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SHERRARD KUZZ LLP
*Employment & Labour Lawyers*


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# Fixin' for a Costly Separation - The Perils of a Fixed Term Employment Contract

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In a recent decision, the Ontario Superior Court of Justice considered the cost of terminating a fixed term employment contract before its natural expiry. In *McGuinty v. 1845035 Ontario Inc. (McGuinty Funeral Home)*[1], the court found the plaintiff was owed nine years of compensation after he was constructively dismissed one year into a ten year employment contract. The decision is a stark reminder of the perils of a fixed term employment contract.

## What happened?

Mr. McGuinty was a 55 year old third generation owner of McGuinty Funeral Home. The business was started by his grandfather and ultimately owned by McGuinty and his brother. In 2012, the McGuinty brothers sold the business to the defendant, a company run by Gary and Steven Eide.

The purchase was contingent on McGuinty agreeing to a transitional consulting services agreement ("TCSA") under which he would continue to work at the funeral home for 10 years. McGuinty agreed and the Eides paid $1,840,000 for the shares in the funeral home and an additional $460,000 for the real property.

Under the TSCA, McGuinty was employed as General Manager and paid $100,000 per year with an annual review for cost of living increases. He received a company car, fuel costs, a golf membership and commission. The TCSA did not contain any provision which provided for early termination.

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Shortly after the sale closed, issues developed between McGuinty and the Eides. Tensions grew over the first year, culminating in:

1. A request that McGuinty return his company car and repay gas expenses associated with personal use, valued at $12,000 per year.
2. Monitoring of McGuinty's hours of work by one of his direct reports.
3. Requiring McGuinty to complete time cards.
4. A dispute over the payment of commission.
5. Changing the locks to the funeral home and not providing McGuinty keys.

Two days after the locks were changed McGuinty went off on sick leave. While off work he attended a funeral at the funeral home when he noticed his desk had been moved to the basement and a picture showing the history of the home's owners had been removed.

McGuinty never returned to work and the parties had little communication with each other until McGuinty sued for constructive dismissal.

## Payment to the end...

The court found McGuinty had been constructively dismissed. He was awarded more than $1.2 million, representing what he would have received under the balance of the TCSA. Since the constructive dismissal occurred at year one of the contract, this meant nine years of salary, commission and other benefits. Moreover, without a termination provision in the TCSA, the court held McGuinty had no duty to mitigate his losses:

> In the absence of an enforceable contractual provision stipulating a fixed term of notice, or any other provision to the contrary, a fixed term employment contract obligates an employer to pay an employee to the end of the term, and that obligation will not be subject to mitigation […]. Accordingly, the Plaintiff is entitled to the compensation and benefits he would had received had the contract been honoured.

## Tips for Employers - have an escape route

In the rare case in which a fixed-term contract is desirable, it should include the ability to, and set out the process for, terminating the contract before its natural end date. Without this language, an employer can be liable to pay out the balance of the contract.

The reality is, a fixed term contract provides no greater protection to an employer than a well drafted employment contract for an indefinite term. Even for a short-term employee, a properly drafted employment contract that limits an employee's entitlement on termination to the minimum requirements under employment standards legislation, can provide the same level of flexibility for an employer, as well as cost certainty at the end of the relationship.

Finally, if an employer uses a series of fixed term contracts (which we often see), allowing the contract to lapse by even a day before a new contract is signed can void the entire series of contracts resulting in the relationship being covered by the common law – a **much** less predictable and more costly scenario for the employer.

*To learn more and for assistance contact Sherrard Kuzz LLP.*

[1]2019 ONSC 4108

## DID YOU KNOW?

Ontario's minimum wage has remained steady at $14.00 since January 2018. That will change in 2020 when minimum wage will increase to reflect the change in Consumer Price Index for Ontario (all items) in 2019. An announcement confirming the increase will be made before April 1, 2020 and come into effect on October 1, 2020. We will keep our readers posted.

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# "How exclusive are we?" The Court of Appeal Weighs in on Dependent Contractors

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In Ontario, most employers are familiar with the distinction between an employee and an independent contractor. While an employee is entitled to notice of a without cause termination, an independent contractor is not entitled to notice. Instead, an independent contractor is considered a party to a commercial arrangement that set outs out how and when services may be terminated.

In many Canadian jurisdictions there is a third, lesser-known, category of worker between employee and independent contractor, known as dependent contractor. A *dependent contractor* is economically dependent on a third-party, but not to the same extent as an employee.

Distinguishing between an independent and dependent contractor is not always straightforward. However, if there is **exclusivity or near-exclusivity** between a contractor and third-party, the contractor is likely to be considered dependant. In that case, courts have generally ordered termination entitlements be provided to the dependent contractor similar to those provided to an employee.

In a recent decision, *Thurston v Ontario (Children's Lawyer)*[1], the Court of Appeal for Ontario confirmed that a very high degree of economic dependence is necessary to meet the test of exclusivity or near exclusivity. This is good news for employers.

