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Feature

Fixed Term Contracts: How Two Weeks' Pay Became Over 27 Months

Beware of unenforceable termination clauses

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The Ontario Court of Appeal has awarded a sales manager who had less than 2 years' service but was on a fixed term contract, over 27 months' wages as a result of a termination of his employment without cause. This decision highlights the importance for employers of careful drafting when entering into an employment contract.

In the case of *Howard v. Benson Group Inc.*, the employer had entered into a five-year fixed term contract with an employee to be a Sales Development Manager. The period of employment commenced in September 2012. The employer terminated the employee's employment in July 2014, almost two years into the contract. The employee was 57 years old and earned a base salary of $60,000 per year plus benefits at the time that his employment was terminated.

The Termination Clause is Ambiguous and Unenforceable

The employment contract expressly provided for early termination. The contract read: "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*".

Based on the employee's length of service, he was provided with two weeks' notice under the Employment Standards Act (the "ESA").

The motions judge who heard the case on a summary judgment motion ruled that the termination clause was unenforceable because it was ambiguous as it did not clearly set out the employee's entitlement under the ESA. In particular, the contract did not specifically set out that the employee's right to benefits continued during the notice period as required by the ESA.

As a result, the motions judge found that the employee was entitled to common law notice of termination and not damages for breach of contract. The motions judge ordered a trial of the issue of the appropriate notice period and the employee's duty to mitigate. However, the employee appealed, seeking damages instead in the full amount owing under the remaining 27 months of the contract.

Contractual Notice Awarded

The Ontario Court of Appeal ruled that the employee was entitled to 27 months' pay due to the employer's breach of contract in terminating the employment relationship early without the benefit of a valid early termination clause. The Court also held that the employee was not required to mitigate his damages by attempting to obtain alternate employment during the notice period.

The Court reasoned that when an employment agreement is for a fixed term, the employment relationship automatically terminates at the end of the term without any obligation on the employer to provide notice or payment in lieu of notice. A fixed term contract ousts the implied term in an employment relationship that reasonable notice must be given for termination.

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The employer and employee were free to include a clause that would provide for early termination and to specify a fixed term of notice or payment in lieu. However, since the employment agreement did not have an enforceable early termination clause, the employee was entitled to the wages the employee would have received to the end of the full term of the contract.

The Court of Appeal rejected the employer's arguments that such a result would be a windfall to the employee because:

(1) The employer had drafted the employment agreement and the employee was not a sophisticated party; and

(2) If an employer does not use unequivocal, clear language and instead drafts an ambiguous or vague termination clause that is later found to be unenforceable, it cannot complain when it is held to the remaining terms of the contract.

The Court's reasoning is certainly a warning to employers to be extremely careful when drafting employment contracts.

Finally, the Court held the employee was also not required to mitigate his losses. This means that any income that the employee earned from other sources during the duration of the contractual term would not be deducted from the damages awarded. The Court reasoned that in the absence of an enforceable contractual provision stipulating a fixed term of notice, or any other provision to the contrary, a fixed term employment contract obligates an employer to pay an employee to the end of the term and that obligation will not be subject to mitigation.

Lessons Learned for Employers

The telling and costly lesson from the Howard case is that the employer could have prevented this significant and unexpected liability by including an enforceable termination clause in its fixed term employment contract.

In contracts with an unlimited duration, an unenforceable termination clause will only entitle an employee to common law notice of termination, and is subject to an employee's duty to mitigate.

Howard demonstrates that termination clauses in fixed term employment contracts can be even more problematic as an unenforceable termination clause will result in the entire remaining value of the contract being owing to the employee, with no discount for mitigation.

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