



Current Employment Issues Facing Indigenous Organizations

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MEET THE PRESENTERS



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Chief and Council: Political Leadership or Employment?

Chiefs and Councillors are generally understood to hold elected leadership positions.

Their authority typically comes from:

- election by the membership
- community governance laws or customs
- responsibility to represent and lead the Nation

Because of this, the role is often seen as political leadership, rather than a typical employer–employee relationship.



When Employment Questions Can Arise

In some situations, elected leaders may also perform administrative or operational work, such as:

- managing programs or staff
- overseeing day-to-day operations
- performing duties similar to a band administrator or manager

When that happens, questions may arise about whether those operational duties are separate from the elected role, and whether they could be treated as an employment relationship in practice.

The key issue becomes understanding the nature of the role being performed.

(FIDUCIARY) EMPLOYEES RESPONSIBILITIES

*The line between self-interest and best interests of
the Band Office and Members*

Sebastian Chern

CHIEF AND COUNCIL



GOVERNANCE STRUCTURE UNDER THE INDIAN ACT

EXECUTIVE BODY OF THE BAND GOVERNMENT

OVERSEE OPERATIONS AND STRATEGIC DIRECTIONS



GOVERNANCE AND EMPLOYEES



Employees execute the policies and decision of Chief and Council



Hierarchical structure ensures vision and goals of Chief and Council implemented effectively



Communication between Chief and Council and employees is key



Chief and Council rely on employees to keep them updated and informed



Interests of the First Nation are critical



FIDUCIARIES EMPLOYEES



Fiduciary Employees

- Employee is a fiduciary if:
 - Discretion or power;
 - Unilaterally affect the employer's interests;
 - and
 - The employer is vulnerable
- Examples may include
Band
Managers/Administrators
and C-Suite employees

Duties

- Fiduciary employees have duties of loyalty, good faith, honesty, the avoidance of conflict of interest, and confidentiality
- Breach of fiduciary duties can result in just cause termination, damages, and injunctions

RECENT EXAMPLE OF BREACH OF FIDUCIARY DUTIES



01

Fiduciary Employee

Band Administrator position

02

Reliance on Financial Guidance

Chief and Council relied on Finance Committee and CFO for financial matters

03

HR Consultant Involvement

Plaintiff hired HR consultant when HR Manager went on leave

Together, they created new wage grid with substantial self-raise and favorable contract changes

04

Self-Interest Actions

Passed motion approving wage grid with retroactive payment to himself

CFO discovered unapproved payment violating Band's Financial Administration Law

Stonewalled CFO attempts to communicate with Chief and Council

05

Court Decision

Termination for cause upheld; ordered to repay retroactive pay

The “True Manager” Exception



Under the Canada Labour Code, most non-union employees have access to unjust dismissal protections.

However, these protections do not apply to managers.

Importantly, the law looks at whether someone is a “true manager”, not simply whether their job title includes words like:

- manager
- supervisor
- lead
- director

The focus is on the actual authority the person exercises in the workplace.

What Makes Someone a “True Manager”?

To fall outside unjust dismissal protections, a person typically must have real managerial authority, such as:

- the power to hire or terminate employees
- the ability to discipline staff
- authority over budgets or financial decisions
- responsibility for setting organizational policies

People who mainly:

- supervise day-to-day work
- coordinate staff
- make recommendations to senior leadership

are often still protected employees, because final decisions are made by someone else. In practice, it can be difficult to meet the threshold of a “true manager.”



BENEFITS OF AN EMPLOYMENT AGREEMENT

Why they are essential to good HR practice

Glen Stratton

BENEFITS OF AN EMPLOYMENT AGREEMENT



Limit to applicable employment standards minimums

Can use general language such as "applicable employment standards minimums" to avoid jurisdictional objections in cases of wrongful or unjust dismissal claims



Termination clauses

Limiting an employee to the applicable employment standards minimums, exclude common law or make-whole-remedy where possible (reduce liability)



Probationary periods

Assess fit and terminate without severance or notice pay obligations (be wary of 6+ month notice periods)



Identify managerial employees

Identify where an employee is managerial and exempt from overtime where applicable (note narrow managerial test under federal/Canada Labour Code employees)



Incorporate other documents

Incorporate other important onboarding documents like policies and procedures



Clear job descriptions

Include clear job title, and associated job description, create clarity around role and expectations (will assist with managing employees down the line)



Disciplinary procedures

Set out clear disciplinary procedures (create consistency and fairness)



ISSUES WITH FIXED-TERM OR SEASONAL EMPLOYMENT

To be used wisely and with caution



Key Legal Principles: Fixed - Term Employment Contracts

Fixed-term contracts operate differently from ordinary employment — and the legal consequences can be significant.

