

**ONTARIO SUPERIOR COURT OF JUSTICE ORDERS EMPLOYER TO PAY SHORT SERVICE
EMPLOYEE THE BALANCE OF A FIVE-YEAR CONTRACT BASED ON AN ORAL
COLLATERAL AGREEMENT**

Dwyer v. Mark II Innovations Ltd., [2004] O.J. No. 5201 (Ont. S.C.J.)

The Ontario Superior Court of Justice recently upheld a collateral agreement that apparently stipulated a five-year employment term, so that an employee who had been dismissed after only five and a half months of service received his salary and bonus for the balance of his five-year contract.

The Employee, who had previous dealings with the Employer as a consultant was brought on board to assist the Employer to achieve world class, Tier I operational status. In discussions leading up to the employment arrangement, the Employee informed the Employer that it might take two to three years to achieve the desired results. After an investigation of the Employer's business operation, it was later determined that this time frame would likely be lengthened.

Even though substantially all of the employment agreement was set out in an employment letter that had been signed by the parties, the Court found that the parties entered into an additional oral agreement just before the Employer's representative signed the letter. The Employer's representative raised the issue of a cancellation clause, questioning what would occur if the Employee were to retire or quit early. In response, the Employee stated that he planned to work until retirement. The Employer's representative responded by saying, "that's right" and signed the letter. In view of the fact that the Employee was 57 years of age and planned to retire when he was 62, the Court interpreted this to mean that the parties were agreeing to a term of five years.

The Court found that the context of the "common vision" which came about through the pre-contract discussions, coupled with the Employer's desires for the future, bolstered the Employee's position that this was in fact a fixed term arrangement of five years, contingent upon his retirement at the age of 62. The Court found that in addition to the agreement itself, the surrounding circumstances must be considered when interpreting what the parties intended to do. The Court made the following comments:

While it might have been preferable to have inserted a specific clause in that document outlining the term of the agreement, nevertheless given the nature and extent to what the two people in question had agreed needed and should be done, coupled with the aspirations for the future of the company which had been identified by [the Employer] and the express desire by the [Employee] to work until age 62 (which would mathematically produce a 5 year agreement) serve in my view to enforce the notion of a fixed term here...

The Court concluded that the collateral agreement stipulating that the Employee would work for a five year period was admissible since it was not inconsistent with the letter itself. Accordingly, while the letter covered the “main deal points” the collateral agreement concerning the term of the agreement was valid.