Fixed-Term Employment Contracts: Are They Worth The Risk?

Employers often hire employees pursuant to fixed-term contracts in order to avoid common law reasonable notice obligations and other perceived liabilities. However, this practice can unnecessarily expose employers to more costly legal liabilities that can be avoided through the use of indefinite-term contracts containing early termination provisions setting out minimal notice of termination.

The first danger to employers stems from the common law legal principle which holds that when terminating a fixed-term contract which does not contain an early termination clause, the measure of damages is not the common law reasonable notice period. Rather, the employee is entitled to the balance of the wages due for the remainder of the contract's term, subject to the employee's duty to mitigate.

The Ontario Superior Court recently applied this principle in a decision where an employee with a fixed term employment contract was terminated 30 months prior to the end of the fixed term. The court ruled that the employee was not entitled to common law reasonable notice. Instead, the court awarded her the remaining 30 months' worth of salary for a total of $129,372.38. To drive home the point, had the employee been hired on an indefinite-term contract with a well-drafted early termination clause, her entitlements would have been capped at eight weeks.

The second danger to employers stems from a shift in the common law regarding early termination clauses in fixed-term contracts. Until recently, if a fixed-term employment contract also included an early termination clause, the employer could either end the employment relationship at the conclusion of the contract's term without providing any notice of termination, or the employer could terminate the employee at any point throughout the employment relationship pursuant to the early termination clause.

In recent years, courts have started to move away from the old line of thinking. Courts have begun to view contracts containing both fixed terms and early termination clauses as ambiguous. The rationale for this new line of thinking is that employment for a fixed-term is inconsistent with clauses which allow for termination of employment prior to the completion of the fixed term.

For example, in a 2009 BC Supreme Court decision, an employee was hired on a fixed term contract spanning five months. The employee was terminated pursuant to the early termination clause in his contract only three months into his employment. Despite

containing a clear early termination clause, the Court held that the contract was ambiguous since in one paragraph it contained a fixed-term and in another it contained an early termination clause. As is the case with contractual ambiguities, the Court ruled against the interests of the drafter of the contract, the employer, and awarded the employee the wages he would have earned for the remainder of his contract.

Despite this trend, a recent Alberta Court of Appeal decision provides some hope for employers who wish to make use of fixed-term contracts. In this decision, the Court upheld an early termination clause in a fixed-term contract, ruling that there was no ambiguity. However, the Court made this ruling on the basis that the provision setting out the term of the contract was clear and made reference to the early termination clause in the employment contract:

The parties understand and agree that employment pursuant to this agreement is for a set term of one year and expires June 30, 2004, **unless terminated earlier pursuant to the terms of this agreement…**

In this instance, the early termination language was viewed as qualifying the fixed term rather than competing with it and creating ambiguity.

For employers, this means that any fixed-term employment templates currently in use could be out of date and exposing employers to legal liability. Employers should consider either switching from fixed-term to indefinite-term contracts, or having existing fixed-term contracts reviewed by a legal professional.

The lawyers at CCPartners can assist employers with drafting effective employment agreements or with revising existing agreements to ensure compliance with the ever-changing legal landscape.

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