered her employment and the

one that paid her". He added that the fact CDAI was a subsidiary within a business grouping did not justify a joint employer finding.

THE ISSUES

[23] Ms. Rahman raises two issues on appeal. Did the motion judge err in concluding that (1) the termination provisions of the Employment Contracts govern the termination of her employment and (2) the Respondents were not her common employers?

(1) THE EMPLOYMENT CONTRACTS' TERMINATION PROVISIONS DO NOT GOVERN THE TERMINATION OF MS. RAHMAN'S EMPLOYMENT

[24] In my view, the motion judge erred in law when he allowed considerations of Ms. Rahman's sophistication and access to independent legal advice, coupled with the parties' subjective intention to not contravene the *ESA*, to override the plain language in the termination provisions in the Employment Contracts. By allowing subjective considerations to distort and override the wording of those provisions, the motion judge committed an extricable error of law reviewable on a correctness standard: *Amberber v. IBM Canada Ltd.,* 2018 ONCA 571, 424 D.L.R. (4th) 169, at para. 65. It is the wording of a termination provision which determines whether it contravenes the *ESA* – even compliance with *ESA* obligations on termination does not have the effect of saving a termination provision that violates the *ESA*: *Wood v. Fred Deeley Imports Ltd*., 2017 ONCA 158, 134 O.R. (3d) 481, at paras. 43-44.

[25] As explained above, the Offer Letter and the Officer Agreement contain conflicting provisions regarding termination for just cause. However, the Offer Letter stipulates that, in the event of a conflict with the Officer Agreement, its provisions govern. Therefore, the operative just cause provision is the one in the Offer Letter (the "**Operative Just Cause Provision**").

[26] The Operative Just Cause Provision states that no notice or payment will be given if there is just cause to terminate. For ease of reference, I set out that clause again:

> 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.

[27] However, *ESA* notice and termination pay must be given for all terminations, even those for just cause, except for "prescribed employees": *ESA*, s. 55. The disentitlement provision is found in the *ESA* regulation *Termination and Severance of Employment*, O. Reg. 288/01. Section 2(1) of the regulation provides:

> **2.** (1) The following employees are prescribed for the purposes of section 55 of the Act as employees who are not entitled to notice of termination or termination pay under Part XV of the Act:
>
> …
>
> 3. An employee who has been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer.

[28] The wilful misconduct standard requires evidence that the employee was "being bad on purpose": *Render v. ThyssenKrupp Elevator (Canada) Limited*, 2022

ONCA 310, at para. 79, citing *Plester v. Polyone Canada Inc.*, 2011 ONSC 6068, 2012 C.L.L.C. 210-022, aff'd 2013 ONCA 47, 2013 C.L.L.C. 210-015. For example, in *Oosterbosch v. FAG Aerospace Inc.*, 2011 ONSC 1538, 2011 C.L.L.C. 210-019, the court awarded damages for *ESA* notice and severance after holding that the employer had just cause to terminate the employee for persistent carelessness that did not meet the wilful misconduct standard.

[29] There is nothing in the Operative Just Cause Provision that limits its scope to just cause terminations for wilful misconduct. On its plain wording, the Operative Just Cause Provision gives CannonDesign the right to terminate Ms. Rahman's employment without notice or payment, for conduct that constitutes just cause alone. That means the Operative Just Clause Provision contravenes the *ESA* and s. 5 renders it void. Section 5 provides that no employer shall contract out of an employment standard and any such contracting out is void.

[30] This court has repeatedly held that if a termination provision in an employment contract violates the *ESA* – such as a "no notice if just cause" provision – all the termination provisions in the contract are invalid. See, for example, *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391, 446 D.L.R. (4th) 725, at para. 10, leave to appeal refused, [2020] S.C.C.A. No. 292; *Rossman v. Canadian Solar Inc.*, 2019 ONCA 992, 444 D.L.R. (4th) 131, at para. 18. In *Waksdale*, as in the present appeal, the employer had not purported to terminate the employee for just cause. However, the just cause provision in the employment

contract violated the *ESA*. The invalidity of the just cause provision rendered the other termination provisions unenforceable: *Waksdale*, at para. 10.

