# Think twice before ending a fixed term contract early

Fixed term contracts may seem like a safer route for employers looking to reduce their exposure when an employment relationship ends, however a recent decision by the Ontario Court of Appeal reveals that fixed-term contracts carry their own unique risks and could expose the employer to much greater liability if not drafted properly. In the recently decided case of Howard v Benson Group Inc., an employee who was terminated before the end of his contract was entitled to the 37 months of salary and benefits he would have received had the contract played out as originally intended. Notably, he was awarded this with no obligation to mitigate. This decision should be a reminder to all employers that fixed-term contracts require explicit and well-worded language throughout, with special attention being given to termination provisions.

The facts of the case will be a familiar story to many employers. The employee, Howard, was hired on a five-year, fixed term contract as a Sales Development Manager for Benson Group Inc. When Benson Group decided to terminate his employment without cause only 23 months into the contract, they believed they were protected by the termination clause in the employment agreement which stated: "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*." On motion for summary judgement, the motion judge found that clause to be unenforceable due to ambiguity. The motion judge also determined that Howard was owed common law damages for wrongful dismissal, rather than being entitled to payment for the remainder of the contract. Howard appealed the latter determination, maintaining that he should receive damages for the duration of the fixed term contract, and should not be obligated to mitigate those damages.

The Court of Appeal agreed with Howard. Justice Miller wrote in his judgement that while fixed term contracts can have unambiguous termination provisions that oust the implied term that reasonable notice must be given for termination without cause, he goes on to say that if the parties to a fixed term employment contract do not specify a pre-determined notice period, an employee is entitled on early termination to the wages the employee would have received to the end of the term. Justice Miller confirmed that there was no duty to mitigate in these circumstances. Justice Miller stated:

> *"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. Just as parties who contract for a specified period of notice (or pay in lieu) are contracting out of the common law approach… so, too, are parties who contract for a fixed term without providing in an enforceable manner for any other specified period of notice (or pay in lieu)."*

Howard was awarded his full salary and benefits for the 37 months remaining in his contract, as well as no obligation to mitigate those damages. By not requiring Howard to mitigate his damages, the Court of Appeal has extended the potential liability of employers with fixed-term employees who end the contract before its expiration.

If you have any questions or concerns regarding your own contract or contracts for your company, please reach out to us at your earliest convenience so that we can review your situation and provide practical options.

Employers should take special note of the passing of Bill 132, as written about in our January 2016 newsletter. Please contact us to make sure your policies and procedures are compliant with the new changes to the *Occupational Health and Safety Act.*