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The Potential Pitfalls of Fixed-Term Employment Contracts

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On October 13, 2016, the Supreme Court of Canada denied leave to appeal an Ontario Court of Appeal decision which ordered an employer to pay a former employee 37 months of salary and benefits following termination - after only 23 months of employment.**[1]**

The employee in question had a written contract with a five-year term. The employer terminated the employee's employment 23 months into the contract, without alleging cause. The employer's right to early termination without cause was governed by the following provision:

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*.

The employer paid the employee two weeks' salary in lieu of notice and took the position that it had satisfied the contract. The motion judge, however, found that the without cause termination provision was unenforceable due to ambiguity. That finding was not appealed.

When the termination without cause provision was held to be unenforceable, the employer argued that the common law presumption of reasonable notice of termination should apply. The Court of Appeal disagreed and held that when the employer terminated a fixed term employment contract, without cause, and there was no enforceable provision for early termination without cause, the employee was entitled to the compensation he would have received to the end of the employment contract. As a result, the employee was entitled to 37 months of salary and benefits.

The Court also found that the employee had no duty to mitigate his damages. Accordingly, the employee could have found new employment the day after the termination and he still would have been entitled to 37 months of compensation from his former employer.

This case is a reminder of the importance of clearly written employment contracts as a whole and termination provisions in particular. The key takeaways for employers are:

- Fully consider whether a fixed term contract is appropriate in the circumstances of the specific job and employee at issue. If it is anticipated that the employee may not complete the full term of the contract, either because of the availability of work or the circumstances of the employee, a contract of indefinite duration may be preferable so as to avoid this additional exposure. In most cases, with

properly worded termination provisions, there is no need for a fixed term agreement.
- Ensure termination provisions are clear and unambiguous. Of course, every contractual term should be clear, but that requirement is especially important when dealing with provisions that carry a high price for failure to achieve clarity.
- A termination without cause provision that simply refers to the applicable employment standards minimum notice provisions is likely insufficient to permit the early termination of a fixed term contract without paying out the remaining sums owed under the contract.
- Absent a provision in the agreement requiring that the employee attempt to mitigate, an employee has no obligation to mitigate his/her damages when a fixed term contract is terminated early.

This case further reinforces that all employers should have their employment contracts reviewed before they are presented to prospective employees. Had the employer adhered to that advice, it could have saved hundreds of thousands of dollars in damages and legal fees.

[1] *Howard v. Benson Group Inc. (The Benson Group Inc.)*, 2016 ONCA 256.
