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Explicit language needed for fixed-term contracts

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Temporary work has become the new reality for many Canadians. According to Statistics Canada, as of May this year 2.1 million individuals were employed in jobs with predetermined end dates. Since the recession, temporary employment has grown three times faster than permanent work.

Fixed-term work presents a much different set of considerations than traditional permanent employment. In contrast to permanent employees, fixed-term employees are not protected by employment protection legislation and the common-law requirement of reasonable notice. Given the consequences to the employee, there must be unequivocal contractual language for a court to find that an employment contract is fixed-term. Any ambiguity in the contract will be interpreted against the employer so as to give the employee the benefit of reasonable notice or pay in lieu: *Ceccol v. Ontario Gymnastic Federation* [2001] O.J. No. 3488.

Although employees on definite-term contracts are not entitled to reasonable notice, it does not mean that they are not entitled to any damages should their contracts be prematurely terminated without cause. The measure of damages is the value of salary and benefits that the employee would have received had he/she worked the remainder of the term: *Canadian Ice Machine Co. v. Sinclair* [1955] S.C.J. No. 56.

It is well-settled that permanent employees must mitigate their losses by making reasonable efforts to seek alternate employment. The jurisprudence is not so clear, however, as to whether mitigation applies to fixed-term contracts.

There is a line of authorities stemming from *Sinclair* which provides that a fixed-term worker is subject to a duty to mitigate if the contract is silent on the point. The plaintiff in *Sinclair* had been a general manager for the defendant company. When he was set to retire at 65, he entered into a seven-year contract with the company pursuant to which the company would pay him a salary to provide consulting services when called upon. Before the term ended, the company purported to terminate the contract with three months' pay in lieu of notice. The majority of the Supreme Court (Justices Kerwin, Estey, Kellock and Cartwright), in two separate reasons, suggested that the plaintiff had to mitigate his loss, which he had done by holding himself available to work as a consultant.

Sinclair has spurred some courts to impose an obligation to mitigate. As crisply stated in *Mosher v. Epic Energy Inc.* [2001] B.C.J. No. 768, "The principles of mitigation apply to fixed term contracts." (See also *Gill v. Navigate Capital Corp.* [2013] B.C.J. No. 1796; *Clelland v. eCRM Networks Inc.* [2006] N.S.J. No. 459; and *Walsten v. Kinonjeoshtegon First Nation* [2009] M.J. No. 148.) Accordingly, damages will be offset by income earned or that might reasonably have been earned during the unexpired portion of the term. This conclusion accords with the general principle of contract law that in the event of a breach, the innocent party is entitled to a sum that would put him/her in the position he/she would have been in had the contract been performed, minus avoidable losses.

Other courts have expressed a different view. In *Bowes v. Goss Power Products Ltd.* [2012] O.J. No. 2811, which involves an indefinite-duration contract with a fixed severance clause, former Chief Justice Warren Winkler held that unless otherwise stated in the contract, an employee is not obliged to mitigate where the parties have opted out of common-law reasonable notice. He observed that it would be counterintuitive and inconsistent for parties to contract for certainty and finality, and yet leave mitigation as a live issue. He was also mindful of the inherent inequality of bargaining power in employment relationships, and noted that "it would be unfair to permit an employer to opt for certainty by specifying a fixed amount of damages and then allow the employer to later seek to obtain a lower amount at the expense of the employee by raising an issue of mitigation that was not mentioned in the employment agreement."

The same considerations apply in support of excluding the principle of mitigation from contracts with a fixed term, according to *Lovely v. Prestige Travel Ltd.* [2013] A.J. No. 901. In *Lovely*, Justice Thomas Wakeling awarded an employee who was dismissed halfway through a two-year contract an amount equal to his remuneration for the balance of the term without any deduction for mitigation. Factually, the employer had failed to establish that the employee did not properly mitigate, but even if it were not so, Justice Wakeling was swayed that "mitigation principles do not apply to fixed-term contracts with no early termination provisions unless the contrary position is stated." There was no mention of *Sinclair* in his mitigation analysis, but citing *Bowes*, he explained that certainty is just as much a feature of a fixed-term contract with no early termination provision as a contract with a fixed severance clause. As such, there is no obligation to mitigate absent a clear provision in the fixed-term contract to do so. This approach, in Justice Wakeling's view, "is logically sound and has the added benefit of simplifying the law and encouraging people to work."

Sinclair is still cited now and then for the proposition that an employer who repudiates a definite-term contract is bound to pay the full amount owing under the contract, yet it seldom comes up with respect to mitigation. Although *Sinclair* remains the last word from our top court, it is a distinguishable precedent because the plaintiff appeared not to have contested and thus put at issue the applicability of mitigation. Moreover, the dependency and disparity of bargaining power typical of employment relationships were conceivably absent. Until more clarity on the issue emanates from appellate courts, employers and employees should explicitly state in their fixed-term contracts that mitigation is required if that is indeed their intention.

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