

Case In Point

\$1.27 Million Damages Award a Reminder to Employers of Perils Associated with Fixed Term Contracts

Date: September 4, 2019

In [McGuinty v. 1845035 Ontario Inc. \(McGuinty Funeral Home\)](#), the Ontario Superior Court of Justice awarded a plaintiff over \$1.27 million in damages for constructive dismissal after only one year had elapsed of a 10 year consulting services agreement (Agreement). In the absence of a cancellation provision, the defendant was obligated to pay the Agreement out to the end of the term.

The plaintiff had sold his family's funeral business to the defendant, a corporation run by two brothers (Gary and Steven). He entered into the Agreement in 2012. The Agreement provided for, among other things, a 10 year fixed employment term, corporate expenses (company vehicle and fuel), vacation entitlement, hours to be worked, commissions on pre-paid funerals in the amount of 5% and a marketing allowance percentage for funeral expense policies sold through the business in the amount of 65%. The plaintiff's duties under the Agreement involved oversight of the general management of the funeral home. The Agreement stated that it could not be cancelled or assigned by the parties except as provided for in the Agreement, but there was no other provision in the Agreement setting out terms of cancellation.

Shortly after the plaintiff commenced employment with the defendant, trust began to erode and disagreements arose between the parties. In particular, the plaintiff was upset that the defendant had enacted the following changes:

- (1) after approximately three months, the plaintiff was required to return the company vehicle and repay personal gas charges;
- (2) the plaintiff was required to track his hours of work after Gary noticed that he did not appear to be performing the hours of work required under the Agreement. Gary also told one of the plaintiff's direct reports to surreptitiously track the plaintiff's hours at work; and
- (3) the plaintiff was no longer entitled to receive certain commission payments for pre-paid funeral expenses.

Ultimately, when the plaintiff entered the funeral home to remove a number of personal files, Gary alleged that he had thrown out files belonging to the funeral home and the locks to the funeral home were changed.

The plaintiff subsequently went off on a medical leave of absence, but did not provide any indication of a date of return. During the leave, he attended a funeral at the home and found that his workspace had been moved to the basement.

There was basically no further communication between the parties until the Statement of Claim asserting constructive dismissal of employment and breach of contract was served on the defendant two years later. It was not until this point that the defendant learned the plaintiff considered himself to have been constructively dismissed.

The Court agreed with the plaintiff that some of the changes implemented by the defendant amounted to constructive dismissal. However, the Court disagreed that the change in the plaintiff's workspace was a factor in this finding.

The Court referred to *Howard v. Benson* and held that the plaintiff was entitled to damages for the amounts he would have earned for the remaining period of the fixed term of the Agreement. The damages amounted to approximately \$1.27 million, which included \$900,000 for the remainder of the plaintiff's salary owing under the Agreement among other things. In so finding, the Court rejected the defendant's argument that the plaintiff's absence over an extended period of time with no

notice that he viewed himself as constructively dismissed precluded his ability to make such a claim.

This case is a reminder for employers of the dangers of fixed term contracts (particularly those involving lengthy terms) and making fundamental changes to the terms of employment. It highlights the importance of a well-drafted, valid termination or cancellation provision which complies with minimum standards obligations: without one, an employee may become entitled to damages to the end of the fixed term contract, regardless of its length. It is also a reminder for employers using fixed term contracts to consider including a duty to mitigate clause.