## What happened?

At all material times, Barbara Thurston worked as a sole practitioner lawyer. In addition, throughout a period of 13 years, Thurston provided legal services to the Office of the Children's Lawyer ("OCL") under several continuous, fixed-term contracts. At the end of each contract, Thurston was required to re-apply to remain on OCL's roster of approximately 380 lawyers. There was no automatic right to renewal, no guarantee of work, and the parties agreed "[Thurston was] not an employee of the OCL".

While a member of OCL's roster, Thurston maintained a private practice that resulted in roughly 60% of her annual billings. The remaining 40% was from OCL work.

In 2015, Thurston's final contract with OCL expired and she was not offered another contract. She sued OCL claiming she was a dependent contractor and entitled to common law reasonable notice. OCL countered that Thurston was an independent contractor and therefore not entitled to any common law notice. OCL relied primarily on the fact that the majority of Thurston's billings were not attributed to OCL, nor did OCL restrict Thurston's ability to work for other clients.

OCL brought a motion seeking summary dismissal of the claim. The court dismissed the motion and granted judgment to Thurston.

Essentially, the court found there was sufficient exclusivity between OCL and Thurston for the following reasons:

- the continuous relationship
- the work Thurston did was "integral" to OCL
- the public would have perceived Thurston to have been an employee of OCL
- OCL had control over the work Thurston undertook for it
- on average 40% of Thurston's work was for OCL.

## The Court of Appeal overturns the decision

OCL successfully appealed the decision to the Court of Appeal for Ontario. In short, the court found Thurston did not have an exclusive or near-exclusive relationship with OCL. While her OCL work resulted in a significant part of Thurston's annual billings, there must be "substantially more than 50% of billings" to establish the level of "near-exclusivity" essential to a dependent contractor relationship.

The Court of Appeal noted the following facts which further supported OCL's position:

- Thurston's contracts with OCL contemplated she would continue her private practice
- Thurston continued her private practice
- Thurston was not guaranteed any work from OCL
- OCL reserved the right to cancel the contract at any time
- Thurston had her own office, supplies and staff.

## Lessons for employers

The flexibility to end a business relationship with minimal cost is often one of the primary reasons to enter into an independent contractor arrangement. However, merely calling a service provider "independent" doesn't make them such. A decision-maker will look at all of the surrounding facts regardless of how the parties describe the relationship. In OCL's case, the fact that only 40% of Thurston's billings derived from OCL work was the key factor. But there is no question the language of the contract between the parties was also important.

A well-drafted independent contractor agreement should set out the rights and obligations of the parties both during the relationship and when it comes to an end. This might include, for example, a statement, or requirement that:

- the parties anticipate the contractor will work for other parties
- there is no guarantee of any work arising out of the arrangement
- the organization has the right to end the contract at any time
- the contractor:
  - ensure a majority of his/her business is derived from other sources
  - maintain his/her own staff and "tools"
  - advise the organization if, in any fiscal period (*e.g.*, quarterly or annually), the services provided by the organization account for at least 50% of the contractor's revenue.

*Each arrangement is unique and will have its own nuances. To learn more and for assistance designing and implementing contractor agreements tailored to your workplace, contact Sherrard Kuzz LLP.*

[1] 2019 ONCA 640.

**HReview Seminar Series**

*Please join us at our next HReview Breakfast Seminar:*

# Just What the Doctor Ordered:

## An Annual Labour and Employment Check-Up for Employers

As every HR professional will attest, employment and labour law is changing at a rapid pace. Compound that with a wide range of annual (and sometimes more frequent) employment-related administrative requirements, and the world of an HR professional can be overwhelming.

The good news is **we can help** by working with you to design a range of compliance audits and checklists to keep you on track and on top of the law. Join us as we break down our **Annual Labour and Employment Check-Up for Employers**:

**1. Employment Standards**

- What employment standards-related agreements must be in writing?
- What records must be maintained?
- Which requirements are best suited for an annual audit?

**2. Human Rights & Accessibility**

- When are policies and training required? When are they recommended?
- What and when are the filing obligations under the *Accessibility for Ontarians with Disabilities Act*?

**3. Workplace Safety & Insurance and Occupational Health & Safety**

- What are the record keeping, posting and reporting obligations?
- What policies, programs and training must be reviewed annually?
- What are the inspection and risk assessment obligations?
- Which requirements are best suited for an annual audit?

**4. Employment Agreements**

- Which provisions of an employment agreement should be reviewed annually?
- How to implement a new and updated employment agreement with an existing employee.

**DATE:** **Wednesday February 26, 2020; 7:30 – 9:30 a.m.** (breakfast at 7:30 a.m.; program at 8:00 a.m.)

**VENUE:** **Hazelton Manor - 99 Peelar Road, Concord ON**

**COST:** Complimentary

**REGISTER:** **By Monday February 17, 2020 at www.sherrardkuzz.com/events/?data-category=hreview**

**Law Society of Ontario, CPD Hours:** This seminar may be applied toward 1.5 general CPD hours.

**HRPA CHRP** designated members should inquire at www.hrpa.ca for eligibility guidelines regarding this *HReview Seminar*.

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