[31] Accordingly, the termination provisions in the Employment Contracts are void and cannot be relied upon by the Respondents.

(2) THE RESPONDENTS ARE COMMON EMPLOYERS

[32] It will be recalled that, based on two findings of fact, the motion judge concluded that CDAI alone was Ms. Rahman's employer. The first factual finding was that only CDAI offered Ms. Rahman employment. The second was that only CDAI paid her. Both are palpable and overriding errors of fact. Accordingly, the motion judge's conclusion that CDAI alone was Ms. Rahman's employer must be set aside.

[33] CDAI alone did not offer Ms. Rahman employment. Her written offer of employment, as I have explained, was contained in the Employment Contracts that Ms. Rahman signed: the Offer Letter and the Officer Agreement. While arguably the Offer Letter refers to CDAI as the employer, The Cannon Corporation – not the CDAI – is clearly the employer in the Officer Agreement.

[34] The Offer Letter is on CANNONDESIGN letterhead. It begins by confirming its verbal offer of employment "to join CannonDesign, a legal entity of [CDAI]". The Offer Letter expressly refers to the Officer Agreement, stating that the latter "also forms the basis for your [Ms. Rahman's] employment". It stipulates that, in the event of a conflict between its terms and the Officer Agreement, the former

prevails. The Offer Letter was signed on behalf of the employer by Mr. Cibrano, an executive with The Cannon Corporation, in his role as “Executive Director” and “Firm Development Leader”.

[35] The Officer Agreement is entitled “THE CANNON CORPORATION SENIOR VICE PRESIDENT AND PRINCIPAL OFFICER AGREEMENT”. The first line reads: “AGREEMENT between The Cannon Corporation and its subsidiary companies including [CDAI] (the “Company”) and (“Employee”) (Farah Rahman)”. The Cannon Corporation is the employer party to the Officer Agreement. As a condition of employment, Ms. Rahman was required to own shares with The Cannon Corporation – a matter governed by both the Offer Letter and the Officer Agreement.

[36] Mr. Cibrano authorized a human resources employee with The Cannon Corporation to send both the Offer Letter and the Officer Agreement to Ms. Rahman. In short, both the Offer Letter and the Officer Agreement were presented to Ms. Rahman, and executed by, representatives of The Cannon Corporation.

[37] On the basis of the Officer Agreement alone, the motion judge’s factual finding that only CDAI offered Ms. Rahman employment is a palpable and overriding error. The Officer Agreement was made between The Cannon Corporation (and its subsidiary, CDAI) and Ms. Rahman.

[38] The motion judge's finding that CDAI alone paid Ms. Rahman is also tainted by palpable and overriding error. The undisputed evidence is that The Cannon Corporation played a significant role in establishing Ms. Rahman's compensation and administering payment thereof.

[39] The Respondents' affiant, Angela DeFazio, was the Benefits and Compensation Senior Associate at The Cannon Corporation. Ms. DeFazio affirmed that she managed and administered the compensation and benefit programs for employees, including Ms. Rahman. Ms. Rahman's compensation was based, in part, on the performance of her US counterparts with The Cannon Corporation because her bonus was calculated based on CannonDesign's performance as a whole, and not solely on CDAI's performance. Further, a significant part of Ms. Rahman's annual bonus was paid by way of shares in The Cannon Corporation. And, on the pay statements themselves, no employer is listed. Instead, the "CANNONDESIGN" logo appears – without any reference to CDAI.

[40] Because I would set aside the motion judge's conclusion that CDAI alone was Ms. Rahman's employer, it falls to this court to determine whether the Respondents were her common employers. On my review of the record, it is beyond question that they were.

