

The Fixed Term Employment Contract

Recent Court of Appeal decision highlights the risks

March 26, 2024

In yet another employee-friendly decision of the Court of Appeal for Ontario, the court held that an invalid early termination clause in a fixed term employment contract did not void the fixed term aspect of the contract. As such, a dismissed employee was entitled to be paid out the remainder of the fixed term contract with no duty to mitigate.

The decision is interesting because, in recent years, the Court of Appeal has been inclined to find that if *any* termination clause in an employment contract is unenforceable, *every* termination clause in the contract is unenforceable, and the employee is entitled to common law reasonable notice, even if the employer never sought to rely on the impugned clause. For example, if a contract contains an unenforceable ‘with cause’ termination clause, and an enforceable ‘without cause’ termination clause, and an employee is dismissed ‘without cause’ (that is, the unenforceable clause is not relied upon by the employer) both clauses will be struck down by the court, and the employee will be entitled to common law reasonable notice.¹ This ‘bad apple spoils the whole bunch’ approach has generally benefitted employees and not employers.

In [*Kopyl v Losani Homes \(1998\) Ltd, 2024 ONCA 199*](#), the employer sought to apply this ‘bad apple’ argument to *its* benefit. Not so fast, said the Court of Appeal.

What happened?

Losani Homes hired Kim Kopyl on a one-year fixed term contract with an annual salary of \$150,000. The contract included a without cause early termination clause by which Losani Homes could end the employment relationship by giving 4 weeks’ notice. Six months into the one-year fixed term, Losani Homes terminated the employment contract without cause and paid Kopyl four weeks’ salary. Kopyl sued for wrongful dismissal alleging the early termination clauses violated the *Employment Standards Act*, thus Kopyl was entitled to be paid out for the remainder of the fixed term without a duty to mitigate.

Losani Homes did not dispute the fact that the termination clauses contravened the *Employment Standards Act* and were therefore void. However, relying on the court’s decision in *Waksdale*,² Losani Homes argued the fixed term aspect of the contract should also be struck down because, in effect, it was a type of termination clause; employment ended at one year. In that case, Kopyl should be entitled to common law reasonable notice with a duty to mitigate her damages. Given her short tenure, and no aggravating factors, that notice might have amounted to a few months. By contrast, if Kopyl was entitled to be paid out the remainder of the contract, she would get six months’ salary and benefits without a duty to mitigate.

¹ *Waksdale v Swegon North America Inc.*, 2020 ONCA 391.

² *Ibid.*

The Court of Appeal decision

The Court of Appeal dismissed the employer's argument. According to the court, a fixed term clause is not a termination clause:

the application judge found that a contractual provision providing for a fixed term of employment was not a termination clause since, upon the expiry of said fixed term, the employment relationship automatically terminates without any obligation on the employer to provide notice or payment in lieu of notice. Therefore, despite the invalidity of the termination clauses, the fixed term clause remained in effect.

As such, the fixed term clause remained in effect, the early termination clauses were invalidated, and Losani Homes was required to pay out salary and benefits for the six months remaining in the term. Further, Kopyl's damages were not subject to an obligation to mitigate the loss.

Lessons for employers

This decision is in line with recent Ontario caselaw that continues to find creative ways to enlarge damages payable to an employee upon termination.

Employers must therefore remain cautious when drafting employment contracts, particularly fixed term contracts. In most cases, a fixed term employment contract provides no greater protection to an employer than a well drafted contract for an indefinite term that includes an enforceable termination clause. In fact, a fixed term contract can come with increased risks including that, if the contract is terminated early, the employer may end up on the hook for the entirety of the remainder of the term, even if the employer *thought* it had a valid early termination clause.³

To learn more and for assistance reviewing and drafting enforceable contracts for your workplace, contact your Sherrard Kuzz lawyer or info@sherrardkuzz.com.

*The information contained in this briefing note is provided for general information purposes only and does not constitute legal or other professional advice, nor does accessing this information create a lawyer-client relationship. This briefing note is current as of **March 25, 2024** and applies only to Ontario, Canada, or such other laws of Canada as expressly indicated. Information about the law is checked for legal accuracy as at the date the briefing note is prepared but may become outdated as laws or policies change. For clarification or for legal or other professional assistance please contact Sherrard Kuzz LLP.*



LEXPERTRANKED

Chambers
and Partners

³ See related articles by our colleagues [Sarah McKay Marton](#), and [Erin Kuzz](#).