

Fixed-term contracts and the duty to mitigate (Monterosso v. Metro Freightliner Hamilton Inc.)

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Employers often mistakenly believe that they are better protected by choosing fixed-term (temporary) employment arrangements instead of indefinite (permanent) employment arrangements.

While this may be true in very limited circumstances – i.e. to cover pregnancy/parental leaves and/or seasonal jobs where the end date of the contract is somewhat certain – in the vast majority of situations, fixed-term contracts are not advisable because the implications for employers who seek to terminate employees under fixed-term contracts can be quite severe.

Ontario's *Employment Standards Act, 2000* provides that employees employed pursuant to a fixed-term employment contract are not entitled to notice on termination (or pay in lieu thereof) unless:

1. the employment terminates before the expiry of the term or the completion of the task;
2. the term expires or the task is not yet completed more than 12 months after the employment commences; or
3. the employment continues for three months or more after the expiry of the term or the completion of the task.

In other words, an employee under a fixed-term contract is entitled to notice upon termination if:

- i. his/her employment is terminated before the end of the term as outlined in their contract;
- ii. their fixed-term employment contract is for a period of more than 12 months; or
- iii. their employment continues for three months or more after their fixed-term contract expires.

The implications of the above for employers are widespread in light of the 2020 decision of the Court of Appeal for Ontario in *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391 (CanLII) in which the court determined that an unenforceable “for cause” termination provision in an employment agreement rendered all of the termination provisions unenforceable (including the “without cause” provision). When it comes to fixed-term employment contracts, then, the absence of an enforceable early termination provision may entitle an employee to damages equaling the loss of income for the balance of the fixed-term.

The notion that an employee terminated pursuant to a fixed-term contract may be entitled to be paid out the amount that was remaining under their fixed-term employment contract triggers an interesting discussion about the duty to mitigate. The duty to mitigate is triggered when a contract is breached. In the employment context, an employee must lessen their damages by seeking and accepting alternative employment (i.e. employment that is comparable or similar in salary, hours, and responsibility to the position lost).

Although the Court of Appeal previously held in *Howard v Benson Group Inc.*, 2016 ONCA 256, that employees under fixed-term contracts are entitled to damages equaling the loss of income for the balance of the fixed term without a duty to mitigate, the question of whether the principle from *Benson* applies to independent contractor fixed-term contracts was left open until the decision of the Court of Appeal for Ontario in *Monterosso (cob Trust Leasing Canada) v Metro Freightliner Hamilton Inc.*, 2023 ONCA 413.

In *Monterosso*, the Plaintiff was hired as an independent contractor by the Defendant, and signed a contract on 7 March 2017, for a 72-month term. However, on 22 November 2017, the Defendant terminated the Plaintiff's services without cause. As a result, the Plaintiff commenced an action for damages for the remaining 65 months of the contract.

The trial judge determined that the contract did not include a termination provision and that it clearly and unambiguously provided for a 72-month fixed term. Consequently, the trial judge found in favour of the Plaintiff and awarded him \$552,500 plus HST, based on the remaining monthly payments owed under the contract.

At the Court of Appeal, the employer argued that the trial judge erred in disregarding internal email correspondence which indicated that the parties had agreed to the inclusion of a provision limiting payment to the last day of active service. The Court of Appeal rejected this argument, highlighting the presence of an "entire agreement clause" in the contract. In general, an "entire agreement clause" prevents a party from relying on discussions not explicitly stated in the contract.

The Court of Appeal ultimately clarified the confusion surrounding the duty to mitigate and ruled that independent contractors under fixed-term contracts have a duty to mitigate damages in the event of contract breaches, unless the terms of the contract state otherwise. As the employer failed to meet their burden of establishing that the Plaintiff had failed to mitigate its damages, the appeal was dismissed.

The *Monterosso* decision highlights the importance of having a well-drafted contract in place, whether it be for an employee or an independent contractor. The decision also makes clear that, in the event of a dispute, it is the party who engaged an independent contractor who will have the burden of demonstrating that the contractor had failed to mitigate its damages.

(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).

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