Automatic Expiry

Employment ends automatically at the end of the term — no notice required.

No Reasonable Notice

Reasonable notice obligations do not apply if the fixed-term is clearly defined.

Early Termination = Breach

Terminating early without contractual authority constitutes a breach of contract.

Liability = Remaining Term

Exposure is typically calculated as the full value of the remaining contract period.



Key Takeaway: Fixed-term contracts can create *greater* termination liability than indefinite employment arrangements.

An abstract artwork featuring various shades of teal, turquoise, and gold. It includes overlapping circles, brushstrokes, and textured areas, creating a dynamic and layered composition.

Early Termination Risk

When a fixed-term contract is terminated early — without a valid termination clause — courts generally award compensation equal to the **full remaining term** of the contract. Appellate courts have consistently confirmed this principle.

The longer the remaining term at termination, the greater the employer's exposure.

Example

- 5-year fixed-term contract
- Terminated after 2 years
- Potential liability: **3 years** of remaining salary and benefits

Mitigation May Not Apply

STANDARD EMPLOYMENT



- Employee must mitigate losses by finding new work.
- Damages reduced by new income.

FIXED-TERM CONTRACT



- Compensation treated as contractual entitlement.
- Mitigation may not be required.
- Employee keeps full remaining value.

The Standard Rule

In most employment disputes, employees are expected to mitigate their losses by seeking comparable work. New earnings reduce the employer's liability.

The Fixed-Term Exception

Courts have held that compensation for the remaining term of a fixed contract may be treated as a **contractual entitlement** — not a damages award. As a result, the employee may not be required to mitigate at all.

- **Result:** An employee may receive the full remaining contract value even after securing new employment. Well-drafted clauses can prevent this outcome.

Consecutive Fixed -Term Contract Issues

A contract labeled "fixed-term" is not automatically treated as one. Courts look beyond the label to assess the true nature of the employment relationship.

- 1 Clear Language Required**
The fixed-term nature must be unambiguous — vague or inconsistent language will undermine enforceability.
- 2 Labels Don't Create Terms**
Calling an agreement "fixed-term" does not make it one. Substance governs over form.
- 3 Repeated Contracts Risk Conversion**
A pattern of consecutive fixed-term agreements may be recharacterized as indefinite employment.
- 4 CLC Unjust Dismissal Protection**
Fixed-term contracts cannot be used to circumvent the unjust dismissal remedy under the *Canada Labour Code*.

□ **Key Takeaway:** Enforceability depends on the actual substance of the employment relationship — not simply the wording of the agreement.




Seasonal Employment Agreements: Legal Risks

What Courts Examine

Even when an employee is not actively working, courts and tribunals may treat the relationship as **continuous employment**.

Key factors considered include:

- Overall duration and history of the relationship
- Whether there was a reasonable expectation of recall
- A regular, established pattern of seasonal work
- The express terms of the employment contract
- Industry or organizational norms and practice

 Inactive periods do not automatically break the employment relationship.

Practical Takeaways

Before deploying fixed-term contracts, employers should rigorously evaluate both legal exposure and operational necessity.

→ Is a Fixed Term Actually Necessary?

Assess whether the role is genuinely temporary or whether indefinite employment with a tailored termination clause is more appropriate.

→ Include an Early Termination Clause


Ensure the contract expressly addresses early termination – and consider whether mitigation obligations should be explicitly stated.

→ Model the Financial Exposure

Quantify potential liability across the remaining term, particularly in long-duration or high-compensation roles where leadership changes are possible.

→ Align Structure with Reality

Ensure that the contract structure reflects how the relationship actually operates – consecutive renewals and ongoing work patterns can undermine a fixed-term designation.

 **Bottom Line:** Fixed-term contracts should be used *strategically*. Roles must be genuinely temporary, and contract structures must be consistent with the actual employment relationship.



THANK YOU

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