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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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**RECENT DEVELOPMENTS**

**Ontario has Ended Mandatory Retirement**

We will be watching over the coming decade or so to see the impact of this decision as the average working age will undoubtedly creep skyward as retirement becomes deferred. Employers will need to consider planning strategies for accommodation, retirement incentives, and adaptive measures for insurance costs, and termination packages. The workforce will feel the impact of a slower move up the corporate ladder but possibly lower tax rates than would otherwise be felt as a result of the shift in fiscal responsibilities back to the private sector. It is worthy of note however that Canada Pension Requirements (being a Federal program) are unaffected.

**Employee Failure to Mitigate may be Complete Disentitlement to Damages**

The Yukon Court of Appeal considered recently the proper impact of an employee's failure to accept his position back five months after termination for a working notice period in mitigation of his claim for damages for wrongful dismissal. The Court refused to award further damages to the employee.

The employee was a business agent for Teamsters, Local 31 (i.e. not a union member but a union employee). He had been employed as business agent for 23 years at the time of his termination. He was provided with 4.5 months salary continuance while negotiations for the terms of termination of his employment occurred. The union then broke off negotiations and requested the employee return to work, 2 weeks hence, to work out the balance of a 24 month notice period. The employee refused.

During the first 4.5 months post-termination the employee took no steps to mitigate his damages. The evidence at trial which went unchallenged was that there were no other suitable jobs for the employee in the City. The Court of Appeal noted that this was a highly important consideration as to whether the employee was obligated to mitigate his damages by returning to work for the union when requested; returning to work was the only way to fulfill his obligation to mitigate his loss.

The Court of Appeal applied the case law on the issue of mitigation with the same employer in the context of a constructive dismissal and held that the considerations were equally applicable in the case of an actual dismissal as here. The employee refused an employment opportunity which was a real one, conveyed in good faith, which fulfilled the notice period the employee was seeking. The Court concluded that on an objective basis the employee should have returned to employment for the union and by virtue of his failure to do so, he was disentitled for any further payment following the date

by which he was to have return to work. *Evans v. Teamsters, Local 31 (2006)*, 2006 Carswell Yukon 14 (Yukon C.A.).

### **Termination of Employment while on LTD**

The issue of when an employee receiving long term disability (LTD) can have their employment terminated was considered by the British Columbia Court of Appeal recently. The Court refused to find there to be an absolute bar to terminating an employee receiving LTD payments.

The employee had been receiving LTD payments for almost two years when he passed away, some three months following the termination of his employment by his employer for almost thirty years which preceded his disability. His estate commenced legal proceedings for damages arising from the employer's failure to provide adequate notice of termination. The employer took the position that the employment contract had been frustrated and therefore had come to an end. The LTD benefits continued post-termination.

The Court of Appeal concurred with the trial judge's framing of the issue in the following manner:

"The employer must prove on the balance of probabilities that [the employee's] incapacity, looked at before the purported dismissal, was of such a nature, or it appeared likely to continue for such a period, that further performance of his obligations in the future would either be impossible or would be a thing radically different from that undertaken by him and agreed to be accepted by the employer under the agreed terms of his employment."

The question which the Court considered was whether the employment contract included as a term that there would be no termination even in the event of permanent disability of the employee. It found that here it did not. The Court refused to accept the appellant's suggestion that by providing LTD benefits as an employment benefit the employer had implicitly agreed it would not terminate the employee in the case of permanent disability. The Court held that this term was not necessarily in place as the LTD policy provided for continuance in the event of termination of the employee's employment, thereby expressly considering the possibility of frustration of the employment contract. The employee was found to be permanently disabled and the employment contract frustrated.

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