

**REFUSAL TO RECOGNIZE EMPLOYER'S RIGHT TO MAKE UNILATERAL CHANGES NOT
JUST CAUSE FOR DISMISSAL**

Belton v. Liberty Life Insurance Co. of Canada, [2004] O.J. No. 3358 (Ont. C.A.)

The Ontario Court of Appeal has held that the failure of employees to acknowledge their employer's managerial right to make unilateral changes to the terms and conditions of employment was not just cause for their dismissal. The Court held that the employer was obligated to recognize the inherent vulnerability of the employees and give them a reasonable amount of time to assess the new terms of employment.

The agents were commissioned sales representatives selling life insurance for London Life ("LL") and property and casualty insurance for Prudential of America General Insurance Co. ("PAGIC"). The PAGIC agent agreements stated that the sales agents were independent contractors and that PAGIC could change the schedule of commissions with 90 days' notice in advance. The Liberty Mutual Insurance Company purchased PAGIC in 1997, assumed the PAGIC agreements and then renamed PAGIC to "Liberty Insurance Company of Canada" ("LICC"). However, the sales agents continued to sell life insurance for LL and began selling property and casualty insurance for LICC. In 1999, LICC announced that the distribution agreement had been renewed and that it included a new LICC agency agreement, which the sales agents were required to sign. The LICC agency agreement purported to change the commission structure under the PAGIC agreement by placing greater emphasis on new sales rather than renewals, and by establishing "minimum production levels" for sales. The agents refused to sign the new agreements and were subsequently terminated for failing to acknowledge LICC's managerial authority to implement the new commission structure.

At trial, the judge dismissed the agents' wrongful dismissal action, holding that the agents were employees, rather than independent contractors, and that their refusal to acknowledge LICC's right to amend the commission structure was a repudiation of an essential term of their employment contracts justifying termination. The agents appealed on the issue of wrongful dismissal, and LICC cross-appealed on the issue of the sales agents' employment status.

The Ontario Court of Appeal allowed the appeal and dismissed the cross-appeal. The court agreed with the trial judge that the agents were employees of LICC since they had no direct contact with their customers, had no ownership or legal entitlement to their customers or books of business, and were not permitted to advertise using the LICC name or sell insurance other than LICC's. However, the court ruled that the trial judge had erred in failing to find that the sales agents had been wrongfully dismissed. The court held that the agents' refusal to sign the new commission agreement could not be considered just cause for terminating the PAGIC agreement. The court reasoned as follows at paragraph 26:

The vulnerability of employees who believe they may have been constructively dismissed and the difficulty of making life-altering decisions had to be recognized... It is understandable that such employees may wish to try to adjust to the new terms and conditions without affirming the employer's right to make

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these changes and before taking the radical step of advancing a constructive dismissal claim. Allowing employees reasonable time to assess the new terms before they are forced to take an irrevocable legal position not only addresses their vulnerability, but also promotes stability and harmonious relations in the workplace.

The court held that on this basis, the sales agents were not obligated to immediately accept the new commission structure and that their refusal to acknowledge LICC's right to implement the new commission structure did not justify dismissal. Accordingly, the court found that the sales agents were entitled to reasonable notice of termination under the PAGIC agreement.

The Ontario Court of Appeal's ruling draws from and contributes to the growing body of jurisprudence that points to the power imbalance in many employer-employee relationships and the role of the common law in providing protection to vulnerable employees. The court's decision makes it clear that employers cannot simply foist new employment agreements on employees. If changes to an employment agreement are required, employers should attempt to provide employees with reasonable notice of the change. Employers should not request that an employee accept the change until after the employee has been given a reasonable amount of time to assess the nature of the change and its impact on the employment contract.