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THIS IS A SUMMARY OF EMPLOYMENT MATTERS OF INTEREST TO THE  
BUSINESS COMMUNITY, FROM A LITIGATOR'S POINT OF VIEW

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### **THREE FIXED TERM CONTRACTS NOT CONTRACT OF INDEFINITE DURATION**

In a decision released February 2, 2006, the Ontario Court of Appeal has upheld the finding of the trial judge that an employee who has signed three consecutive fixed term contracts was not an employee of indefinite hiring. The Court relied upon the clarity of the language in the contract in support of this conclusion.

The employer had made a business decision to place each of its 40 employees on fixed term contracts of employment which it referred to as "standardized employment agreements". The plaintiff was one of these employees. He had entered into three one year contracts with the employer at the time of his termination.

Notwithstanding the fact that the entire staff of the company were on such contracts, the court declined to find the situation artificial and amounting to a contract of indefinite hiring. The court found that as there were no representations to contradict the fact that the employee was a fixed term employee and that he understood that his employment was speculative in nature at the time he was hired.

No appeal to the Supreme Court of Canada is being pursued and therefore this case now affirms the employer's decision to implement such measures to avoid common law and statutory liability on termination.

### **EMPLOYEES NEED NOT EXECUTE POLICIES**

A recent decision of the Honourable Mr. Justice Reilly of the Ontario Superior Court of Justice puts into question the ability of employers to require employees to sign written policies being implemented. It was concluded that the employer had to provide the employee with reasonable notice to require a commissioned sales representative to sign a commission policy even though there was no evidence that the commission policy would have had adverse impact upon the employee's compensation.

The individual's employment was terminated when he refused to sign a commission policy being implemented by the employer following over 8 years of employment. While the employee had not ever signed an employment contract, there was annually a "pay packet agreement" which outlined the general working conditions, remuneration and commissions. The commission arrangement was re-established on an annual basis. There was no question that a significant change to the commission agreement to reduce remuneration might constitute constructive dismissal. That however was not the case.

The employee was of the belief that his commission was not being properly calculated as of at least a year prior. He was then presented with a "commission plan" which he believed to be different from his present arrangement. He refused to sign it and his employment was terminated.

The court held that the employee's refusal to sign did not amount to a resignation but resulted in a wrongful dismissal. The employer was required to provide notice of the requirement to sign the policy or notice of termination.

## **24 MONTHS UPPER LIMIT MAY SOON BE RAISED**

Absent *Wallace* damages for egregious conduct in affecting a termination, courts in Ontario have declined to award notice to an employee for a period in excess of 24 months. However, it has now been acknowledged by the Court of Appeal, that there is no "upper limit" or "cap" on reasonable notice other than in exceptional circumstances.

The court was reviewing the decision which awarded to a plaintiff employee 30 months pay in lieu of notice with respect to a 59 year old male with a 28 year employment history. He was at one time a General Manager but at the time of his termination his job duties had been reduced to such an extent that he was not considered to be senior management.

The Honourable Madam Justice Cronk wrote:

"Although it is true that reasonable notice of employment termination must be determined on a case-specific basis and there is no absolute upper limit or 'cap' on what constitutes reasonable notice, generally only exceptional circumstances will support a base notice period in excess of 24 months."

The court concluded that the employee's circumstances were not so exceptional as to warrant a base notice period in excess of 24 months, and it reduced the notice period to 24 months accordingly. The additional 4 month increase in the notice period for *Wallace* damages was upheld.

In view of the language used by the court, we can expect to see exceptional circumstances alleged soon, particularly in view of the recent changes to mandatory retirement.

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