SMHI LEGAL NOTES
STEINBERG MORTON HOPE & ISRAEL LLP
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Fixed vs Indefinite

When an employee is hired by an employer, it is usually for an indefinite term. There are, however, a significant number of employees who are hired on a contract basis with a term of employment that is fixed. While the former are entitled to reasonable notice or payment in lieu should their employment be terminated, the latter are not, at least in most cases.

The following cases involve two employees who worked on contract. After a number of years with their respective employers, their services were terminated. Both employees sued for damages. One was successful, the other was not.

Diana had worked as an administrative director for a provincial sports federation for nearly 16 years. Her employment was governed by a series of one-year contracts. Irene provided computer training for a school run by a First Nation. She worked for the school for 11 years under a series of contracts that ran from September to June each year.

Diana's annual employment contracts all contained a clause (article 1.1) that her employment would commence on July 1st and terminate on June 30th of the following year. The contracts also indicated that subject to acceptable performance reviews (article 1.2), the agreement was subject to renewal upon the consent of both parties as to terms and conditions. Each year, Irene prepared a proposal for her employer, which incorporated a fixed term. Following annual negotiations, the proposal was approved by her and the employer.

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*The articles in **SMHI Legal Notes** are necessarily of a general nature and cannot be regarded as legal advice. Our firm will be pleased to provide additional details on request.*

Seven months before her current employment contract was due to expire, Diana learned that the federation would not be renewing some of its employment contracts. A few months later she was given written notice that, in fact, her's was one of the contracts they had decided not to renew. Irene was informed that her job was to become a permanent one and was to be put out for tender and therefore she would not be rehired.

Both women sued, arguing that, despite the fixed terms in their respective employment contracts, they were effectively employees hired on an indefinite term and therefore entitled to reasonable notice of termination or payment in lieu thereof. Diana was successful in her argument. Irene, on the other hand, was unable to persuade the Court. Why the different results?

The starting point in both cases is for the Court to determine whether or not the terms of the employment contract are crystal clear. The consequences of a finding that an employment contract is for a fixed term are serious and therefore, "the courts require unequivocal and explicit language to establish such a contract, and will interpret any ambiguities strictly against the employer's interest." *(Professor Geoffrey England, Individual Employment Law (Toronto: Irwin Law; 2000)*

In Diana's case, the Ontario Court of Appeal found that the relationship between articles 1.1 and 1.2 in the contract were not entirely clear. In particular, the words "subject to renewal" in article 1.2 were not self-defining and cast doubt on the federation's argument that article 1.1 was effective in creating a clear fixed term contract. To rectify the ambiguity, the Court had to hear evidence from the parties as to their intentions and their conduct relating to the employment contract. The evidence in support of Diana's position, that she was an indefinite employee, included:

- Testimony by the executive director and two former presidents of the federation who all indicated that they had regarded Diana as an indefinite employee and that the 12 month term was simply the vehicle by which the terms and conditions of a new contract were negotiated each year.

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He Who Represents Himself Has a Fool for a Client

There is real truth to this famous quotation. While there are times when a lay person will be able to navigate their way through a legal issue, there are many other situations when you should consider professional legal help. In this issue of our newsletter we have three recent cases that involve parties that tried to go it alone. As a result, lawsuits became necessary in all three situations.

The first case involves a couple who attempted to negotiate and draft their own separation agreement. In the second case, a testator changed her will on several occasions but only sought the help of a lawyer once. A homebuyer is the plaintiff in the third case. Instead of hiring a lawyer as soon as she started house hunting she waited until after the agreement of purchase and sale was signed. Unfortunately, the last two scenarios, in particular, are not so uncommon.

The Case of the Undeclared Assets

Mary Ann and William were married for 16 years when their marriage came to an end. They made the decision to write up their own separation agreement. Neither consulted a lawyer prior to signing the agreement. After the agreement was signed William began to feel that the agreement did not favour him and sought to have it set aside.

Mary Ann had taken the lead in drafting the agreement, although she did discuss its content with William. In essence, the couple agreed that Mary Ann and their two teenage children would stay in the matrimonial home and that William would pay $150 a week as child support. William would transfer his interest in the home to Mary Ann and she would provide him with an Equity note payable on July 1, 2016.

