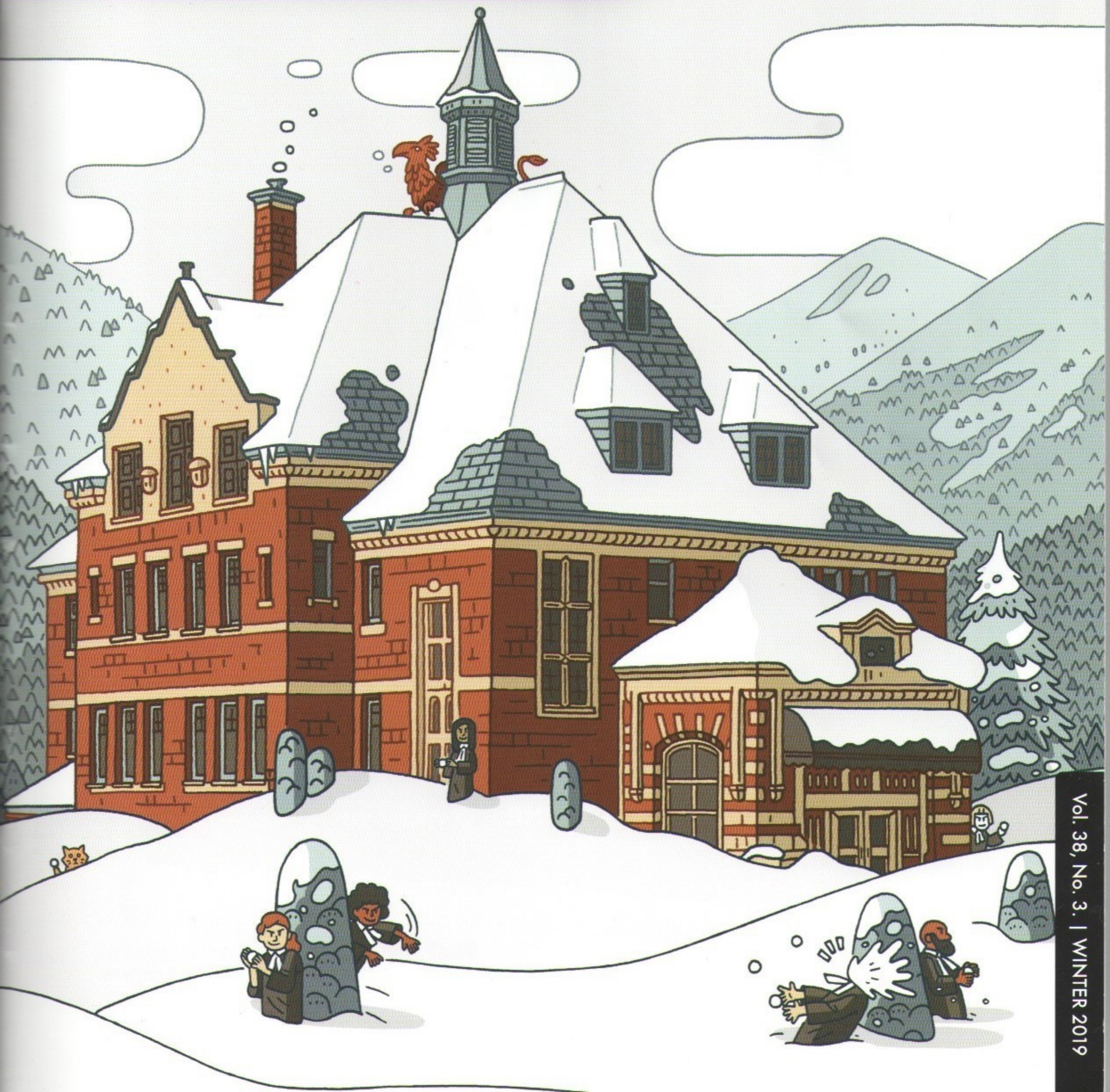
THE ADVOCATES' JOURNAL



Vol. 38, No. 3. | WINTER 2019

Howard v. The Benson Group Inc.:

Three years on, and still dangerous

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An employment contract is one of the more accessible expressions of the legal concept of a bargain: An employee offers to provide his or her labour in exchange for an employer's agreement to pay wages. Our familiarity with this concept, and other basic concepts underpinning the paradigm employment relationship, is no doubt attributable to the fundamental role that work plays, and has always played, in society.

