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Employment Matters

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BEWARE OF THE FIXED-TERM CONTRACT

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What's the Issue?

Fixed-term contracts are employment agreements that have a start date and a fixed end date. Employers often use them when they hire employees who are essentially temporary workers. Employers also use them as a tool to try to limit their liability on termination of employment, the idea being that employment simply comes to an end at the end of the term. Because these contracts have fixed end dates, employers often forget to include termination clauses that provide for an early "out". This is a very common mistake and it can be a costly one.

What's the Case?

In *Howard v. Benson Group*, the company hired Mr. Howard for a fixed term of five years. The company contemplated early termination by including a termination clause that stipulated the following: "*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*".

The trial judge held that the termination clause was unenforceable because it was ambiguous and this finding was not appealed. After deciding the termination clause was unenforceable, the trial judge considered whether Mr. Howard should be paid the balance of his contract (over 3 years!) or whether he should receive a common law notice period. The trial judge determined that Mr. Howard should receive a common law notice period and ordered a mini trial on the issue. Mr. Howard did not agree and appealed the decision. Mr. Howard believed he was owed the balance of the term and the Court of Appeal agreed with him.

In its decision, the Court of Appeal made two points clear:

1. If an employer terminates a fixed-term contract before the end of the term, absent an enforceable termination clause, the employer will be responsible to pay out the balance of the term.
2. In these circumstances, the employee does not have to mitigate his damages, which means the employer cannot take credit for income earned by the employee during the balance of the term.

What should employers take away from this case?

Drafting is key.

First, if you insist on a fixed-term contract, make sure you have a termination clause that contemplates early termination otherwise you will be required to pay out the balance of the term if you terminate early. Second, make sure your termination clause is enforceable: it must comply with applicable provincial legislation. Third, if you are contemplating a generous termination clause, consider whether you should include a mitigation clause to enable you to take credit for any income earned by the employee during the notice period. Notably, mitigation clauses must also comply with applicable provincial legislation. Lastly, even if you have a fixed-term contract, with an enforceable termination clause, you still have to make sure that your contract does not attempt to contract out of applicable legislation.