[41] The common employer doctrine was recently considered by this court in *O'Reilly v. ClearMRI Solutions Ltd.*, 2021 ONCA 385, 460 D.L.R. (4th) 487, leave

to appeal refused, [2021] S.C.C.A. No. 316. Zarnett J.A., writing for the court, explains, at para. 2, that the doctrine recognizes that an employee may simultaneously have more than one employer:

> If an employer is a member of an interrelated corporate group, one or more other corporations in the group may also have liability for the employment obligations. However, and importantly, they will only have liability if, on the evidence assessed objectively, there was an intention to create an employer/employee relationship between the employee and those related corporations.

[42] At para. 54 of *O'Reilly*, Zarnett J.A. states that "[t]he conduct most germane to showing an intention that there was an employment relationship with two or more members of an interrelated corporate group is conduct which reveals that effective control over the employee resided with those members".

[43] The record in this proceeding contains a body of uncontested evidence showing that, from the outset of her employment through to its end, Ms. Rahman was directed and controlled by senior managers employed by The Cannon Corporation, and that the Respondents were sufficiently intertwined and exerted sufficient control over Ms. Rahman that they must be considered common employers.

[44] In addition to the evidence recounted above on the Employment Contracts and how Ms. Rahman was paid, among other things, the following show that the Respondents were part of an interrelated corporate group – CannonDesign – that intended to create an employer/employee relationship with Ms. Rahman.

a. There was a high level of integration among the Respondents. CannonDesign operated using its “Single Firm Multiple Offices” business strategy, requiring that all of CannonDesign’s many offices, including the Toronto office, be interdependent and work in conjunction with one another.

b. Ms. Rahman signed at least one services agreement as “Principal, Office Practice Leader” for Cannon Design Ltd.

c. CannonDesign’s website listed all employees, including Ms. Rahman, by reference to the “CANNONDESIGN” or “CD” logo.

d. Relevant communications from the Respondents to Ms. Rahman were on CANNONDESIGN letterhead, including pay statements and correspondence.

e. The Termination Letter was on “CANNONDESIGN” letterhead. Throughout it, the Respondents are referred to as “Cannon Design” or “CannonDesign”. The first line of the Termination Letter reads as follows: “It is with regret that we confirm the difficult conversation regarding your position as a Principal of The Cannon Corporation” (emphasis added). The letter goes on to list the positions Ms. Rahman held and require that she submit formal resignation documents for them. Ms. Rahman’s positions were stated as: Director, CEO, President and Architect in Responsible Charge in the Provinces of Alberta, British Columbia, Nova

Scotia and Saskatchewan for the CannonDesign entities of Cannon Design Ltd. and CDAI.

f. Mr. Cibrano, Executive Director of The Cannon Corporation, was Ms. Rahman's direct supervisor.

g. Ms. Rahman regularly attended meetings with other The Cannon Corporation managers.

h. As explained above, Ms. Rahman's bonus was determined by The Cannon Corporation. For that determination, Ms. Rahman was placed in the same bonus pool as other employees of The Cannon Corporation. Further, when The Cannon Corporation imposed an immediate pay reduction in April 2020 on employees of CannonDesign firmwide, it included Ms. Rahman and unilaterally cut her base salary by ten percent.

[45] This brief summary of undisputed facts, considered objectively, shows that the Respondents intended to create an employer/employee relationship with Ms. Rahman. The Respondents' conduct – as members of an interrelated corporate group – demonstrated effective control over Ms. Rahman, their employee.

[46] Consequently, the Respondents are Ms. Rahman's common employers. They are, therefore, jointly and severally liable for any damages payable to her.

DISPOSITION

[47] Accordingly, I would allow the appeal and set aside the Order. I would further:

a. declare that the Respondents were Ms. Rahman's common employer;
b. declare that the termination clauses in the Employment Contracts are void;
c. remit the Action to the Superior Court to determine the remaining matters, including the quantification of damages for failure to provide reasonable notice;
d. order that costs of the Motion and the Action be determined by the Superior Court judge who decides the merits of the Action; and
e. order costs of this appeal in favour of Ms. Rahman, fixed at the agreed-on sum of $7,500, all-inclusive.

Released: June 8, 2022 GRS

G.R. Gillese J.A.

I agree. K.J. Tzimas J.A.

I agree. Harvison Young J.A.