

Member's Quarterly

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Feature

When Fixed Terms are Forever: Unexpected Liability for Employers

The Dangers of Fixed-Term Employment Agreements

Fixed-term employment agreements continue to hold a special place in the hearts of many employers. These agreements definitely offer some attractive benefits for the employer, but renewals or ambiguous language can cause unexpected liability to rear its ugly head.

Fixed-Term Must be Unequivocal and Explicit

One of the most attractive parts of fixed-term agreements is that upon expiration, the employee is usually not entitled to any termination notice or pay in lieu of notice.

However, because the expiration of a fixed-term employment agreement can have serious consequences for an employee, courts will require employment agreements to have unequivocal and explicit language in establishing its fixed-term nature. Any ambiguity will generally be construed against the employer's interest.

Terminating Fixed-Term Agreements Early

On the other hand, if an employer wants to terminate a fixed-term agreement before its expiration, the employee is often entitled to notice equal to the remaining duration of the fixed-term. This may or may not be to the employer's advantage depending on what is remaining of the fixed-term. Employers may attempt to mitigate this risk by providing an early termination clause but if such clause is found to be unenforceable, that is when liability can be at its greatest.

When Fixed-Terms Break

The potential risks of fixed-term agreements were on full display in a recent Alberta decision, *Lui v. ABC Benefits Corporation*, 2019 ABPC 125. In this decision, the employee held a part-time position working on a specific project. The position was approved until February 4, 2014, with the possibility of extension, and contained a clause that the position may be terminated at any time with 2 weeks' notice. During the project, the position was extended with the new end date of June 30, 2014. On June 27, 2014 the employer advised the employee that her employment had come to an end, and paid her until June 30, 2014.

The employee claimed for her wages for the period from July 1, 2014 to December 23, 2014, because her view was that her position was extended until December 23, 2014. There was conflicting evidence over whether the employer promised further extensions and until what date would the positions be extended. Unfortunately for the employer, there was nothing in writing. The end dates, based on conflicting evidence, varied between end of December, December 23, 2014, December 30, 2014 and even into 2015.

The employee's actions supported her understanding that she was working past June 30, 2014. She did not look for other jobs and she provided her planned vacation dates



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for December to the employer, but the employer did not advise her that her agreement was expiring on June 30, 2014.

On June 23, the employer also mentioned providing the employee with 2 weeks' notice and having the employee work until July 4. As discussed above, if an agreement is fixed-term, it simply expires on the end date and the employee is not entitled to any notice. The court questioned why the employer would provide termination notice one week before the employee's alleged end date, if the agreement was expiring.

As a result, the court found that the agreement had been extended past June 30, 2014. However, the court did not accept the employee's claim that it was extended until December 23, 2014. Due to conflicting evidence, it was unclear when the specific end date actually was. With such ambiguity, the court found that the employment was actually of an indefinite term.

Once the employment relationship was found to be of an indefinite term, the early termination provision in the agreement that provided only 2 weeks of notice was void, because it could potentially offend section 56(c) of the *Employment Standards Code*. For example, after 4 years of service, the employee would have been entitled to 4 weeks of notice. However, in this instance, it was actually beneficial to the employer to classify the agreement as indefinite rather than as a fixed-term until December. Since the employee only worked for 8 months, performed a job that did not require specialized skills and was relatively young, she was only awarded 3 weeks of reasonable notice.

This will not always be the case, especially if an employee has many years of service through successive fixed-term agreements. For example, the employer in *Ceccol v. Ontario Gymnastic Federation*, 2001 CanLII 8589 (ON CA) was not as lucky. In this decision, a nearly 16-year employee who worked through a series of one-year agreements was found to be employed on an indefinite employment agreement. The agreement did not contain a clause for termination without cause. This resulted in 16 months of reasonable notice awarded to the employee.

Takeaway for Employers

Thinking that no notice is required to be given to an employee when their fixed-term agreement expires may often lead employers into a false sense of security. Employers should seriously think about whether to take a chance on fixed-term agreements, or to hire an employee on an indefinite basis with an enforceable termination clause to properly manage this risk. If fixed-term agreements are a must, the employer should ensure that the agreement is unequivocal and explicit regarding the fixed-term and include an enforceable early termination clause. In addition, employers should try to limit renewals and maintain proper written documentation that clearly records the specific end dates if renewed.

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