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WHAT A DIFFERENCE A MONTH MAKES

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While the notion of a *fixed term employment contract* may seem like a straight-forward matter, this is not always the case. How a fixed term contract may come to an end without further liability requires careful drafting, monitoring and action. Even when this appears to have been the case, one Alberta-based employer suffered a rude and expensive surprise due to its failure to strictly adhere to the precise terms of the agreement (*Thompson v. Cardel Homes Limited Partnership*).

What happened?

Geoffrey Thompson was an executive with a new home builder, Cardel Homes, in Calgary. Under the first of his two employment contracts with Cardel, Mr. Thompson was entitled to one-year's pay in the event of non-renewal or early termination of his contract without cause. Under his renewal contract the termination provisions were revised such that Mr. Thompson remained entitled to one year's pay if his employment was terminated without cause; however, there was no longer any similar provision for a one year salary payment if the contract was not renewed.

One month before the expiry of his contract, Cardel notified Mr. Thompson his contract would not be renewed. Though he would continue to be paid until the end of his term, he was asked to return all company property and not return at work. Cardel's President assumed Mr. Thompson's duties of employment and an announcement was made that Mr. Thompson was no longer with Cardel.

The issues and trial decision

Mr. Thompson was not happy with this turn of events, not having received any earlier indication his contract would not be renewed. He sued Cardel for the full one-year's severance payment alleging he had been constructively dismissed prior to the conclusion of his employment term. In its defense, Cardel argued that once the decision had been made to end the employment relationship, it had no obligation to provide work to Mr. Thompson – only to continue to pay him until the end of his employment term.

The legal concept of constructive dismissal applies if an employer commits a unilateral, negative act, such as a change in working conditions, which amounts to a "repudiation" of the employment relationship. The test for repudiated is an objective one, but is applied from the perspective of a reasonable person in the position of the employee. The trial judge explained the doctrine as follows:

> [I]f the change to the employment relationship is minor, or if the change reflects a proper interpretation of an existing provision of the employment contract, the employee may not consider such change to be an act of repudiation. However, if a particularly important term is altered unilaterally, the employee may have his or her remedy. An employer's repudiatory words or conduct must be such as to constitute a repudiation of the essential obligations imposed on him by the contract.

Against this backdrop, the trial judge found that a reasonable person in Mr. Thompson's position would have felt he had suffered a "total usurpation of [his] duties and powers", constituting a repudiation by the employer of the employment contract. The judge ordered payment of one year's salary-- $285,000.

The employer appealed

Cardel appealed to the Alberta Court of Appeal, which upheld the trial judge's decision. The appeal court held that had Cardel wished to avoid the problem it unwittingly created, it should have sought Mr. Thompson's agreement to an early termination with pay. If agreement could not be reached, Cardel ought to have confined its notification to informing Mr. Thompson that his services were not required effective the expiry date of the agreement, rather than immediately.

Tips for employers

Cardel may have believed its fixed term employment agreement provided protection from substantial severance liability if employment ended at the expiry of the term; however, its experience in court proved otherwise. This decision adds to a list of notorious judgments in which employers end up with liability they thought a fixed term agreement would avoid.

To minimize this kind of risk employers contemplating or currently working with a fixed term employee should consider the following and, where appropriate, seek the advice and assistance of experienced employment counsel:

- Prior to making an offer of fixed term employment, carefully analyse why a fixed term is being offered. There can be good legal or practical reasons to do so, but many times a fixed term agreement may not be an appropriate vehicle.
- If already working with a fixed term contract, maintain strict surveillance of any time limits set out in the contract. For example, many fixed term contracts contain due dates by which notice must be given to an employee to avoid an automatic renewal.
- If a fixed term agreement is coming up for renewal, this may be the opportunity to transform it to another form of contract more suitable for the employment relationship, or to revise problematic terms in the existing agreement.
- If proceeding to terminate employment, the provisions of the contract should be scrutinized to ensure unintended liability is not incurred. Most employees, if requested, will agree to leave early rather than be a 'lame duck', and would prefer to be paid without

having to work. If an employee does not agree, it will be necessary to consider how to manage the risk of the employee staying in the workplace, or how short a period of working notice can be imposed with minimal risk.

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