

# Fixed Terms – Can They Be Broken?



Employers and employees are free to contract on the terms and conditions of employment. That contract, often referred to as an employment agreement, if appropriately and properly drafted, can bind the parties in the event of what occurs on the termination of employment.

Most employment agreements have open-ended terms. That is, they are contracts of indefinite hire, subject to an early termination provision set out in the employment agreement. However, some employment agreements specify that the employee's employment is for a "fixed term," which means it automatically comes to an end at the end of that term, unless the parties agree otherwise.

The legal issue which often arises with a fixed-term contract is that unless the language is specific on early termination, the courts may find that the liability of the employer could be not only statutory or even common law notice, but payment to the end date of the fixed-term, absent the obligation to mitigate. For this reason, employers have been reticent to enter into fixed-term employment contracts.

However, the Ontario Superior Court of Justice (the "Court"), in its recent decision in *Howard v. Benson Group Inc.* offers some clarity and provides employers with much needed guidance with respect to their potential liability in the circumstance of an early termination of a fixed-term employment agreement.

John Howard ("Howard") was employed by Benson Group Inc. (the "Benson Group") under a five-year fixed-term employment agreement. The agreement had an early termination provision which allowed the Benson Group to terminate Howard's employment at any point during the five year fixed-term by providing him with the minimum amounts required under the Ontario *Employment Standards Act, 2000* (the "ESA"). The termination provision was somewhat vague, providing only that "any amounts paid to the Employee shall be in accordance with the *Employment Standards Act of Ontario*."

The Benson Group terminated Howard's employment with three years remaining in the five-year term. Rather than paying the balance of the term, it provided Howard with two weeks' pay in lieu of notice of termination – the minimum amount required under the ESA.

Howard disagreed and claimed \$194,284 against the Benson Group, which represented the damages arising from the early termination of his five-year fixed-term employment contract with Benson. In other words, he asked for payment of the term (that is, for three years) even though he was not required to work. Howard argued that the

termination provision in the fixed-term contract was unenforceable on the basis that it was vague. If the termination provision was vague, past case law suggested that he would be entitled to that three-year payment.

The Court was faced with two issues: first, was the termination provision enforceable; and second, if the termination provision was unenforceable, was Howard entitled to compensation representing what he would have earned for the balance of the term or common law notice.

Not surprisingly, given how strictly courts have recently scrutinized termination provisions, the Court held that the termination provision was unenforceable. However, and most importantly, the Court held that because the employment agreement *expressly contemplated early termination*, Howard was not entitled to damages representing what he would have earned for the balance of the term. Instead, the Court held that his entitlement was to those damages representing his common law notice period.

In determining the issue of damages, the Court held that the early termination provision, despite not actually being enforceable for the purpose of limiting Howard's entitlements to the ESA minimums, operated nonetheless to save the Benson Group from having to compensate Howard for the balance of the term.

This is a welcome application of common sense. The Court actually looked to the contemplation of the parties at the formation of the contract, instead of creating a windfall to the employee due to some faulty drafting.

## **Employer Take-Aways**

The Howard case is a reminder and a warning that absent an early termination provision, employers ending a fixed-term agreement prior to the end of the term may be required to compensate the employee for what they would have earned for the balance of the term.

The attractiveness of fixed-term employment agreements is often illusory. As seen in the Howard case, the liability arising from the termination of a fixed-term employment agreement can actually be far more significant than the liability an employer faces in the circumstances of a termination of an indefinite employment arrangement with an enforceable termination provision or, more importantly in certain circumstances, at common law.

Employers seeking to use fixed-term employment agreements should carefully review their termination provisions to ensure that they specifically contemplate early termination and, further, that they are enforceable. Even if they are not, this new case provides some comfort that payment until the end of the term may not be the automatic result.

Article by Fiona Brown