Case In Point

Full Payout to End of Fixed Term Contract in Case of Early Termination, No Duty to Mitigate

Date: April 21, 2016

In Howard v. Benson Group Inc. (The Benson Group Inc.), the Ontario Court of Appeal ruled that in the absence of an express provision specifying a pre-determined notice period or pay in lieu (for early termination without cause), on the early termination of a fixed term contract an employee is entitled to the wages the employee would have received to the end of the fixed term contract. The Court also ruled that, absent an express provision addressing mitigation, an employee whose employment is terminated (without cause) prior to the end of a fixed term contract does not have an obligation to mitigate his or her damages. In other words, the employer has to pay the contract out to the end of the fixed term.

In this case, the employee was employed pursuant to a five-year fixed term contract. His employment was terminated without cause after 23 months and the employer paid out two weeks' notice, relying on the *Employment Standards Act, 2000* and the following contractual term:

8.1 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* [sic].

As described in a previous blog post, the trial judge found clause 8.1 unenforceable and awarded common law reasonable notice. The trial judge did not award a payout of wages for the remainder of the five-year fixed term. The employee appealed and was successful.

The Court of Appeal noted that the employment contract expressly provided for early termination. Clause 1.3 of the contract set out the general framework: "(t)he Employee and the Employer may terminate the Employee's employment at any time in accordance with the terms and conditions of this Agreement." Since the trial judge found clause 8.1 unenforceable, that clause was effectively removed from the contract. As a result, the contract did not specify a period of notice or pay in lieu in the event of early termination.

By declaration of the Court, the employer became liable to pay the employee the amount equal to his salary and benefits for the unexpired term of the employment contract (almost three years).

This decision further highlights the challenges that employers face when trying to draft adequate fixed term employment contracts and limit their liability upon termination. It is of paramount importance that all provisions of an employment contract be carefully drafted and the impact of recent case law on that drafting be considered.

(See our article "Employment Contracts: How to Get it Right and Help Your Chance of Success" for tips on best practices.)