Court Finds Fixed-Term Contract No Excuse for Not Giving Reasonable Notice

April 21, 2008

In a recent B.C. Supreme Court decision, the issue of whether an employee with a fixed-term contract is continuously employed – and therefore entitled to reasonable notice – is clarified. In *Monjushko* v. *Century College Ltd.,* 2008 BCSC 86, the plaintiff argued that he was entitled to damages in lieu of reasonable notice for the nine years he was employed by the defendant. The defendant claimed that the plaintiff was hired on a fixed-term contract and was therefore not entitled to any reasonable notice.

The Facts

The plaintiff, Dr. Monjushko, was a Ukrainian mechanical engineer who worked as an instructor and associate professor before he immigrated to Canada in 1995. In 1996, Monjushko began working for the defendant, Century College Ltd. ("Century"), as an instructor for Century's math and computer science–related distance education courses, provided under contract with Athabasca University.

Century gave Monjushko an appointment letter at the start of each academic term; the first one in January 1996. Each of these appointment letters stated that the plaintiff's appointment as instructor had been approved for the upcoming semester, and noted which courses the plaintiff would be teaching that term as well as the exact start and end dates of the semester. From 1996 to 2004, Century issued a total of 40 appointment letters to Monjushko. The form of the appointment letters for each semester were nearly identical to each other, with only the semester start and end dates and the particular course names changing. In return, Monjushko issued invoices to Century under the name of AVM Computing, a business name he used. All invoices listed AVM Computing's address as Monjushko's home address.

The issue of whether Monjushko was an independent contractor or an employee was considered by the Canada Customs and Revenue Agency ("CCRA") in 2004 and a letter was sent by CCRA to Century, which stated:

We have determined that Vladimir Monjushko was an employee under a contract of service…for the following reasons:

- You controlled his hours of work

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- He had to perform the services personally.
- He had to take direction about the work to accomplish as well as the method to use to complete it.
- You determined the course content.
- You provided any equipment necessary to complete the work.
- The terms of his employment did not allow him to profit or expose him to a risk of loss.

Century did not appeal the CCRA ruling. Rather, Century issued T4 statements to Monjushko for each year that he worked.

Around the end of October 2004, Century learned that Athabasca University, the source of approximately 70% of its students and revenue, did not intend to renew its partnership agreement after the current agreement expired in June 2005. After learning this, and prior to the sale of the company some months later, Century issued one last appointment letter to Monjushko in December 2004. That letter covered the spring 2005 semester, which ran from January 10, 2005 to April 22, 2005.

Sometime in April 2005, Monjushko was informed without warning that his employment would be terminated at the end of the semester. On April 28, 2005, Century issued a Record of Employment (ROE) to Monjushko, which noted the first day worked as January 2, 1996 and the last day paid as April 22, 2005. This was the one and only ROE that Century issued to Monjushko.

The Law

In determining whether Monjushko was employed under a contract of fixed term or indefinite term, Madam Justice Loo referred to two applicable appellate level cases. In *Marbry Distributors Ltd.* v. *Avrecan International Inc.,* 1999 BCCA 172, Justice Braidwood considered the intermediate category of employment relationships between those that are clearly employment and those that are clearly independent contracts. In determining "where on the continuum a relationship of this [intermediate] nature resides," Braidwood referred to a non-exhaustive list of three factors to consider:

1. Duration/permanency of the relationship: the longer or more permanent the relationship, the more likely it is that it is an employment relationship and a reasonable notice requirement exists;
2. Degree of reliance/closeness of the relationship: the higher the degree of reliance between the parties, the more likely it is that the relationship falls on the employer/employee side of the continuum; and
3. Degree of exclusivity: an exclusive relationship favours the master/servant classification.

Madam Justice Loo also looked at the Ontario Court of Appeal case, *Ceccol* v. *Ontario Gymnastic Federation*, 204 D.L.R. (4th) 688 ("*Ceccol*"). The facts of *Ceccol* closely mirrored those of the case at bar. There, the parties had entered into a series of 15 annual contracts, each of which contained a

specified end date. In finding that the plaintiff was not a fixed-term employee, Justice MacPherson emphasized the importance of the parties' reasonable expectations in situations such as these. This direction clearly resonated with Madam Justice Loo, who made particular note of the fact that: "Century was Monjushko's sole source of income. He worked for no other employer. He expected his employment to continue indefinitely."

The Case at Bar

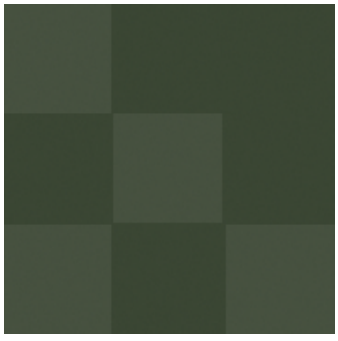
Madam Justice Loo considered the facts of this case to "fly in the face" of the defendant's assertion that each of the 40 appointments was a separate fixed-term contract that did not require any termination notice. In particular, she made note of the start and end dates quoted on the ROE issued to Monjushko, as well as the fact that there was only one ROE, instead of a ROE being issued at the end of each semester.

These facts, combined with the fact that Century never appealed the CCRA ruling that Monjushko was an employee and not an independent contractor, led the judge to conclude that Monjushko was considered by both parties to be continuously employed from January 2, 1996 to April 22, 2005. In light of this conclusion, the judge held that the plaintiff was entitled to reasonable notice of the termination of his employment.

Madam Justice Loo's decision in this case appears to have been strongly influenced by Justice MacPherson's reasoning in the *Ceccol* decision:

> It seems to me that a court should be particularly vigilant when an employee works for several years under a series of allegedly fixed-term contracts. Employers should not be able to evade the traditional protections of the ESA and the common law by resorting to the label of "fixed-term contract" when the underlying reality of the employment relationship is something quite different, namely, continuous service by the employee for many years coupled with verbal representations and conduct on the part of the employer that clearly signal an indefinite term relationship.

Applying this reasoning to Monjushko's case appears to be at the heart of the court's decision. A party's reasonable expectations must be considered and employers cannot be allowed to evade traditional legal protections by merely applying the "fixed-term" label to the employment relationship.



Interestingly, while Madam Justice Loo found that there were insufficient facts to support a finding for *Wallace* damages (aggravated damages awarded against an employer for their bad-faith conduct in the manner in which the employee was dismissed), she found another way to penalize Century for its behaviour. The judge states that:

> Century knew at the end of October 2004 that it would no longer have work for Dr.

> Monjushko after its partnership agreement with AU [Athabasca University] ended in June 2005, or even sooner, when the semester ended in April 2005. However, it did not make that fact known to Dr. Monjushko when it ought to have. That is a factor that in my view ought to lengthen the notice period.

Judge Loo does not indicate the precise extent to which this factor increased the damages award she made; however, it was held that 15 months was the appropriate notice period in this case.

Based on the result of this case, employers should be warned that the courts will not hesitate to search below the surface of an employment contract, and the "fixed-term" label, to determine whether an employee is entitled to and has received reasonable notice.

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