



What's New in HR Law

Sometimes Even When You Win, You Lose: Court of Appeal Confirms Independent Contractors Have Duty to Mitigate

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Bottom Line

In [*Monterosso v. Metro Freightliner Hamilton Inc., 2023 ONCA 413*](#), the Court of Appeal accepted the employer's argument that independent contractors, unlike employees, have a duty to mitigate when a fixed-term contract is terminated before the end of its term. This did not help the employer as the Court ultimately concluded that the independent contractor in this case satisfied his duty to mitigate.

Background Facts

Antonio Monterosso (the "Contractor") entered into a 72-month fixed-term contract to provide services to Metro Freightliner Hamilton Inc. ("Metro") as an independent contractor. The contract did not contain an early termination clause permitting Metro to terminate the contract early, nor did it include any language requiring the Contractor to mitigate any damages if Metro terminated the contract.

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Metro terminated the contract without cause after 7 months, leading the Contractor to sue for payment of the remaining 65 months of the contract. At trial, the trial judge awarded the Contractor \$552,500, plus HST, representing payments for the remaining term of the contract.

Metro appealed the trial judge's decision to the Ontario Court of Appeal. Among other things, Metro argued that the trial judge failed to consider certain communications between Metro and the Contractor while negotiating the contract which, Metro argued, demonstrated that the Contractor was not entitled to be paid for the remainder of the term in the event the contract was terminated early. Metro also argued that the Contractor had a duty to mitigate any losses he experienced as a result of Metro terminating the contract, and that the damage award should be reduced because the Contractor failed his duty to mitigate.

The Court of Appeal Decision

The Court of Appeal held that the Contractor was entitled to damages for the remainder of the term because the contract did not contain an early termination provision. While the Court of Appeal agreed with Metro that the Contractor did indeed have a duty to mitigate his damages, the Court concluded that the Contractor satisfied that duty.

No Early Termination Provision

The Court of Appeal confirmed the longstanding principle that, in the absence of a valid early termination provision, an independent contractor whose fixed-term contract is terminated early will be entitled to damages for the remaining term of the contract. This same principle also applies to employees.

Reviewing the facts before it, the Court of Appeal confirmed that the contract between Metro and the Contractor did not contain an early termination provision.

Duty to Mitigate

The Court of Appeal then considered Metro's arguments that the Contractor had a duty to mitigate his damages for the remainder of the fixed-term and that, on the facts, the Contractor had failed to do so.

The Court held that the Contractor did have a duty to mitigate his damages. In doing so, the Court highlighted the distinction between how courts treat the duty to mitigate a breach of a fixed-term contract within the context of an employment relationship and an independent contractor relationship. The Court held that while employees hired under a fixed-term contract have no duty to mitigate unless their contract specifically includes a mitigation clause, the opposite is true of independent contractors; namely, independent contractors are assumed to have a duty to mitigate their losses under a fixed-term contract *unless* the language of the contract says otherwise. The Court also highlighted the grey area that exists in the case of "dependent contractors"; where a contractor has certain trappings of an employment relationship (economic dependence and exclusivity, etc.), they may be treated more like an employee.

The Court of Appeal concluded that the Contractor had a duty to mitigate and that the Contractor had satisfied that duty. In reaching this conclusion, the Court relied on the extensive job search evidence filed by the Contractor, and noted that Metro failed to provide any evidence that there were jobs available that the Contractor could have taken to mitigate his losses.

Check the Box

This case reinforces the potential risks involved with entering into fixed-term contracts with employees and contractors. While hiring personnel for a fixed-term may sound appealing for many employers, it can create significant risk of liability.

To avoid the risks that arose in this case, prudent employers should seek the advice and drafting assistance of knowledgeable legal counsel before entering into a fixed-term contract with an employee or contractor.

Need More Information?

For more information or assistance with employment and/or independent contractor agreements, contact James Jennings at jjennings@filion.on.ca or your regular lawyer at the firm.



PROUD MEMBER OF
L&E GLOBAL
Alliance of Employers' Counsel Worldwide



ADVOCATES
for EMPLOYERS
of CANADA

Toronto
Bay Adelaide Centre
333 Bay Street
Suite 2500, PO Box 44
Toronto, Ontario M5H 2R2
tel: 416.408.3221
fax: 416.408.4814
toronto@filion.on.ca

London
252 Pall Mall Street, Suite 100
London, Ontario N6A 5P6
tel: 519.433.7270
fax: 519.433.4453
london@filion.on.ca

Hamilton
1 King Street West
Suite 1201, Box 57030
Hamilton, Ontario L8P 4W9
tel: 905.526.8904
fax: 905.577.0805
hamilton@filion.on.ca

Kitchener-Waterloo
137 Glasgow Street
Suite 210, Office 175
Kitchener, Ontario N2G 4X8
tel: 519.433.7270
fax: 519.433.4453
kitchener-waterloo@filion.on.ca