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Court Confirms Possibility to Owe an Employee 9 Years' Salary and Benefits

Imagine being told that you owe someone nine years' salary and benefits. And that person had no duty to mitigate their damages. And that effectively means you owe that person more than \$1 million. This exact scenario played out in a recent case in Ontario. Although this case happened in the transactions context, the lessons of this case also apply to the non-transactions fixed-term agreement context.

The Sale, The Fixed-Term Agreement, and The Conflict

In October 2012, Grant McGuinty, a third-generation owner of a funeral home, sold his shares in that funeral home to a purchaser. The sale agreement had an express term that Mr. McGuinty would enter into a 10-year fixed-term transitional consulting services agreement.

The recitals in the services agreement recognized Mr. McGuinty as the "key employee" of the business. Other terms included that he would be the general manager of the funeral home under the new purchaser, would be paid \$100,000 per year, and was subject to a 10-year non-competition covenant. Importantly, there was no provision in the service agreement providing for termination of the agreement before the 10-year term.

Within a relatively short period of time, differences emerged between the purchaser and Mr. McGuinty. Mr. McGuinty's last day of active employment was on or around September 2, 2013. He never returned to active employment with the purchaser after that. Mr. McGuinty commenced an action and alleged constructive dismissal. On the facts of the case, the court in McGuinty v. 1845035 Ontario Inc. (McGuinty Funeral Home), 2019 ONSC 4108, ultimately found that Mr. McGuinty was constructively dismissed by the purchaser.

Costly Damages — \$1.2 million for Constructive Dismissal of a Fixed-Term Contract

Once the court found constructive dismissal, it had to determine Mr. McGuinty's damages. Ultimately, the court awarded Mr. McGuinty, who was earning approximately \$100,000 per year, more than \$1.2 million. How did the court get to that large number?

1. The court's starting point was that Mr. McGuinty and the purchaser entered into a fixed-term employment contract.
2. The court noted that "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".
3. In this case, there was no enforceable contractual provision stipulating a fixed-term of notice. Also, Mr. McGuinty had approximately nine years left on his fixed-term contract. Accordingly, the purchaser had to pay Mr. McGuinty to the end of the 10-year term without an obligation to mitigate. That meant that the court awarded nine years' damages (approximately the remaining amount of time on the contract when Mr. McGuinty ceased to work) without a duty to mitigate.
4. Financially, that meant a damages award of \$1,274,173.83 against the purchaser. This comprised of loss of salary of \$100,000 per year for nine years (equalling \$900,000), and various other commissions and benefits for the remaining \$374,173.83.

The Importance of Legal Advice and a Key Danger of Fixed-Term Contracts

This recent case illustrates the importance of having experienced employment law counsel in the sale and purchase process, particularly when drafting and revising fixed-term employment or "consultant" agreements as part of the sale and purchase process. This decision follows the recent trends of:

1. fixed-term agreement court decisions rendered by Ontario courts, such as Mohamed v. Information Systems Architects Inc., 2018 ONCA 428; and
2. former owner employees litigating against their new owners, such as in Kerzner v. American Iron & Metal Company Inc., 2018 ONCA 989 (which we had previously written about) and which the former owner's leave to appeal to the Supreme Court of Canada was recently dismissed; both being cases that highlight the value of experienced employment law counsel.

On a closely related point, in both transactions and non-transactions contexts, this case highlights a key danger when using fixed-term employment and "consultant" agreements. That key danger is that, unless carefully drafted, damages for breach of a fixed-term employment agreement can be awarded to the end of the fixed term with no duty to mitigate. In this case, the court awarded damages to the end of the fixed term with no duty to mitigate, in the amount of \$1.2 million. Employers contemplating fixed-term employment or "consultant" agreements should heed that lesson from this case.

Any member of our Labour and Employment Group would be pleased to advise in the sale and purchase context, together with our full-service business law firm Mergers and Acquisition Group colleagues, and in the drafting and revision of fixed-term employment and "consultant" agreements. Our Labour and Employment Group has extensive experience in employment arrangements in transactions, including pensions and benefits matters. Our Labour and Employment Group is also well-versed in drafting fixed-term employment and "consultant" agreements and would be pleased to assist.

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