Cassels

McGuinty v. 1845035 Ontario Inc. - A Stark Reminder of the Importance of Termination Provisions in Fixed-Term Employment

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The Ontario Superior Court's recent decision in *McGuinty v. 1845035 Ontario Inc. o/a McGuinty Funeral Home*, in which the Court awarded nine years of salary and benefits to an employee who had been constructively dismissed during a fixed-term contract of employment, should serve as a warning to employers of the importance of including a well-drafted termination provision in any fixed-term employment agreement.

Background

Grant McGuinty was the owner of McGuinty Funeral Home Limited when in 2012, he sold the company to 1645035 Ontario Inc. (the employer). As a condition of the share purchase, Mr. McGuinty entered into a transitional consulting services agreement (TCSA) with the employer wherein he would continue working as the General Manager of the funeral home for 10 years post-closing. Under the terms of the TCSA, Mr. McGuinty earned a base salary of $100,000 plus commissions and was entitled to a company vehicle, fuel reimbursement, comprehensive health and dental benefits, and a golf club membership.

Importantly, the TCSA did not contain any terms addressing early termination or cancellation of the agreement.

Soon after the business was sold, tensions arose between Mr. McGuinty and his new employer. The employer revoked Mr. McGuinty's company vehicle privileges and fuel reimbursement, began to scrutinize his hours worked, and moved his workstation from a private office to the basement kitchen of the funeral home. Moreover, Mr. McGuinty and the employer disagreed on the commissions owed to Mr. McGuinty under the terms of the TCSA.

Within less than a year, Mr. McGuinty began a medical leave of absence due to workplace stress. He was unable to return to work and, two years after starting his medical leave, sued the employer for constructive dismissal.

Constructive Dismissal

Constructive dismissal arises when an employer's conduct evinces an intention to no longer be bound by the employment contract, and the employee treats that conduct as a repudiation of the contract by the employer. The employee bears the burden of establishing that he or she has been constructively dismissed.

In concluding that Mr. McGuinty had been constructively dismissed, the Court noted that the employer had, over a period of several months:

- required Mr. McGuinty to return his company vehicle and ceased paying him a fuel reimbursement, in contravention of the TCSA;
- recruited an employee who was subordinate to Mr. McGuinty to track Mr. McGuinty's hours worked;
- failed to pay Mr. McGuinty commissions to which he was entitled under the TCSA;
- removed a photograph of Mr. McGuinty that had been hanging in the hallway of the funeral home; and
- changed the locks to the funeral home, without notice to Mr. McGuinty and without providing him with a new set of keys.

Taken together, the Court held that this course of conduct had reasonably led Mr. McGuinty to conclude that the employer no longer intended to be bound by the terms of the TCSA and that he had been constructively dismissed.

The employer argued that Mr. McGuinty had acquiesced to the changes in the terms of his employment by remaining in his position (albeit on sick leave) for a two-year period before commencing a constructive dismissal action, such that he was not entitled to take the position that he had been constructively dismissed. The Court disagreed, noting that Mr. McGuinty had not willingly remained in his position for a two-year period; in fact, he did not and could not return to work due to the stress and anxiety caused by the employer's conduct and the unilateral changes the employer had made to the terms of his employment.

Damages

Pursuant to the Ontario Court of Appeal's 2016 decision in *Howard v. Benson Group Inc.*, in the absence of an enforceable contractual termination provision, an employee working pursuant to a fixed-term employment contract who is dismissed prior to the end of the term is entitled to be paid to the end of the term, with no obligation to mitigate his or her damages by seeking alternative employment. Since the TCSA contained no termination provision, Mr. McGuinty was entitled to the compensation and benefits he would have received had he continued to work to the end of the 10-year term. The Court calculated Mr. McGuinty's losses over the nine remaining years of the term (starting from when he began his medical leave), including lost salary, use of a company vehicle, fuel reimbursement, health and dental benefits, commissions and golf club membership, and ordered the employer to pay damages of approximately $1.3 million.

Takeaways for Employers

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Employers that use fixed-term employment contracts should ensure that such agreements contain well-drafted termination provisions, entitling the employer to terminate the agreement prior to the end of the term in a manner that complies with the applicable employment standards legislation. Otherwise, an employer may find itself on the hook to pay an employee the full compensation package he or she would have earned until the end of the term. Moreover, while certain circumstances are well-suited to the use of fixed-term employment agreements (such as when hiring to cover a specific project or a maternity leave), in many cases an indefinite term agreement with a well-drafted termination provision may be the preferable option.

For further information, please contact Maria Constantine or any member of the Employment & Labour Group.

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