However, many of the flowery perorations that courts have given over the years extolling the virtues of harmonious employer-employee relations fail to give equal credence to the less glamorous and more practical aspects of employment law. As the relevant jurisprudence demonstrates in technicolour, implementing enforceable employment contracts on the ground is no mean feat. A combination of robust minimum standards legislation and strict common-law interpretive rules means that in the delicate ecosystem of employment law, there is no shortage of legal pitfalls capable of torpedoing an ostensibly acceptable employment agreement. Semantic quarrels over these unforgiving (and sometimes unclear) laws and rules have spawned a cottage industry of litigation regarding the application of statutory language to early termination clauses. The result has been a steady drumbeat of employee-friendly court rulings that pose a serious risk of financial harm to employers who fail to account for them when drafting employment contracts.

Howard v. Benson Group Inc.

One striking example of this trend is the Court of Appeal for Ontario's 2016 ruling in *Howard v. Benson Group Inc.* (*Howard*).[1] In *Howard*, the court changed the law of mitigation as it applies to employment agreements by holding that, in the absence of an enforceable early termination clause, a fixed-term employee who is dismissed prior to the completion of his or her contract is entitled to a liquidated payment equal to full salary and benefits for the balance of the fixed term without any obligation to mitigate. The court went on to award the plaintiff damages equal to 37 months' pay, or roughly $236,000, inclusive of costs and interest, on the basis that the termination clause contained in the plaintiff's contract violated the minimum requirements set out in the Ontario *Employment Standards Act, 2000* (ESA). Had the employer drafted an enforceable early termination clause, the plaintiff would have been entitled to contractual termination pay of only $2,307.69. In other words, Benson made a $233,692.31 drafting error.

This brief article examines the risks associated with the use (or, more accurately, the misuse) of fixed-term employment contracts through the narrow lens of *Howard*. The implications of *Howard* are significant for employers, particularly those seeking to take advantage of the burgeoning gig economy, and are therefore worth exploring in greater detail.

Fixed-term employment contracts generally

Unlike indefinite-term employees, who, in the absence of an enforceable contractual term limiting their entitlements on termination must be given reasonable working notice of dismissal, employees working on fixed-term contracts are not entitled to common-law notice. An employee whose contract is not renewed at the conclusion of a fixed term is not dismissed or terminated; rather, his or her employment simply ceases in accordance with the terms of the agreement.

Given that fixed-term contracts have the effect of taking away an employee's prima facie entitlement to reasonable working notice of dismissal (and, consequently, the employee's ability to

claim common-law termination pay), courts are generally reticent to find that an employee's contract of employment is for a fixed term in the absence of clear and unequivocal contractual language evidencing a bona fide fixed-term arrangement. Thus, employers who attempt to use fixed-term contracts as a Trojan horse to defeat the common law of reasonable notice can be certain that their efforts will not be well received.

Early termination clauses in fixed-term contracts

As we have seen, the common law of reasonable notice does not apply to an employee who is working on a truly fixed-term basis. That is not to say, however, that it is unnecessary to include an early termination clause in a fixed-term employment contract. Quite the contrary. This is the case for two reasons.

First, if an employee is dismissed prior to the completion of his or her fixed term and his or her contract does not include an enforceable early termination clause that provides for a lesser payment on dismissal, then the employee will be immediately entitled to a lump-sum payment equal to the wages and benefits that he or she would have received during the unexpired term of the agreement.

Second, in most cases, provincial employment standards legislation will apply to a fixed-term employee notwithstanding the common law. Consequently, an early termination clause not only must be clear and unambiguous; it also cannot purport to contract out of minimum standards legislation. For example, in Ontario, an employee working under a putative fixed-term employment agreement will nevertheless be entitled to statutory termination pay in accordance with the ESA if the term of his or her employment contract exceeds 12 months; where the employment ends prior to the completion of the fixed term; or where the term is extended more than 90 days beyond the original term of the agreement.

