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COMPARATIVE LABOR LAW DOSSIER FIXED-TERM CONTRACTS AND PRINCIPLE OF EQUAL TREATMENT IN CANADA

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Introduction

Canada is best characterized as a liberal market economy which lightly regulates employment relations and, in particular, the duration of employment contracts.¹ As such, many of the kinds of protections that might be found in other countries included in this dossier are not present in Canada. There are, however, a few older statutory provisions that limit the length of fixed-term contracts and impose formalities for their creation because of a concern about the creation of disguised forms of unfree labour. There is also a small body of common law that reflects a preference for contracts of indefinite hiring over fixed term contracts and that provides for damages when fixed-term contracts are prematurely terminated without just cause. These are discussed in more detail below.

Before turning to the law, it is helpful to provide a brief overview of the dimensions of temporary work and fixed term contracts in particular. Statistics Canada collects data on permanent and temporary employment. It defines a permanent job as one which is expected to last as long as the employee wants the job or as long as business conditions permit. A temporary job is defined as one that has a predetermined end date or will end as soon as a project is completed. Temporary work is divided into four categories: seasonal jobs that are expected to last for a season; contract jobs that have a fixed duration but are not seasonal; casual jobs that are on call or in which hours are expected to vary widely; and other. Overall, temporary employment has increased between 1997 and 2016 from 11.3% to 13.3% of all employment. Contract employment has increased more rapidly than other forms of temporary work, comprising about 46% of temporary jobs in 1997 and 52% in 2016.² One study of temporary employment found that short-term temporary jobs of less than one year are becoming less frequent; in 1997 about $\frac{2}{3}$ of temporary jobs were for less than one year, while in 2009 it had dropped to $\frac{1}{2}$.³ It is also the case that temporary employment is much more common among younger

¹ Canada is a federation and, for the most part, labour and employment is regulated at the provincial level. However, in general, labour and employment laws are similar between Canadian jurisdictions. This study uses Ontario, Canada's most populous province, as a case study.

² Statistics Canada, [Cansim Table 282-0080](#).

³ Diane Galarneau, "Temporary Employment in the Downturn" ([Nov. 2010](#)) *Perspectives in Labour and Employment* 5.

workers than it is for workers above the age of 25 (30.7% to 10.1%) and more common among women than men (14.0% to 12.6%).

There are significant legal consequences that flow from a contract being temporary rather than permanent. The most important is in regard to the cost of terminating employment. Absent wrong doing justifying immediate dismissal, permanent employees can only be terminated by the provision of notice or pay in lieu of notice and, in some cases, severance. Statutes establish minimum notice and severance entitlements, but common law will frequently imply significantly longer notice periods. The employment of temporary employees ends in accordance with the terms of the contract and there is no need to provide notice or pay in lieu of notice at common law or by statute. However, statutory severance payments may be required if the term of the contract is sufficiently long to qualify, although in practice this would be highly unusual. Overall, temporary employment substantially reduces the cost of shedding employees and thus is extremely attractive to employers who do not wish to make long-term commitments to employees.⁴

1. Is it possible to subscribe to a temporary or fixed-term contract? Also can temporary or fixed-term contracts be used to carry out the company's permanent needs or activities?

Canadian employment law is founded on the principle of freedom of contract, but the common law begins from a set of implied terms, which may be altered by agreement, subject to any limitation imposed by statute. The common law starts from the presumption that all contracts of employment are of indefinite duration – that is that the job continues until either the employer or the employee takes action to terminate it. However, freedom of contract permits the parties to vary the duration of the contract, including making it temporary and, statutes do not significantly limit that freedom, subject to a few minor provisions discussed in question 3. The reason for entering into fixed-term employment contracts makes no legal difference and so fixed-term and temporary employment contracts may be used to carry out a company's permanent activities.

