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## Sit Back and Relax – Is there a Duty to Mitigate after Termination of a Fixed-Term Contract?



By [Matthew Turzansky](#)

The Ontario Court of Appeal recently issued its decision in *Howard v. Benson Group Inc.* [2016 ONCA 256](#), relating to the termination of a fixed-term employment contract. The Plaintiff, Mr. Howard, was a Truck Shop Manager who entered into a five year fixed-term employment contract with the Defendant starting September 2012. Twenty-three months into the contract, the employer terminated him with two weeks' pay in lieu of notice, relying on a provision in the contract that limited his severance to his *Employment Standards Act* minimum.

At Trial, the Judge held that the termination clause was unenforceable on the grounds of ambiguity – a finding that was not appealed. Since the Trial Judge struck out the clause limiting his severance to the statutory minimum, the Court held that the Plaintiff's damages should be calculated on the basis of an implied term of reasonable notice.

The matter was appealed on two issues:

1. The appropriate basis for calculating damages upon termination of a fixed-term contract; and
2. Whether the duty to mitigate applies.

On the first issue, the Court concluded that, in the absence of a clause allowing for early termination, the proper quantum of damages for such a fixed-term employment contract is payment of the remainder of the term of the contract. This conclusion is undoubtedly correct, and is in line with Alberta decisions on the subject. However, in arriving at this conclusion, the Court's analysis blurs the concepts of damages for breach of contract and contractual termination entitlements, which has implications in the area of mitigation.

The Ontario Court of Appeal cited the Supreme Court's decision in *Machtiger v. HOJ Industries Ltd.* [1992] 1 SCR 986, stating that the presumption of reasonable notice can be displaced where the employment contract "clearly specifies some other period of notice, whether expressly or impliedly." Relying on this, the Court held that Benson must deliver on its duty under

the contract to pay the Plaintiff's salary for the balance of the fixed term. In essence, the Court is saying that upon termination, the Plaintiff has a contractual entitlement to the balance of his salary under the Contract.

It is not uncommon for parties to fixed-term employment contracts to agree to a specific sum to be payable upon early termination (other than salary for the balance of the fixed term). There is good reason to do so. Employees have the security of knowing that, while they may be terminated at any time, they will receive a specified sum of money that is not subject to mitigation. On the other side, employers get the freedom to terminate any employee at any time in exchange for a set cost.

In *Howard v. Benson*, however, the Court created a contractual entitlement that was **not** in the contemplation of the parties at the time the contract was entered into (after all, there was a provision in the contract that addressed early termination). Since the appropriate quantum for damages upon termination of a fixed-term contract is also the balance of the fixed term, this may not seem problematic at first glance. The problem manifests itself in the question of mitigation.

Relying on its earlier decision in *Bowes v. Goss Power Products Ltd.* 2012 ONCA 425, the Court in *Howard* held that there was no duty to mitigate. However, in *Bowes*, the Court was dealing with a fixed-term contract that stipulated an amount payable upon early termination of the contract. Where a contract contains such a provision, then termination is not a breach of the contract at all; rather the employer is simply exercising his or her contractual right to terminate in exchange for payment of a stipulated sum. As the amount payable is a contractual entitlement, it is not subject to mitigation.

By contrast, in *Howard v. Benson*, there was no contractual provision providing for early termination (after the governing clause was found unenforceable). As a result, Mr. Howard's termination cannot be anything **but** a breach of his employment contract. Alberta Courts have held that the duty to mitigate **does** apply to damages for breach of an employment contract, even for a fixed-term contract. This is because an innocent party is entitled to be placed in the position he would be in if the contract had not been breached, but is not entitled to damages that could reasonably have been avoided.

In terms of what to take away from this decision, employers should be alive to the possibility that, upon termination of a fixed-term employment contract, an employee may be entitled to the salary remaining under the term of the contract with no duty to mitigate. In a lengthy fixed-term contract, this amount could be enormous. As an employer, the best way to avoid this unwelcome outcome is to have a comprehensive written employment agreement containing a clear, enforceable termination clause. Even though, in our respectful view, the Court in *Howard v. Benson* did not get the analysis quite right in dealing with mitigation, the case demonstrates how unintended consequences can arise out of a poorly drafted termination clause. Field Law's lawyers would be happy to assist you to ensure that you do not face this risk.

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