Ontario, Canada Court Concludes Secondment Agreement Was Not A Fixed-term Employment Agreement



In *Nader v. University Health Network*, 2022 ONSC 447, the court examined the language of a secondment agreement and concluded that the plaintiff-employee was not a fixed-term employee of the organization to which he was seconded. The agreement at issue explicitly confirmed that the employee would remain an employee of the assignor/employer at all times. Accordingly, the employee could not "double collect" damages for the termination of both the employment agreement and the secondment agreement. He was entitled only to the 12 months' damages specified in his employment agreement, and not to salary and related compensation for the balance of the term outstanding under the secondment agreement at the time of termination.

Background

The employee commenced employment with University Health Network (UHN) as executive vice president in 2016. He entered into an employment agreement under which he received a base salary, benefits and a performance bonus (Employment Agreement). The indefinite-term Employment Agreement included the following clause pertaining to termination without cause:

(UHN) may terminate your employment, other than for just cause, at any time upon payment to you of an amount equal to 12-months' salary, which includes all your entitlement pursuant to the Employment Standards Act. It is expected that if you elect to terminate your employment with UHN, you will provide two months prior written notice, which notice may be waived by UHN at its discretion.

In 2019, Ontario Health, UHN and the employee executed an agreement for the employee to fill a two-year secondment role at Ontario Health (Secondment Agreement). Prior to the Secondment Agreement's execution, the employee was advised that his role at UHN might not be available following the secondment. The Secondment Agreement contained the following provisions:

1. Subject to early termination in accordance with this agreement, the Employee will be seconded from UHN to Ontario Health for a period of two (2) years from September

3, 2019 to August 31, 2021.

6. During the period of the secondment the Employee will remain an employee of UHN on UHN's payroll and UHN will continue to pay the Employee's salary of $362,300.00 and continue the Employee's benefit coverage and pension contributions. For greater certainty, all entitlements owed to the Employee by UHN, including all pension entitlements, bonus payments, benefits and any severance accrued as a result of the Employee's employment relationship with UHN, shall continue to accrue during the term of the secondment and shall not be impacted in any way as a result of the secondment.

11. Upon the termination of the secondment the Employee will return to the position of Executive Vice President Clinical Support and Performance of UHN or a comparable position. If that position no longer exists at the UHN then the Employee will be entitled to receive the termination entitlement provided for in his/her employment agreement with the UHN.

12. Should for any reason the Employee be unable to return to his former, or comparable, position at UHN at the end of the two year term, which causes his termination entitlement to be activated then it is agreed that Ontario Health will be responsible for reimbursing UHN for 50% of the total cost of this severance entitlement providing such. It is understood that such reimbursement will not exceed 50% of a salary continuance that will be no more than twelve (12) months.

13. The secondment will terminate on the expiry of the term of the secondment.

UHN hired another individual to fill the employee's UHN role for the duration of the secondment. One year into the secondment, Ontario Health advised him that his secondment would end the following month. UHN conducted a search for available suitable positions but could not find any. UHN then terminated the employee's employment without cause effective the date the secondment ended. Relying on the termination provision in the Employment Agreement, UHN continued salary and benefits for 12 months.

The primary issue before the court was whether the employee was entitled only to the 12 months in his Employment Agreement, or also entitled to salary and related compensation for the balance of the term outstanding under the Secondment Agreement at the time of termination.

The employee argued that the Secondment Agreement was a fixed-term contract and he was entitled to the balance remaining, in addition to the 12 months' payment under the Employment Agreement.

Decision

The court reviewed the jurisprudence for guidance on the legal framework within which it was required to interpret the agreements. It concluded that, based on the case law, there was a presumption in favour of the written agreement, *i.e.*, it was to interpret the written agreement as the best evidence of the parties' intentions; only pre-contractual stipulations that were intended to be included in the written agreement but inadvertently omitted, or that were necessary to resolve any ambiguity in the written agreement, could be relied on.

The court determined that it was the parties' intention to reduce their entire agreement to writing, and that the agreements were clear and unambiguous. Neither party sought to establish that any pre-contractual stipulations were intended to be included in the written agreement.

The court acknowledged that the Secondment Agreement implicitly but clearly stipulated its termination before the expiry of two years as it stated at paragraph 1 that its anticipated two-year duration was "subject to early termination in accordance with this agreement." Furthermore, the court concluded that based on authorities cited by both UHN and Ontario Health interpreting secondment agreements in the setting of a pre-existing employment agreement, and clause 6 of the Secondment Agreement, the Secondment Agreement was a secondment agreement and not a fixed-term employment agreement. Both the Employment Agreement and Secondment Agreement (which incorporated the relevant provision of the Employment Agreement in paragraph 11), specified that in the event of termination without cause, the employee was entitled to 12 months' salary; he was not entitled to payment for the balance of the two years contemplated by the parties as the probable duration of the employee's secondment.

Bottom Line for Employers

This case underscores the importance of strong legal drafting as it puts employers on notice that clear and unambiguous written agreements will be upheld by the courts as evidence of the parties' intention. If a secondment agreement explicitly provides that a seconded individual will remain an employee of the assignor/employer at all times, then the individual will not be a fixed-term employee of the organization to which they are seconded. The individual will be unable to "double collect" damages for the termination without cause of the employment agreement and the secondment agreement; they will be entitled to the damages specified in their employment agreement only.

The content of this article is intended

by Rhonda B. Levy , Barry Kuretzky and George Vassos
Littler – Canada