That said, the common law does require that in order to create a fixed-term or temporary contract, the parties have to clearly intend to do so and that any ambiguities will be resolved against the employer's interest, which will result in the contract being found to be one of indefinite duration. Courts are particularly vigilant where an employee works for the same employer for a number of years under a series of fixed-term contracts. In these circumstances, the courts will look to the underlying reality of the relationship rather than the legal form of the contract and may find that the employee is permanent rather than temporary:

“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.

⁴ Shutao Cao, Enchuan Shao and Pedro Silos, “Fixed-Term and Permanent Employment Contracts: Theory and Evidence” [Bank of Canada, Working Paper 2011-21](#).

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.”⁵

2. Which fixed-term contracts exist?

As mentioned in the introduction, Statistics Canada has divided temporary employment into four categories, seasonal, contractual, casual and other. Leaving aside the catchall “other” each of these types of temporary employment are permitted by Canadian law and they all share the common feature that they terminate without notice according to the terms of the contract, whether it be a set date, the completion of a project or, in the case of casual employment, the employer simply ceases to provide work.

In some instances, there are special legal rules governing particular forms of temporary employment. In general, these do not restrict the freedom of the parties to create these relations, but rather establish protective laws when they are created. For example, the employment of temporary foreign workers is limited by immigration law and regulated by an array of rules that vary according to the particular temporary foreign worker program through which the employee has been hired, as well as by provincial laws protecting such workers from certain forms of exploitation.⁶ Temporary help agency (THA) employees are regulated by special rules regarding who is the employer (agency or client), prohibiting exploitative practices, such as charging fees, and other matters.⁷

3. Does the legal regulation establish a maximum duration for hiring fixed-term workers?

Under Canadian law the length of fixed-term contracts is largely a matter left to the parties negotiate under the principle of freedom of contract. Practically however, this process typically results in employees, especially low-wage workers, simply accepting the length of fixed-term contracts, dictated by employers, at the start of the employment relationship.

However, the *Employers and Employees Act*, formally the *1847 Masters and Servant Act*, prohibits “voluntary contracts of service of indenture” for longer than a term of 9 years.⁸ While the *Employers and Employees Act* is rarely litigated today it is still in force.

Accordingly, fixed-term contracts longer than 9 years will be rendered unenforceable by

⁵ *Ceccol v. Ontario Gymnastic Federation*, [2001] O.J. No. 3488, para. 26. But, see *Pennock v. United Farmers of Alberta Co-Operative Limited*, 2008 ABCA 278.

⁶ *Employment Protection for Foreign Nationals Act*, S.O. 2009, c. 32.

⁷ *Employment Standards Act 2000*, S.O. 2000, c. 41, Part XVIII.1.

⁸ *Employers and Employees Act*, R.S.O. 1990, c. E.12, s. 2.

the legislation. While the legislative intent of this provision, in the original *1847 Masters and Servant Act*, was to protect employees from disguised forms of unfree labour it has been used, under the current common law regime, to strike down employee claims for the pay remaining on fixed-term contracts.⁹ (Please see question 8 for more detail.)

There is no statutory or regulatory limit on the number of fixed-term contracts to which an employer can be a party, but there is some regulation of the form that these contracts must take. The English *Statute of Frauds 1677* has been adopted into many Canadian jurisdictions. The *Statute of Frauds* holds that no action shall be brought on an agreement of more than one year unless it is in writing and signed by the party against whom it is being enforced.¹⁰ Canadian courts have interpreted this provision to apply to fixed-term contracts of employment. Accordingly, oral fixed-term contracts of employment that are longer than one year are unenforceable by either party. However, a number of Canadian provinces have either repealed or amended the statute to eliminate the requirement of writing for contracts of employment with a fixed term greater than one year.

4. Does the legal system regulate fixed-term contracts aimed at fostering employment and job creation?

The law does not restrict the freedom of the parties from entering into fixed-term contracts of employment, even though this may have the effect of reducing the number of permanent jobs in the labour market. However, in unionized work places, the union may bargain to limit the number of temporary workers in order to foster permanent employment. That said, it must be noted that collective bargaining coverage in Canada is low, particularly in the private sector, and there is no evidence on the extent to which collective bargaining agreements contain provisions limiting the hiring of temporary employees.

