



Fixed Term Employees

Ontario's Top Court Confirms Employers Must Proceed with Caution When Hiring Fixed Term Employees

Boards sometimes consider fixed-term contracts to be an effective way to hire a worker on an interim basis without exposing the corporation to liability for notice, or pay in lieu. Fixed term contracts are employment agreements which terminate at a future date when a specific term expires – for example, on a predetermined date or upon the completion of a particular project or task.

However, corporations which terminate a fixed term employee prior to the expiry of the term may be liable to the worker for several months' salary in lieu of notice, even if the worker finds a job very quickly after termination. In addition, the amounts owing to the employee for notice could be substantially more than two years' of the employee's salary.

In *Howard v. Benson Corp. Inc.*, a decision released on April 21, 2016, the Ontario Court of Appeal held that a 57 year old employee on a fixed term contract who had less than 2 years' service was entitled to over 3 years' wages as a result of the termination of his employment, without any duty to attempt to find alternate employment.

The decision is not significant because the employer had to pay the worker damages reflecting the balance of the contract – this

law was already fairly well-established in Ontario. What is significant about the decision is that the fixed term contract had an early termination clause which was found by the lower court to be unenforceable, and thus, when coupled with the Court of Appeal's finding that the employee had no mitigation obligation, this created a financial obligation for the employer which appears disproportionate and far exceeds any reasonable notice period at common law.

Background

In the *Howard v. Benson* case, the plaintiff employee was hired for a five-year term. Like so many other employment agreements, the contract had a termination provision which the employer believed allowed it to terminate the contract early. This clause provided that: "Employment may be terminated at any time by the Employer and any amounts paid to the Employee shall be in accordance with the Employment Standards Act of Ontario."

Twenty-three months into the work term, with just over three years remaining under the contract, Mr. Howard was terminated without cause. The employer offered him the minimum amount of pay in lieu of notice under the Employment Standards Act, 2000 (the "ESA"), being two weeks' pay. Rather than accepting the two weeks'

pay in lieu of notice, Mr. Howard sued his employer for wrongful dismissal, seeking damages equal to the salary he would have received during the remainder of his employment contract.

The motions judge found that the termination clause was ambiguous, in that it did not indicate whether the "amounts" referred to in the clause also included benefits during the notice period. As such, the lower court ruled the termination clause was unenforceable and the employee was entitled to reasonable notice of termination at common law. However, the employee was under an obligation to attempt to seek out comparable work to mitigate his damages. The employee appealed the finding.

On appeal, the Court of Appeal ruled that the employer was liable for damages in an amount equal to the unexpired term of the employment contract, being 37 months. It also found that the employee was not subject to any duty to mitigate, as the employment agreement did not expressly require him to mitigate the damages.

The Supreme Court of Canada denied the employer leave to appeal. Thus, in the end, the employer's liability for the termination ballooned from an expected two weeks' pay under the ESA to over three years' termi-

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nation pay, not to mention the legal costs incurred in the lawsuit, which were not insignificant.

Lessons for Condo Corporations

This case is sobering for corporations with fixed term employees.

Though there is no absolute upper limit (often referred to as a 'cap') on what constitutes reasonable notice in any given case, generally only in very exceptional circumstances will an employee be entitled to notice, or pay in lieu of notice, in excess of two years. Thus, even though the employer intended to limit its liability on termination by implementing an employment agreement with an early termination clause, the fixed term contract actually created greater liability for the employer. That is, the employer would have been better off had it simply hired the employee on an indefinite basis.

When considering hiring a fixed-term employee, here are some points to keep in mind:

1. is a fixed-term contract really necessary? In some cases, it is preferable for the corporation to hire workers on an indefinite basis, with a written employment agreement containing a solid

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termination clause that limits notice of termination to the minimum under the ESA.

2. if a fixed term contract is indeed necessary, the corporation should ensure the term is as short as possible, and ideally less than 12 months. Many property managers and directors are unaware that, under Ontario regulations, where a fixed-term employment contract exceeds 12 months, or where employment ends before the end of the term, or where the term is extended more than 90 days after the original end date, the employee will be entitled to statutory notice of termination.
3. the corporation should ensure the writ-

ten employment agreement confirms the employment is for a fixed term together with confirmation that, at the end of the term, the employee will not be entitled to statutory or common law notice of termination of employment.

4. whether or not the employee is hired on a fixed term or indefinite basis, a properly-worded termination clause in the employment agreement is crucial. Any vague or uncertain language will not be upheld by the courts, and the corporation could consequently be liable for damages in an amount far greater than under the ESA or, in some cases, far greater than the common law reasonable notice period. To be enforceable, the early termination clause in fixed term contracts must be in language that is plain, clear, concise, and unequivocal.
5. the employment contract should contain an express mitigation obligation.

Condo corporations can avoid the unintended consequences of hiring fixed-term workers if they ensure their written employment contracts comply with the best practices outlined above before they hire prospective workers. To do otherwise would be risky, with significant potential liability. **CV**



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