Hence, the same principles that apply to determine the enforceability of early termination clauses in indefinite-term employment contracts also apply to early termination clauses found in fixed-term employment agreements; that is, if an early termination clause purports to contract out of provincial employment standards and the employee is ultimately found to fall within the ambit of the legislation, then the termination clause will be void.

The law of mitigation before *Howard*

It remains well settled that employment agreements are subject to the ordinary principles of contract law, including the presumptive rule that the victim of a breach of contract cannot recover avoidable losses. A wrongfully dismissed employee must therefore make reasonable efforts to mitigate his or her damages by seeking out an alternative source of income.

However, in *Bowes v. Goss Power Products Ltd.* (*Bowes*),[2] a five-judge panel of the Court of Appeal for Ontario held that when parties contract for a specified period of notice or pay in lieu they are choosing to opt out of the common law of reasonable notice. The court further held that if parties who enter into an employment agreement specifying a fixed amount of damages intend for mitigation to apply upon termination without cause, they must express such an intention in clear and specific language in the contract.

Prior to *Howard*, it was assumed that the law of mitigation applied equally to indefinite-term and fixed-term employees; that is, that both have a common-law duty to seek out comparable employment in the absence of a contractual term providing for a

specific payment upon termination. However, and as I will discuss below, the Court of Appeal in *Howard* drove a dagger straight through the heart of this apparent misapprehension of the law.

Howard's journey to the Court of Appeal

The facts

John Howard was hired by The Benson Group Inc. on August 31, 2012, to manage its truck shop in Bowmanville, Ontario. Howard was hired pursuant to a five-year fixed-term employment contract. The terms of his employment were set out in an 11-page agreement drafted exclusively by Benson. Howard began working for Benson on September 4, 2012. Benson's right to early termination without cause was governed by clause 8.1, which stated:

> 8.1 Employment may be terminated at any time by the Employer and any amounts paid to the Employee shall be in accordance with the *Employment Standards Act of Ontario* [sic].

Howard was continuously employed by Benson until July 28, 2014, when the company terminated his employment without cause and without any prior notice. At that time, Benson told Howard that he would receive only two weeks' pay ($2,307.69). In limiting Howard's termination pay to the minimum amount required by the ESA, Benson relied on clause 8.1. Benson refused to provide Howard with any further payments.

Howard subsequently sued Benson, claiming damages equal to the total amount of remuneration that he would have received during the unexpired term of his fixed-term contract. Howard argued that the early termination clause contained in his contract was void on the basis that it was sufficiently ambiguous as to the extent of his entitlements under the ESA because the term "paid in accordance with [the Act]" does not clearly indicate that Benson would continue Howard's benefits during his statutory notice period, as required under sections 60 and 61 of the Act. Finally, Howard argued that he was entitled to liquidated damages and therefore did not have a duty to mitigate.

Benson took the position that clause 8.1 was binding and enforceable. Benson further argued that even if the court determined that clause 8.1 is unenforceable, Howard would be entitled only to reasonable notice at common law because, according to Benson, the terms of Howard's contract nevertheless "contemplated early dismissal," as evidenced by clauses 8.2 (resignation) and 8.3 (termination for cause). Finally, Benson argued that there was no basis in law for finding that Howard did not have a duty to mitigate his damages.

The lower court's ruling

The motions judge agreed that the termination clause in Howard's contract was not enforceable, finding the language in clause 8.1 "to be sufficiently ambiguous as to the true extent of the plaintiff's entitlement under the E.S.A. and in the result, that ambiguity must be construed against the defendant."[3]

However, the motions judge did not accept Howard's argument regarding the issue of damages. Rather, the motions judge found that Howard was entitled only to reasonable notice of dismissal at common law and was therefore required to take steps to mitigate his losses. The motions judge ordered a mini trial under Rule 20 of the *Rules of Civil Procedure* to determine Howard's notice period and the quantum of his damages.

The appeal

On appeal, Howard argued that the motions judge erred in law by (1) failing to apply the accepted rule that a fixed-term employee who is dismissed prior to the end of his or her agreement is entitled to a payment equal to the total amount of remuneration that he or she would have received during the unexpired term of the contract; and (2) finding that Howard had a duty to mitigate. The latter issue was uncharted territory for the Court of Appeal.

