



Independent Contractors Have a Duty to Mitigate Damages

The Ontario Court of Appeal has recently determined that independent contractors whose fixed term contracts are terminated early, have a duty to mitigate their damages.

In *Monterosso v. Metro Freightliner Hamilton Inc.*, the independent contractor was engaged in March 2017 for a fixed term contract of 72 months. His services were terminated without cause in November 2017, and he brought an action for damages for the remaining 65 months in the contract. The trial judge found that the contract between the parties did not have a termination provision and clearly and unambiguously provided for a 72-month term; she awarded the plaintiff \$552,500 in damages and determined that he had no duty to mitigate.

On Appeal, the defendants argued that email correspondence had amended the contract to remove the 72-month guaranteed term. The court rejected this argument finding that the contract contained an “entire agreement” clause not permitting them to rely on ambiguous email correspondence.

The defendants further argued that the trial judge had erred when she held that the contractor was not required to mitigate his damages. The court accepted this argument finding that the trial judge had mistakenly conflated independent contractors with fixed term employees, who have no duty to mitigate when their contracts are terminated early and must be paid to the end of the contract term:

A duty to mitigate arises when a contract is breached, including contracts with independent contractors. Of course, the terms of a contract may provide otherwise. However, nothing in this case takes it outside the normal circumstances in which mitigation is required. For example, the respondent was not in an exclusive, employee-like relationship with the appellants, nor was he dependent on the appellants; the terms of the contract permitted the respondent to perform services for other parties. The matter was not argued fully before us, but for purposes of this appeal it suffices to say there was no basis for the trial judge to conclude that the respondent was not required to mitigate (at para 9).

However, the evidence on record showed that the contractor had made extensive efforts to find alternative employment opportunities. Despite the



trial judge's error, the defendants had failed to meet their burden of proving the contractor failed to mitigate; the trial judge's decision would stand.

Takeaways:

Unless the contract provides otherwise, independent contractors whose fixed term agreements are terminated early and who are not in dependent relationships with the employer, have a duty to mitigate their damages by attempting to find work.

Businesses should also ensure that the independent contract agreements explicitly contain a clause permitting early termination as well as mitigation obligations.

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