Court of Appeal Affirms Exercise of Good Faith Requirement in Terminating Contractor Agreement

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Background

In *Mohamed v. Information Systems Architects Inc.*, 2018 ONCA 428, Information Systems Architects Inc. (the Company) engaged an independent contractor, Mr. Mohamed, to provide technological consulting services under an Independent Consulting Agreement (ICA) for a six-month project with Canadian Tire. After agreeing to work full-time under the ICA, Mr. Mohamed resigned from his permanent, full-time employment.

As a term and condition of the ICA, the parties had expressly agreed that Mr. Mohamed would be an independent contractor and agreed that the ICA would terminate in the following circumstances:

- By the Company, at its sole discretion, if it determines that the consultant's work quality to be substandard;
- If the project with the customer gets cancelled, experiences reduced or altered scope and/or timeline;
- If the Company determines it is in the Company's best interest to replace the consultant for any reason; or
- Immediately, upon written notice from the Company, for any breach of the agreement by the consultant.

Canadian Tire's agreement with the Company included a term that the Company would not send any consultant who had a criminal record, except with Canadian Tire's consent. On November 2, 2015, before signing the ICA and being assigned to Canadian Tire, Mr. Mohamed told the Company that he had a dated criminal record from high school. He also agreed to a background security check. On November 4, he again disclosed his criminal record to the Company in a Declaration of Criminal Record Form. On November 5, Mr. Mohamed began work at Canadian Tire. However, when the security check report came back one month later disclosing the criminal record, Canadian Tire requested a new consultant.

Mr. Mohamed requested that the Company consider him for other roles, but instead the Company terminated the ICA on December 10, 2015. Mr. Mohamed sued the Company for breach of the ICA, claiming six months' remuneration, which was the full amount that he would have been paid had the contract been completed. Both parties brought a motion for summary judgment.

Finding in favour of Mr. Mohamed, the motion judge held that his status did not matter — although Mr. Mohamed was an independent contractor and not a dependent contractor or an employee, because the ICA was a fixed term contract, damages were based on the unexpired term of the contract with no duty to mitigate. The company sought an appeal to the Ontario Court of Appeal.

Court of Appeal Decision

Although the Court of Appeal concluded that the termination provision in the ICA was valid and enforceable, the Court dismissed the appeal. The Court confirmed that the employment law principle in *Howard v. Benson Group Inc.* (another Court of Appeal decision) that damages should be based on the fixed term of the agreement with no duty to mitigate, also applied in this independent contractor case. Despite this finding, the Court was clear in stating that it was not deciding whether the principle from *Benson* would apply to *all* fixed-term contracts of independent contractors; only that it applied in this case.

Takeaways

The takeaways from this case for any company looking to engage an independent contractor or to terminate an independent contractor arrangement are as follows:

- Although a fixed-term independent contractor agreement may provide a terminating party with an unfettered right to terminate the agreement, it has an obligation to exercise its right to terminate the agreement only in good faith.
- When the terminating party does not exercise its right to terminate the agreement in good faith, it may trigger a right to damages that was not contemplated by the agreement.
- Although an independent contractor agreement may not provide for what damages would flow from a failure to terminate in good faith, based on the specific terms and circumstances of the agreement, it may be reasonable to infer that the parties intended that if the power to terminate was not exercised in good faith, then damages for breach would be based on the compensation owed for the remaining term of the agreement, without a duty to mitigate.

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