

**THE FAILURE TO ALLEGE CAUSE IN AN EMPLOYMENT TERMINATION LETTER,
COUPLED WITH A SEVERANCE PACKAGE OFFER, DID NOT AMOUNT TO
CONDONATION SO AS TO FORECLOSE THE EMPLOYER'S CAUSE ARGUMENT AT TRIAL**

Giancola v. Jo-Del Investments Ltd. (c.o.b. Da Vinci Banquet Hall & Restaurant), [2003] O.J.
No. 3296 (C.A.)

The Ontario Superior Court of Justice found that the employer had cause to dismiss a banquet hall manager who decided to leave for five weeks' vacation without giving notice and without arranging any coverage of his duties, despite the manager's 18 years of acknowledged loyal and faithful service.

The manager appealed, asserting that the employer did not have cause for dismissal at law and that, in any event, the employer had condoned any misconduct on his part. On the facts, the employer had not decisively terminated the manager's employment until approximately one month after his return from his vacation. Further, in its second (and final) termination letter, the employer had stated that the manager's employment was being terminated because of "restructuring" and had offered him a severance package without clarifying that it was a "without prejudice" offer. The employer conceded that "the situation was an awkward and painful one for everyone" and that "they did not have the courage to actually throw him out" when the manager refused to listen.

The Ontario Court of Appeal dismissed the manager's appeal. The Court of Appeal held that the employer did have cause and that its failure to allege cause in the termination letters did not amount to condoning the manager's misconduct:

It has frequently been held that an employer who first states that an employee is dismissed without cause will not necessarily be precluded from later asserting cause, especially where the employer's initial position was taken out of concern for the feelings of the employee ... The issue is whether or not the employer's conduct amounts to condonation ... [Emphasis added.]

The Court concluded:

"The [employer's] lack of resolve did not, in the face of [its] consistent assertion that [it] wished to terminate [the manager], reflect an intention to condone his misconduct. It certainly would have been preferable for the [employer] to have clearly stated that [it] had cause for termination and that the notice package [it was] offering was without prejudice to [its] right to terminate for cause. However, [its] failure to put [its] position in these clear terms does not, in our view, support a finding of condonation ... [Emphasis added.]