

## Case study: Livshin v. The Clinic Network Canada

By **Frank Portman**

Law360 Canada (February 1, 2024, 10:12 AM EST) -- The Ontario Superior Court of Justice's decision in *Livshin v. The Clinic Network Canada Inc.* [Indexed as: *Livshin v. Clinic Network Canada Inc.*], 159 O.R. (3d) dealt with the dismissal of a senior employee at the height of the COVID-19 pandemic. The plaintiff, Steve Livshin, had been hired as part of a purchase of his business. As part of that process, Livshin signed a three-year contract to act as vice-president of the larger organization. Ultimately, the employer dismissed Livshin with approximately 20 months left on the term of the contract.



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Following well-settled cases like, Justice William Black found that the contract in question had a termination clause that violated the *Employment Standards Act* (ESA) in how it addressed Livshin's entitlements in the event he was dismissed with just cause. As a result, the entire employment contract was invalid. Following other decisions, such as *McGuinty v. 1845035 Ontario Inc. o/a McGuinty Funeral Home* [Indexed as: *McGuinty v. 1845035 Ontario Inc.*], 154 O.R. (3d) 451, Justice Black also held that, as a result, Livshin was entitled to be paid the value of the remaining contractual term *Waksdale v. Swegon North America Inc.*, 2020 O.J. No. 2703.



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In an effort to avoid the significant payout that would accompany such findings, the employer argued that any flaw in the contract should be mitigated by the fact that Livshin was a sophisticated executive who was represented by counsel at the time who executed the contract. In most contractual cases, the sophistication and access to counsel of a party will weigh heavily towards the enforceability of a contract. Justice Black found, however, that it had no application to an employment contract. The fact that the contract was contrary to the ESA was the end of the story,

rendering it unenforceable and rendering the employer liable to pay the full term of the contract. Justice Black ordered the employer to pay the remaining term of the contract, over \$300,000.

Shortly after the decision, the Ontario Court of Appeal confirmed the correctness of Justice Black's approach in *Rahman v. Cannon Design Architecture Inc.*, [2022] O.J. No. 2603. This put to bed the issue of whether an executive employee could be subjected to harsher contractual terms than other employees with a resounding "no." Neither employers nor executives can opt out of ESA.

### **Problems, challenges**

Most C-suite executives are sophisticated business people who have access to counsel. Nonetheless, their employment contracts are still subject to the same rules as any other employment contract. This can make a massive difference in employees' entitlements on termination.

Moreover, many employers prefer to sign their executives to fixed-term contracts, so that the position can be re-evaluated after a set period of time. While this can provide flexibility, the contract must be perfectly configured, or it can lead to significantly more liability for the employer in the event of a dismissal than without cause dismissal under an indefinite term contract.

### **Approach, solution**

Executive employment contracts usually include complex terms surrounding performance, role, compensation and other obligations. They can be among the most sophisticated contracts in law. Moreover, they must reflect the numerous pieces of legislation governing employment relationships.

What *Livshin* establishes is that an executive who signs a contract with the advice of legal counsel will not be subject to a different standard because of this fact. Employers will still be held to the high standards of contractual drafting required by the law. There is, in other words, nothing but upside to engaging an executive employment lawyer to review and negotiate employment contracts.

This is particularly true where a contract purports to expire on a particular date. Such contracts have significant nuances and must be drafted perfectly, or else entitlements on termination could be very different from what a contract states.

### **Lessons learned**

1. The engagement of a lawyer by an executive during contract negotiations will have no impact on the later interpretation of that contract for legal compliance with the ESA.
2. Given the complexity of executive employment contracts, it is always advisable to have an executive employment lawyer review any contract, even one that appears to be straightforward at first glance.
3. Particular care must be taken in drafting fixed-term employment contracts, since if not perfectly drafted, they can give rise to significant liability and disputes.

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