

## Court of Appeal for Ontario: Independent Contractors Have a Duty to Mitigate Their Damages Following Early Termination of Fixed-Term Contracts

Alessandra Fusco

September 8, 2023

In *Monterosso v. Metro Freightliner Hamilton Inc.*,<sup>1</sup> the Court of Appeal for Ontario (ONCA) confirmed that independent contractors engaged pursuant to a fixed-term contract have a duty to mitigate their damages in the event of an early termination of such contract.

### Background and Facts

A group of companies (Metro) engaged Mr. Monterosso as an independent contractor for a 72-month term. Metro terminated Mr. Monterosso's engagement seven months after the term began. He sued for the payments he would have received over the remaining 65 months of the contract.

The trial judge held that the contract did not have a termination provision and that it clearly provided for a 72-month fixed term. On that basis, she awarded Mr. Monterosso \$552,500 plus HST calculated based on the remaining monthly payments that were owing under the contract. The trial judge also held that Mr. Monterosso was not required to mitigate his damages.

### Metro's Appeal

Metro appealed the decision and argued that the trial judge made two errors.

First, Metro argued that the trial judge failed to consider internal email correspondence that was dated 10 days after Mr. Monterosso signed his contract. This internal correspondence added a provision to the contract stating that Mr. Monterosso would be paid up until the last day of active service. Metro argued that this provision would be superfluous if the 72-month term of the contract were guaranteed. The ONCA rejected this argument, finding that the email correspondence at issue was ambiguous. The contract Mr. Monterosso signed also contained an "entire agreement clause," which was intended to avoid the argument raised by Metro.

Next, Metro argued that the trial judge erred by finding that Mr. Monterosso was not required to mitigate his

# Cassels

damages when the contract was terminated. The ONCA accepted Metro's argument on this issue, holding that the trial judge erred by "conflating the situation of independent contractors with that of employees working under fixed-term contracts." While in *Howard v. Benson Group Inc.*,<sup>2</sup> the ONCA held that employees under fixed-term contracts that are terminated early are entitled to damages equal to lost earnings for the balance of the fixed term, without a duty to mitigate, the ONCA had never held that independent contractors do not have a duty to mitigate following breach of a fixed-term contract.

The ONCA considered the legal principles related to the mitigation of damages, underscoring that a duty to mitigate arises when a contract is breached, including agreements with independent contractors. Although the contractual terms of an independent contractor agreement or circumstances of a contractor's engagement could conceivably relieve the contractor of the duty to mitigate following early termination, no such circumstances or contractual terms existed in this case. The ONCA noted, for example, that Mr. Monterosso was not in an exclusive, employee-like relationship with Metro, nor was he economically dependent on Metro. In fact, the terms of his contract expressly allowed him to provide services to other clients. As he was not in an "employee-like" relationship with Metro, Mr. Monterosso was required to mitigate.

## Damages

While the ONCA concluded that Mr. Monterosso had a duty to mitigate his damages, it ultimately held that Mr. Monterosso was entitled to the full damages awarded at trial because Metro had not met its burden of proving that Mr. Monterosso had failed in his duty to mitigate. Mr. Monterosso had filed extensive evidence outlining his unsuccessful job search efforts, whereas Metro had led no evidence to establish that there were jobs Mr. Monterosso ought to have applied for and/or accepted. As a result, despite the trial judge's error on the mitigation issue, the result was the same and the appeal was dismissed.

## Key Takeaways

The ONCA's decision in *Monterosso* resolves much uncertainty around damages for early termination of fixed-term independent contractor engagements. Independent contractors who are engaged pursuant to a fixed-term contract will ordinarily have an obligation to mitigate their damages in the event of early termination, unless their contract provides otherwise. However, the distinction between dependent and independent contractors will be essential in determining the scope of each party's potential liabilities and obligations in such circumstances. Whereas properly classified independent contractors will be subject to the duty to mitigate, dependent contractors and other workers in an "employee-like" relationship with their clients may not be subject to such duty.

Finally, the decision serves as a useful reminder that employers bear the onus of proving, on a balance of

probabilities, that an independent contractor failed to make reasonable efforts to find work following the termination of their engagement. A failure to lead evidence of inadequate mitigation efforts and work opportunities available to the contractor will preclude a reduction in damages for failure to mitigate.

If you have any questions regarding drafting independent contractor agreements, please contact a member of our Employment & Labour Group.

---

<sup>1</sup> 2023 ONCA 413.

<sup>2</sup> ONCA 256, leave to appeal refused, [2016] S.C.C.A. No. 240.

---

*This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.*