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## LABOUR AND EMPLOYMENT COMMUNIQUÉ

### EMPLOYMENT CONTRACT REQUIRING DEPARTING EMPLOYEE TO REPAY FOR TRAINING AND OTHER PENALTIES ENFORCEABLE

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The Ontario Divisional Court has upheld a repayment provision in an employment contract which required a departing employee to pay his former employer a “penalty” and training costs if he accepted employment with a competitor within a year of his resignation. In *Renaud v. Graham*<sup>1</sup>, the Divisional Court maintained the trial award of \$23,387 in damages payable by the Plaintiff Mr. Graham to his previous employer, Messrs. Renaud and Otten, two real estate agents.

Mr. Graham was hired as an unlicensed sales assistant by the Defendants. The Defendants provided the Plaintiff with training at their own expense. The parties entered in to a written contract which explicitly addressed the possibility of Mr. Graham's departure to work as a realtor on his own or with another broker within one year of his resignation. The contract expressly provided that in that case, Mr. Graham would be required to return wages in the amount of \$20,000 and repay to the Defendants his training costs. Mr. Graham argued that the training repayment provision was oppressive and unenforceable. He also argued that the salary repayment provision was invalid because:

1. the bargaining power between him and the employer was unequal;
2. the agreement represented a restraint of trade; and
3. it was an illegal penalty clause.

The trial judge rejected Mr. Graham's arguments. On appeal, the Divisional Court upheld the trial judge's finding that the contract was valid and enforceable. In arriving at its finding, the Divisional Court made a number of key and interesting findings.

The Divisional Court confirmed that neither the fact that Mr. Graham was unemployed and needed a job, nor the fact that the employer was more experienced, was a sufficient basis to set aside or refuse to enforce the employment contract. As the Court noted, Mr. Graham was aware of the repayment terms of the contract and signed the contract without objection.

The Divisional Court found that the repayment provision was not in fact a restrictive covenant and therefore, not a restraint of trade. The Court also rejected the characterization of the repayment provision as a penalty clause but rather considered the repayment obligation as a “genuine pre-estimate of damages”, stating that the enforcement of the clause was neither harsh nor unconscionable.

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<sup>1</sup> *Renaud v. Graham*, [2009] O.J. No. 597 (Ont. Div. Ct.), aff'g [2007] O.J. No. 753, 155 A.C.W.S. (3d) 856 (Ont. Sup. Ct.).

This case is important for employers and employer counsel as it signifies the courts' willingness to uphold appropriately drafted repayment clauses in employment contracts. In this case, rather than prohibiting competition *per se* the contract provided financial consequences to the departing employee that were properly linked to real damages incurred by the employer. It may be appropriate in some cases to use these repayment clauses in place of the more onerous and difficult to enforce non-competition clause.

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