5. Does the legal regulation recognize fixed-term workers a preferential right to occupy a vacant job position in the firm?

Canadian labour and employment law makes no provision giving temporary workers a preferential right to be hired into a permanent job if one becomes available. However, in unionized workplaces, the union may bargain for such a provision but, for the reasons stated above, it is unlikely that many temporary employees enjoy such a preference.

6. Does the legal regulation allow differences in working conditions of fixed-term workers (worktime, wage, schedule, etc.) in comparison with indefinite workers?

⁹ Interestingly, when a worker attempted to use the statutory 9 year limitation to argue that a termination clause in an *indefinite contract* of employment is unenforceable the court decided that that the provision does not apply to indefinite contracts of employment. *Hine v Susan Shoe Industries Ltd* (1988), [1989] O.J. No. 2202 (Ont. HHC).

¹⁰ *Statute of Frauds*, 1677 (29 Cha. 2), c. 3, s. 4.

Canadian labour and employment law does not require equality of treatment for temporary and permanent workers. Therefore, employers may offer lower wages or less favourable conditions to temporary workers than they do to permanent employees. Alternatively, in some cases temporary workers may receive higher wages. Whether or not there is inequality of treatment depends on conditions in the labour market or the characteristics of the firm.

7. Are workers entitled an economic compensation for the extinction of the fixed-term contract according to the agreed terms?

Please see answer to question 8.

8. What is the amount of the economic compensation recognized in favor of workers for the valid termination of the fixed-term contract? Is it of an equivalent or different amount than the one recognized in cases of extinction of the contract due to business-related reasons?

Under Canadian law employees are not owed any notice or pay in lieu of notice when a fixed-term employment contract expires as stipulated by the contract. A term of reasonable notice is not implied into fixed-term contracts of employment on account that a clear date of expiry acts as a substitute for notice of termination.

Likewise, an employee, working under a fixed-term contract, who is fired for just cause is not owed any compensation under common law or statute on account that egregious employee misconduct gives rise to a breakdown of the employment relationship.

However, when an employee is terminated, without just cause, prior to the expiry of a fixed-term contract, they can claim compensation for the pay remaining under contract. In the absence of an enforceable termination clause, employees working under fixed-term contracts can sue for the contractual sum of the unperformed work that was contracted for.

While employers retain the right to end the contractual relationship prematurely employees are owed the pay they *would have* received if they had worked to the expiry date of the contract.¹¹ Terminating fixed-term contracts on account of business efficacy or organizational restructuring is not a defence against this sort of claim. The contractual sum owed to terminated employees, working under fixed-term contracts, can be greater than the reasonable notice owed under indefinite contracts of employment. This is especially true for newly employed workers who are terminated half through their first fixed-term contract. However, courts have held that the duty to mitigate damages applies both for fixed-term and indefinite contracts of employment.¹²

¹¹ *Lovely v Prestige Travel Ltd*, [2013 ABQB 467](#).

¹² *Spark v. Generex Pharmaceuticals Inc.* (2003), [169 OAC 182](#).

9. What are the consequences derived from breach of the regulation regarding fixed-term contracts? In particular, is the contract declared indefinite? Are workers recognized a higher economic compensation in case of extinction of the contract?

As noted, the only regulations regarding fixed-term contracts limit their duration and impose formalities for the creation of long-term fixed-term contracts. A fixed-term contract that is longer than nine years and thus in violation of the *Employers and Employers Act* will be treated as a contract of indefinite duration. Similarly, an oral contract for a fixed term of employment that violates the *Statute of Frauds* will also be treated as an indefinite contract of employment. The consequence of this characterization of the employment contract is that notice or pay in lieu of notice will be required to terminate the employment.¹³

10. Not applicable.

References and judicial decisions

See footnotes.

¹³ *Horton v. Rio Algom Ltd.*, [\[1995\] O.J. No. 743](#); *Lavallee v. Siksika Nation*, [2011 ABQB 49](#).