

Risky Business: When is a Fixed-Term Contract an Indefinite-Term Contract?

Unlike employees hired to indefinite-term contracts, fixed-term employees are not entitled to statutory or common law reasonable notice of termination following discharge at the end of the employment term. Given the significance of this distinction and to guard against overzealous employers, Canadian courts require fixed-term contracts to be clear and unequivocal, interpreting any ambiguity as to the length of the term as evidence of indefinite-term employment. *Michela v. St. Thomas of Villanova Catholic School*, a recent decision of the Ontario Superior Court of Justice, highlights the risks to employers who fail to use explicit language in fixed-term contracts.

The Facts

The issue before the court was whether three teachers, employed under fixed-term contracts, were, in fact, indefinite-term employees. All of the teachers were employed by the school on successive fixed-term contracts that set out a one-year term, were open to renewal, and provided for early termination by the employer.

The three teachers were advised prior to the expiry of the fixed-term in their then-current contracts that, due to low enrollment, the school was unable to renew their contracts for the following year. When the employees were asked to sign a release and did not receive statutory or common law notice of termination, they commenced a wrongful dismissal action against their former employer.

The Findings

Following the seminal decision of the Ontario Court of Appeal in *Ceccol v Ontario Gymnastic Federation*, the court affirmed that employers should not be able to evade the traditional protections of employment standards legislation and the common law by resorting to the label of "fixed-term contract" when the underlying reality of the employment relationship is something quite different, namely, continuous service by the employee for many years coupled with representations and conduct on the part of the employer that clearly signal an indefinite-term relationship. Accordingly, the court analyzed the substance of the contracts and the expectations of the parties to determine the "true nature" of the employment relationship.

With respect to the substance of the contracts, the court found that the early termination and renewal provisions created ambiguity as to the length of the term, which provided an opening for the court to interpret the contracts in a manner more favourable to the three teachers. Although the stated term was for one year, the contracts contemplated that they may operate for either a longer or shorter period as they were "subject to review on an annual basis" and terminable by the school in "its sole discretion" and "for any reason whatsoever". The court found that the ambiguity created by these provisions demonstrated that the term was not fixed and final, and instead evidenced indefinite-term employment.

With respect to the expectations of the parties, the court found that the school made representations to the teachers that their employment contracts would be renewed annually. For example, the three teachers were required to abide by the Staff Handbook, which, in the court's view, was "infused with a philosophy which is clearly contrary to the idea that teachers should see themselves as being year-to-year employees without any longer term commitment to the school, its students or its programs". The Staff Handbook also contained a salary grid, which suggested the salaries a teacher could anticipate up to 10 years of experience at the school, and referred to pension contributions to be made "on an annual basis". Further, the

court found the fact that the three teachers' contracts were renewed annually for several years to be further evidence of indefinite-term employment.

In light of the foregoing, the court found that the "purported" fixed-term employees were indefinite-term employees, each entitled to six months pay in lieu of reasonable notice.

Lessons for Employers

Fixed-term employment contracts can be a practical management tool for various reasons, including the completion of short term projects or replacement of a permanent employee on leave. However, in most other circumstances, instead of offering fixed-term employment, employers should consider limiting their liability by offering indefinite-term employment contracts, containing termination clauses that limit notice of termination to the minimums set out in provincial employment standards legislation.

Employers who wish to use fixed-term contracts should be aware of the risks and ensure that such contracts are drafted carefully in order to minimize those risks. Specifically, employers should:

1. **Be Aware of Employment Standards Legislation.** In Ontario, Regulation 288/01 of the Ontario *Employment Standards Act, 2000* provides that where a fixed-term employment contract exceeds 12 months, where employment ends before the end of the term, or where the term is extended more than 90 days beyond the original term, the employee is entitled to statutory notice of termination.
2. **Use Clear and Explicit Language.** Fixed-term contracts should set out the fixed term in clear, unequivocal, plain language. If a contract is for a fixed term, but the substance of the contract contemplates that it may operate for either a longer or shorter term, a court may find that this creates sufficient ambiguity to render the term unenforceable. Accordingly, employers should

draft early termination clauses carefully and should not include automatic renewal clauses in fixed-term employment contracts.

3. **Ensure Mutual Understanding.** Explain the effect of the fixed-term clause to the employee. State that at the end of the fixed-term, the employee will not, at that time, be entitled to statutory or common law notice of termination of employment. Have the employee initial the relevant provisions in the contract to indicate that he or she has read and understands them. Above all, treat the employee as if he or she will only be employed for the fixed-term.

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a cautionary note

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