Howard urged the court to extend the principle it established in *Bowes* to fixed-term employment contracts. More specifically, Howard argued that there is fundamentally no difference between a contract of indefinite hiring that prescribes a fixed payment on termination and an employment contract of definite hiring that does not contain an early termination clause. In both scenarios, the parties have consciously contracted out of the common law of reasonable notice in order to achieve what the court in *Bowes* referred to as "certainty and closure."[4] In the case of an indefinite-term employee, the contract fixes the payment due to the employee at the time of dismissal. Similarly, a fixed-term agreement fixes the period of employment so as to dispense with the need for prior notice of pending dismissal. To argue that these scenarios are distinguishable is to create a distinction without a difference.

The Court of Appeal accepted Howard's argument and overturned the motions judge's ruling. The court found that "[i]t does not matter whether the penalty is specified expressly, as in *Bowes*, or is by default the wages and benefits for the unexpired term of the contract, as in the case of fixed term contracts generally."[5] In both instances, "the absence of an enforceable contractual provision stipulating a fixed term of notice, or any other provision to the contrary … obligates an employer to pay an employee … and that obligation will not be subject to mitigation."[6] The court concluded that "[j]ust as parties who contract for a specified period of notice (or pay in lieu) are contracting out of the common law [presumption of reasonable notice] … so, too, are parties who contract for a fixed term without providing in an enforceable manner for any other specified period of notice (or pay in lieu)."[7] Benson subsequently applied for leave to appeal to the Supreme Court of Canada, which application was, to the surprise of many, dismissed.

The aftermath

Howard is significant because of its sheer precedential force and its obvious potential to cause serious financial hardship for unwary and poorly counselled employers. One can easily contemplate the agony that Benson would have experienced if the plaintiff was earning a six-figure salary supplemented by significant performance bonuses, stock options and the like.

Having represented Howard, I recall vividly the period following the release of the court's ruling in April 2016. Numerous lawyers complained to me that the *Howard* decision is the Cheops Pyramid of judicial overreaching and serves as proof that the "rule of law" has perished and given way to an insidious "equity culture" in which our courts render judgments based primarily on subjective notions of fairness.

I disagree with the remarks of my colleagues for two reasons. First, the Court of Appeal's ruling in *Howard* is an organic, logical and arguably inevitable extension of the *Bowes* principle, which is itself the culmination of decisions handed down by various courts throughout the country. As such, the "rule of law" remains intact. Second, the result in *Howard* is entirely consistent with the Supreme Court of Canada's admonition in *Machtinger v. HOJ Industries Ltd.*[8] that employment law is distinct from its commercial counterpart and should be interpreted and applied in a manner that incentivizes compliance with provincial employment standards.

Whatever the case, *Howard* is here to stay. The Court of Appeal affirmed *Howard* in early 2017 and has since applied it to independent contractor agreements.[9] In July 2019, the Ontario Superior Court of Justice relied on *Howard* in awarding a former fixed-term employee damages of $1.2 million, being the total amount of salary and benefits he would have been paid during the balance of his nine-year contract term.[10]

Conclusion

The key point to take away from this discussion is that our courts hold employers to a very high standard when it comes to drafting employment contracts. Employers who elect to use fixed-term employment arrangements must therefore do so with great care if they wish to avoid the financial Pandora's Box that invariably results from faulty execution. With decisions like *Howard* now lurking within the common law, employers must be especially vigilant lest they suffer a fate even worse than that experienced by the Benson Group.

Notes

1. 2016 ONCA 256 (CanLII).
2. 2012 ONCA 425 (CanLII).
3. *Howard v. Benson Group*, 2015 ONSC 2638 (CanLII) (SCJ) at para 58.
4. *Bowes, supra* note 2 at para 57.
5. *Howard, supra* note 1 at para 39.
6. *Howard, supra* note 1 at para 44.
7. *Howard, supra* note 1 at para 44.
8. 1992 CanLII 102 (SCC).
9. See *Covenoho v Pendylum Ltd.*, 2017 ONCA 284 (CanLII) and *Mohamed v Information Systems Architects Inc.*, 2018 ONCA 428 (CanLII).
10. *McGuinty v 1845035 Ontario Inc. (McGuinty Funeral Home)*, 2019 ONSC 4108 (CanLII).