Term Definite Contracts: Avoiding The Pitfalls

All of us are familiar with term contracts awarded to sports stars – the 10 million dollar contract for three years for a leading professional player – but term contracts are also common outside professional sports.

A term contract is a contract for a defined term with a defined end date. Often a term contract will provide for termination before the end of the term, and, so long as it complies with any relevant employment standards legislation, the contract can be terminated earlier by complying with those terms. Otherwise, if the contract is terminated before its term ends there are two possible outcomes, which may or may not require the employer to pay out the contract to the end of the term. In one scenario, any payment by the employer to the end date is subject to the employee's duty to mitigate, and in the other case, there is no such duty. Which of these apply depends on the terms of the contract itself. Often term contracts are 'pay or play' contracts, meaning no mitigation is required.

The more difficult issues arise when employers renew term contracts, resulting in a series of term contracts. Section 8(2) of Regulation 288/01 under the Ontario *Employment Standards Act, 2000* (the "Act") provides that employment periods separated by less than 13 weeks are deemed to be continuous for purposes of calculating termination entitlements under the Act. In other words, if the employment of one term is followed by another that commences less than 13 weeks after the first term ends, the employment period is deemed to have been continuous for purposes of termination notice under the Act.

But does this principle apply to common law obligations? Many employers attempt to get around the common law provisions of reasonable notice by providing a series of term contracts. A recent Quebec court has followed the example set in many common law courts and found that in many cases, a series of term contracts, one following the other, creates a long term common law contract deserving of reasonable notice or pay in lieu thereof. In several recent cases, courts have indicated that a series of such term contracts, one following the other, can, but will not necessarily result in such a finding. But what are the circumstances that lead to this result? Some of the relevant factors for this determination include:

1. Were Records of Employment ("ROE) provided at the end of each term?
2. If ROEs were provided, and if there was a period of non-employment between terms, did the employee apply for and/or receive employment insurance benefits

between terms?
3. Were there any real negotiations prior to entering into each fresh term?
4. Did the employee have any obligation to give notice that he or she would not be available for any successor term, or was no such notice required?
5. Did the employer have any obligation, express or implied, to give notice that there would be no successor term available or was it understood that further employment might or might not be available? Did the issue of availability relate to circumstances over which the employer had no or little control?
6. Are there external factors which influence the need for short term contracts and that change from time to time. Can the employer show that this need has altered the numbers and types of employees hired? Are the employees hired aware that they are hired to fulfill a need that can change and that is the reason for the term employment?
7. Any other factor relevant – including verbal assurances that may have been given without authority.

If you intend to use term contracts, and have a legitimate need to do so – as in the case of seasonal employment or employment depending on external factors such as enrolment, membership or funding-it is essential that the employees you hire understand that they are being hired for the term only and that neither you nor they have any obligation to the other after the term is over. You should also issue ROEs at the end of each term.

A long series of term contracts with no hiatus and with no real change in duties from one to the other may create a presumption of long term continuous employment that will be hard to refute. Make sure you establish and keep records to substantiate the factors above as well as any other relevant factors.

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