

EMPLOYERS BEWARE - FIXED-TERM EMPLOYMENT TRAPS: IF YOU'RE GOING TO "BENSON", YOU NEED HEDGES

Posted on April 15, 2016

Categories: [Insights](#), [Publications](#)

Terminating the employment of an employee prior to the expiry of a fixed-term employment agreement is often a ticklish issue for an employer. Thanks to the Ontario Court of Appeal's April 8, 2016 decision in *Howard v. Benson Group Inc.*, 2016 ONCA 256, one such employer has painfully discovered just how tricky it can be.

The plaintiff Howard was hired as a "truck shop manager" by The Benson Group Inc. (Benson) under the terms of a five year fixed-term employment agreement. The agreement expressly provided for the early termination of Howard's employment "at any time in accordance with the terms" of the agreement. Among those terms was Benson's right to dismiss Howard without cause, as follows:

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.

Relying on that provision, Benson exercised its right to terminate with 37 months remaining in the term.

On Howard's summary judgment motion in the Superior Court of Ontario seeking to have the provision set aside and an order for the payment of damages based on the balance of the five year term, the motion judge found that (1) the clause was sufficiently ambiguous as to be unenforceable, and (2) in the absence of an enforceable early termination clause, the employer's obligations were governed by an implied right to reasonable notice at common law. He went on to order a hearing based on affidavit evidence (and any cross-examinations on the affidavits) to determine the "appropriate amount of reasonable notice having regard to mitigation issues".

On Howard's appeal, the Court of Appeal first determined that the appropriate standard of review on the "balance of the fixed term v. reasonable notice" debate was correctness, since the issue was properly characterized as an "extricable question of law". It then held that in a fixed-term employment arrangement, the relationship automatically terminates at the end of the term without further obligation. If unambiguous, such a provision ousts the implied term of reasonable notice. The Court therefore overruled the motion judge on this point and found in Howard's favour.

As a result, the Court then decided that it needed to make a "fresh determination" about the duty to mitigate. Relying on its previous decision in *Bowes v. Goss Power Products Ltd.*, 2012 ONCA 425 in which it found that there is no duty to mitigate when a contract specifies the penalty for early termination, the Court held that the same principle applies in a fixed-term agreement when neither early termination nor mitigation are expressly addressed. Accordingly Benson was held liable to Howard for the remaining 37 months of the five year term.

What this means for Employers

1. The underlying facts in Benson are puzzling, since the need for a five year fixed-term contract for a "truck shop manager" is not apparent. While certain businesses lend themselves to fixed-term employment agreements (e.g. sports, entertainment), an employer should always ask itself: "why do we want a fixed-term contract in this instance?" More often than not, the answer will be: "we don't." An indefinite term agreement with appropriately drafted termination provisions may well be the better option.
2. If circumstances dictate the preference for a fixed-term arrangement, from the employer's perspective it is critical to build in a "hedge" against the relationship simply not working out. That hedge should consist of one of, or ideally both, carefully drafted and enforceable early termination clauses and an express duty on the part of the employee to mitigate by diligently seeking new employment.

An employer will want to avoid a Benson without hedges at all costs.

by David Elenbaas

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

© McMillan LLP 2016