The couple also agreed that each would keep his/her own assets and liabilities and that they would have no claim against each other with respect to any personal assets or liabilities. Unfortunately there were a few of Mary Ann's assets that William was either unaware of or did not have a correct value for. These included Mary Ann's pension, which she valued at $24,000, though it was actually worth between $83,000 and $52,000. She also failed to mention a mutual fund, stock options and two bank accounts all of which totalled approximately $28,000.

To determine whether a separation agreement should be set aside, the Court engages in a two-stage analysis. Firstly, the applicant spouse must demonstrate that one or more of the circumstances set out in the *Family Law Act* has been engaged. Section 56(4) of the Act states that:

A court may, on application, set aside a domestic contract (which includes separation agreements) or a provision in it,

(a) if a party failed to disclose to the other significant assets, or significant debts or other liabilities, existing when the domestic contract was made;

(b) if a party did not understand the nature or consequences of the domestic contract; or

(c) otherwise in accordance with the law of contract.

Despite the one-sidedness of the agreement, the Court found that the parties in this case knew that they could or should obtain legal advice, but both parties chose not to. As a result, William could not now complain that he was not aware of the legal consequences of the agreement. Therefore, it came down to whether or not Mary Ann had failed to disclose and accurately value significant assets.

The Court found that William was entitled to rely on Mary Ann to provide a proper valuation of her pension, which she failed to do. The Court did not accept Mary Ann's reasons for not disclosing the mutual fund, stock options and bank accounts. She claimed that she thought the stock options had no value and that the parties had agreed to leave the bank accounts out of the process despite the fact that her accounts held more than $11,000 and William's lone account held $20.

The Court concluded that if William had been aware of all of Mary Ann's assets and their values, that this would have affected his decision as to whether or not to enter into the agreement as it was written. On this basis, the Court exercised its discretion and set the separation agreement aside.

In addition, to the legal costs both parties incurred for this litigation, they are now back at square one with respect to the separation agreement. Much time, money and grief could have been avoided had they chosen to seek legal advice as soon as they realized their marriage was over.

Clarity is Everything

Drafting a will on your own can lead to some unintended results. This is what happened in the estate of Margaret G.

Margaret had spent her life accumulating an estate worth $300,000. Over the years, Margaret made two wills as well as many subsequent changes to them. While she did use a lawyer at one point, much of what she did, she did on her own.

In 1989, Margaret drafted her own will. In 1994, she consulted with a lawyer and had him draft a new will for her. In addition, she made a number of handwritten notes on the 1989 will, some of which post-dated the 1994 will. She had also made a note on the 1994 will that changed how her estate was to be divided. In 2007, she wrote a note indicating how she wanted to distribute her estate. Faced with these various documents and notes, the estate trustee could not be sure of Margaret's true intentions, so she was forced to turn to the Court.

Generally, a new will revokes a prior will. In this case the 1994 will would supersede the 1989 will. However, because Margaret continued to make changes on the 1989 will even after she had a lawyer prepare a new will, this had the potential effect of reviving the 1989 will. This was the first issue the Court had to contend with. The Court concluded that the 1989 will had not been revived because none of the changes bore her signature.

The Court next had to decide whether the 2007 note constituted simple instructions for a future will or whether it was intended to be a new will if no formal document was executed. The Court ultimately decided that it could not be considered a new will because it lacked any formality.

Finally, the Court had to consider the handwritten note on the 1994 will and determine whether it amounted to a codicil. Because the note was written entirely in Margaret's own hand and she had signed it, the Court found that it did meet the legal requirements of a codicil. This finding had the effect of altering the original bequest which was to a single recipient and instead divided the estate among two beneficiaries.

The final item the Court had to determine was who the actual beneficiaries were. Although the two beneficiaries were charities, both charities had undergone several changes, including name and purpose and therefore it was not clear who exactly was to receive the money.

The time and cost involved in having the Court make these determinations could have been avoided if Margaret had chosen to use a lawyer to draft her will as well as all subsequent changes. This case also serves to illustrate the importance of not making changes on the original will.

Our firm works in estate planning and we would be happy to assist you to implement your plans in this area.

