

# Do fixed-term independent contractors have a duty to mitigate?

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Fixed-term contracts are often complex and can create risk. Companies looking to terminate fixed-term contracts with their independent contractors can breathe a bit easier after an Ontario appeal court found that, generally, independent contractors under fixed-term contracts have a duty to mitigate their damages. This diverges from the approach the same court has applied for employees.

## **Trial Court - No duty to mitigate, like employees!**

In [Monterosso v. Metro Freightliner Hamilton Inc., 2023 ONCA 413](#), the Metro Truck Group of Companies (Metro) entered into a 72-month term fixed term contract with Antonio Monterosso o/a Truck Leasing Canada (Monterosso). Metro terminated the contract early, such that there were 65 months of the contract “remaining” after such termination. At trial, the court ruled that an independent contractor who had entered into a fixed-term contract was entitled to fees from the time of notice of termination to the end of the fixed term of the contractor’s fixed term contract. The total of these remaining monthly over the term amounted to \$552,500 and that amount was awarded. The court noted, among other things, the contract did not have a termination provision.

On appeal, Metro argued that the trial judge erred in a number of ways. The Ontario Court of Appeal rejected all of Metro’s argument except that it accepted Metro’s argument that the trial judge erred in holding that Monterosso was not required to mitigate his damages.

## **Appeal Court - Wait! Independent contractors generally do have a duty to mitigate**

The Ontario Court of Appeal found that the trial judge erred by “conflating the situation of independent contractors with that of employees working under fixed-term contracts”.

The court outlined that a duty to mitigate arises when a contract is breached, including contracts with independent contractors, unless the terms of a contract may provide otherwise. It found that nothing in this specific case took it outside the “normal circumstances in which mitigation is required”. It expressly noted that Monterosso was

not in an exclusive, employee-like relationship with Metro, nor was he dependent on Metro, as the terms of the contract permitted Monterosso to perform services for other parties. So, there was the duty to mitigate in this case. However, it was somewhat of a **pyrrhic “victory” for the appellant, as the court found that the appellant did not meet their burden of providing** Monterosso failed to mitigate his damages.

## Distinguishing earlier decisions of the same court

The court noted that it had earlier ruled that employees under fixed-term contracts are entitled to damages equal to the loss of remuneration for the balance of the fixed term, without a duty to mitigate. The court also stated that it had never decided this in the independent contractor context.

The court also distinguished another earlier case in which the same court had found, on the specific facts of that case, that a contractor had no duty to mitigate in the specific circumstances of that case because the parties in that case intended compensation for **the fixed term to be the consequence for failing to terminate the contract in good faith** - effectively, a liquidated damages agreement.

## Lessons learned

Companies looking to terminate a fixed-term contract with a true independent contractor **might now have “less liability” because of this decision, providing potentially more flexibility**. However, terminating a fixed-term contract prior to the end of its term is often fraught with risk. Early consideration during the drafting of any fixed-term contract and implementing an appropriate plan if early termination is needed, will almost always provide more certainty.

## Get in touch

BLG's Labour and Employment Group has assisted many companies with drafting fixed-term independent contractor and fixed-term employee contracts, as well as providing appropriate legal advice when faced with a claim from contractors and employees.

BLG's Labour and Employment Group would be pleased to assist your organization with any fixed-term contracts, including the initial drafting which is often one of the most important steps. To get started, reach out to any of the authors or key contacts listed below.

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