

# Ontario Superior Court of Justice Refuses to Apply Waksdale for Negotiated Employment Agreement

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In [\*Rahman v Cannon Design Architecture Inc.\*](#), the Ontario Superior Court of Justice upheld termination provisions that appeared to be in violation of the minimum standards prescribed by the *Employment Standards Act, 2000* (ESA). This decision represents a positive development for Ontario employers.

## Background

The plaintiff, Farah Rahman, worked for Cannon Design Architecture Inc. as a “principal” earning a substantial salary. Prior to the commencement of her employment, Rahman, through her legal counsel, negotiated the terms of her employment agreement, including the termination provisions. With the help of legal counsel, Rahman negotiated “material improvements” to the terms of her severance package under her contract. These improved terms granted Rahman two months of notice for each year of employment “within the first five years,” if she signed a release for the company. Rahman did not raise any concerns with the “just cause termination language.”

After her dismissal, Rahman brought an action for wrongful dismissal. She argued that, in accordance with the Ontario Court of Appeal’s decision in [\*Waksdale v. Swegon North America Inc.\*](#), the termination provisions of the employment agreement were not enforceable because the “just cause” provision would allow for termination without notice in situations in which the ESA still required notice to terminate an employment contract. Ontario Regulation 288/01, the implementing regulatory section of the ESA’s employment termination provisions, permits termination without notice only where an 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”—a standard Rahman argued was different than “just cause” at common law.

Rahman also argued that the termination provisions failed to refer to severance pay and that its application in the future could lead to insufficient notice to comply with the ESA. In addition, Rahman argued that the provisions of the initial “Officer’s Agreement” that had been sent to her before the employment agreement was negotiated between the parties violated the ESA. The Officer’s Agreement and the employment agreement contained different termination provisions, and Rahman had not negotiated the Officer’s Agreement’s provisions.

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## The Court's Decision

The superior court ruled that the termination provisions of Rahman's employment agreement, taken as a whole, were valid. The superior court also held that even if certain provisions of the Officer's Agreement violated the ESA, Rahman received "complete and thorough" information prior to executing the employment contract, and the provisions of the negotiated employment agreement stated that they would take precedence over the Officer's Agreement in the event of a conflict.

The superior court rejected Rahman's reliance on *Waksdale* and [\*Ojo v Crystal Claire Cosmetics Inc.\*](#), which found that referring to termination without notice "for just cause" invalidated the entire termination provision including "without cause" provisions, based on the strict construction and interpretation of such clauses against the interest of employers. The superior court found "no basis to apply a strict or even adverse construction approach to the termination provisions of [the] employment contract in the context of [the] case." The context referred to by the superior court included the following:

- the sophistication of Rahman;
- the presence of "independent legal advice";
- the lack of a "disparity in bargaining power";
- negotiations that resulted in improved terms relating to dismissal for Rahman;
- the "for greater certainty clause" in the offer letter that clearly stated that the employment agreement would comply with the minimum entitlements provided in the ESA; and
- the "*mutual* intent" (emphasis in the original) of the parties to abide by the standards set in the ESA.

The superior court could not find evidence to substantiate Rahman's inference that the employer had wanted to use the "just cause" provisions to contract out of the ESA, so the superior court refused to make this inference, contrary to *Waksdale* and a subsequent decision.

Additionally, the superior court upheld the termination provisions because the employer was entitled to render the ESA provisions void by offering greater benefits to employees. To make the employer's termination provisions void, in their entirety, would result in an adverse outcome for employees. Voiding entire provisions, the court found, could lead to situations in which employees would be stripped of contractual entitlements in excess of the common law.

The superior court added that attempts to challenge negotiated termination provisions create uncertainty that, ultimately, could hurt both parties to employment agreements:

"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.

After finding that the termination provisions were valid, the superior court dismissed the action on the basis that there was “no genuine issue for trial.”

## Key Takeaways

This decision demonstrates that in the presence of comparable levels of bargaining power, and the mutual intention of the bargaining parties to create an employment agreement in compliance with the standards in the ESA, employees may not have much room to argue that terms they bargained for should be rendered void. Technical arguments based on *contra proferentem* (the contractual doctrine that states that ambiguities should be construed against the drafter) may not be successful in such situations.

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