Buyers and Vendors Beware

The purchase and sale of homes are common activities that happen on a daily basis and ones that many people will be involved with at least once in their life. When deciding whether to sell or buy a home, the first professional that most will contact is a real estate agent.

While vendors and purchasers recognize the importance of involving a lawyer, the majority do not meet with their lawyer until after the agreement of purchase and sale has been signed. The following illustrates why you should contact your lawyer as soon as you decided to buy or sell.

Janis entered into an agreement of purchase and sale for a townhouse owned by Kimberley. As part of the agreement, Janis provided a deposit in the amount of $15,000.

This townhouse was one of five that were attached to each other. Running across all five properties, both driveways and backyards, were easements allowing all five property owners access to the other properties. Nothing in the easement text limited the use to which the easements could be put.

Janis was informally told of the easements when she asked about building a fence for her dog. Not only did the agreement of purchase and sale not mention the easements, it provided *that the title to the property is good and free from all restrictions, charges, liens, and encumbrances except as otherwise specifically provided in this agreement...*

The result was that Kimberley was unable to deliver good title to the property and Janis refused to close, instead suing for a return of the deposit. The Court agreed with Janis and Kimberley was ordered to return the $15,000 plus interest. An experienced real estate lawyer, would ensure that such crucial items were properly disclosed and included in the agreement of purchase and sale.

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- Diana's uncontradicted testimony about the initial job interview, wherein she and the interviewer had discussed that it was to be a full-time permanent position.
- Diana's testimony that she would never have applied for a job that was only for one year.
- The language in the contract that contemplated automatic renewal, including the linking of renewals to "acceptable performance reviews", the requirement that performance reviews "shall be considered in annual salary negotiations" and the requirement that the employee's salary be negotiated by a specified date before the end of the contract.

Based on the overwhelming evidence, the Court concluded that the employment contract did not contain the unequivocal and explicit language necessary to establish a fixed term contract and Diana was entitled to a 16 month notice period.

Unlike Diana's employment contract, the wording in Irene's contracts was not ambiguous. The Court in Irene's case concluded that "No opening is provided to the court to 'interpret' the contract in a manner more favourable to the plaintiff." Irene was a fixed term employee and was therefore not entitled to any notice. The following factors worked against Irene.

- There was no renewal clause as there was in Diana's case.
- There was no formal appraisal process undertaken by the employer or incorporated in the contracts raising a potential basis for a suggestion of "employment" and a basis for a finding of ambiguity.
- It was Irene herself who structured the annual proposal.
- The term of the contract was for the school year only. Unlike the full-time teachers, Irene was paid only for the 10 months she worked.
- Irene's admission that from one year to the next, she was always uncertain whether her contract would be renewed.
- She habitually would not return to work until advised to do so.
- The employer's policy was that non-natives could only be hired on a term contract.

The Court concluded by stating that, "I am mindful of the danger of repeated 'fixed term' contracts, but in this case the underlying reality of the employment was that the parties specifically knew they were entering into successive, independent contractor, fixed term contracts."

The difference in these two cases really comes down to the wording in the two contracts. The wording in Irene's contracts made it very clear that she was a fixed term employee. The wording in Diana's contracts left room for doubt and in such cases the court will interpret any ambiguities in favour of the employee and against the employer.

Employers can certainly make use of fixed term contracts of employment, however, they need to ensure that the terms are clear for them to be enforced.

Employees who choose to sign such contracts need to understand that they will not be protected by employment standards or the common law when it comes to termination of employment.

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Steinberg Morton Hope & Israel LLP

5255 Yonge Street - Suite 1100
Toronto, Ontario M2N 6P4

T: 416 225-2777
F: 416 225-7112
www.smhilaw.com

LAWYERS

Irwin Steinberg
isteinberg@smhilaw.com

James C. Morton
jmorton@smhilaw.com

Jack W. Hope
jhope@smhilaw.com

David M. Israel
disrael@smhilaw.com

Michael E. Cass
mcass@smhilaw.com

M. Michael Title
mtitle@smhilaw.com

Shelley Brian Brown
sbrown@smhilaw.com

Taras Kulish
tkulish@smhilaw.com

Antonin I. Pribetic
apribetic@smhilaw.com

David A. Brooker
dbrooker@smhilaw.com

Mark M. Persaud
mpersaud@smhilaw.com

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