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TERMINATION AND SEVERANCE - PITFALLS AND PERILS

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Landscape has changed. Previously, when I started to practice, employees were customarily terminated with 2 weeks notice and that was the end of it. Today, that is not the case. Every time an employee is terminated, in their mind it is wrongful termination or constructive dismissal.

Our firm belongs to the lawyer referral program operated by the Law Society of Upper Canada which is our governing body. This program entitles a caller to 30 minutes of free legal advice. It would be fair to say that 75 to 80 percent of the calls we receive are around issues of termination of employment and severance.

When someone calls, they usually begin the conversation with the words "*I've been wrongfully dismissed*". And, that usually happens after they have discussed the unfortunate event with friends. I tell the caller that, unless they have been terminated for just cause, their employer is entitled to terminate their employment at any time and without any reason so long as they provide the employee with notice in terms of time or money. In the same fashion, an employee is entitled to terminate their employment at any time by providing the same notice to the employer. If the employee is quitting, however, they will in most cases give 2 weeks notice and leave with the employer bearing the consequences.

As I said earlier, years ago, employees were given the minimum required notice under the Employment Standards Act and that was the end of it. However, over the last number of years, the Courts have taken the position that in many cases, such notice is not sufficient and they have increased the notice requirements.

Employment Standards Act

So, today, you must as a minimum provide under the Employment Standards Act 1 week for every year up to a maximum of 8 weeks. The employer must also continue benefit contributions during the notice period. Further, if the employer's payroll exceeds \$2.5 million per year and the employee has completed 5 years, or 50 or more employees are terminated within a 6 month period, the employer is required to pay "severance pay" of 1 week's pay for each year of service to a maximum of 26 weeks pay. Those are the statutory requirements.

Common Law Notice

The Courts, however, have in a number of decisions stated that the statutory notice is not sufficient in many instances. And here we have the concept of common law notice which is not defined but based on case law as it has evolved. Generally, except for some federally regulated industries to which the Canada Labour Code applies, common law allows only for monetary damages and not reinstatement. Generally, this can run from 1 week's notice per year for lower level employees, 2 to 3 weeks per year for mid-range employees and up to 1 month per year for senior management employees with an upper limit of 24 months.

And with common law severance, you take into account a number of factors including:

- the character of the employment (ie. the position held by the employee);
- the length of service;
- the age of the employee; and
- the availability of similar employment, having regard to the experience, training and qualifications of the employee.

“Wallace” damages

In addition, if an employer dismisses an employee in an unnecessarily callous manner (ie. if the employer engages in bad faith conduct, unfair dealing during the course of the dismissal, injuries such as humiliation, embarrassment and damage to one's self-worth and self-esteem) might be deemed worthy of compensation resulting in “Wallace” damages and in exceptional cases, punitive damages.

So, you can provide working notice for the required time or pay severance. If you do not want the employee on the premises any longer, you will be better to pay severance.

Severance

Severance can be paid in different ways:

- lump sum;
- continuance of salary for notice period which can be stopped if employee secures similar employment; or
- continuance of salary with employee getting ½ of salary for remaining notice period if employee secures employment. This encourages the employee to actively seek employment which they are required by law to do.

Termination without Cause

Now, all of the above applies if you are terminating without cause. So, for instance, if you are restructuring, downsizing or you just don't like an employee, you must provide severance as we have just discussed.

If you are terminating an employee without cause, most companies will have put together a written proposal setting out the terms of the termination. It should include such things as:

- severance pay;
- holiday pay;
- continuation of benefits;
- car allowance;
- pension plan entitlements;
- life insurance;
- profit sharing;
- bonus;
- stock options;
- outplacement services;
- outstanding company equipment (ie. laptop, cell phone etc.);
- outstanding expense accounts;
- keys to premises;
- letter of reference;
- non-disclosure of terms of termination; and
- non-solicitation or non-competition agreement.

A full and complete release should also accompany the offer and the employee should be given the opportunity to obtain independent legal advice. Don't withhold moneys owing if a release is not signed.

Have someone else present when the termination letter is presented to the employee and make detailed notes of the meeting.

Termination with Cause

On the other hand, if you are dismissing for just cause, no notice is required. So, what is just cause? The employer must prove incompetence or misconduct and not just dissatisfaction with performance or concern about potential misconduct. The onus is on the employer to prove that cause exists.

In 1967, the Ontario Court of Appeal stated:

“If an employee has been guilty of serious misconduct, habitual neglect of duty, incompetence, or conduct incompatible with his duties, or prejudicial to the employer's business, or if he has been guilty of wilful disobedience to the employer's orders in a matter of substance, the law recognizes the employer's right summarily to dismiss the delinquent employee.”

So, dismissing an employee for just cause should not be taken lightly.

What do you do? You create a file and document the employee's behavior and conduct including warnings, suspensions

or disciplinary action. Conduct performance reviews and have them documented and acknowledged by the employee. You provide written warnings. In other words, you have to give the employee every opportunity to correct substandard performance.

Avoiding Problems

To avoid all of the above:

- use a probationary period; limit to 3 months after which the Employment Standards Act requirements of notice comes into play; include this in an employment contract;
- use written employment contracts or letters of employment setting out the terms of termination;
- termination cannot contravene the Employment Standards Act or Human Rights Code;
- the employee should have independent legal advice before signing an employment contract;
- termination cannot be forced on an employee during employment without the proper notice period;
- have contracts signed by the employee;
- consider giving working notice; and
- consider continuing salary rather than lump sum for period of notice reduced by $\frac{1}{2}$ if a new job is secured; have employee submit reports of job finding endeavors as they are under a duty to attempt to find work.

Other items of interest

Constructive dismissal	Fundamental change in the terms of employment could constitute wrongful dismissal.
Small Claims Court	Increase in limit of claims from \$10,000 to \$25,000
Simplified Rules of Procedure	Increase from \$50,000 to \$100,000
Restrictive Covenants	Use non-solicitation rather than non-competition; must be reasonable in terms of time and geographical area
Disabled employees	<p>Must try and accommodate to the limit of "undue hardship"; the threshold is fairly high</p> <p>Factors: Cost - must be significant and related to the accommodation; is outside funding available? Risk - will it pose a risk to the health and safety of the employee, co-workers or general public?</p> <p>If the disabled employee has applied for long term disability, or is off work for a considerable period of time, wait until the appeal period has expired or his application has been denied, then request medical documents. If the employee fails to produce these, he will be deemed to have abandoned his position and can be terminated for cause.</p>
Pregnancy	Not a ground to terminate; can create difficulties for smaller employers.
Human Rights Code	<p>A quagmire! Another avenue of recourse for the employee. If there is a finding of unlawful discrimination, reinstatement can be ordered together with full back wages.</p> <p>Under the Human Rights Code Amendment Act, 2006 (in force June 30, 2008) must respond to an application within 35 days of receipt.</p> <p>Tribunal can award general damages based on:</p> <ul style="list-style-type: none">~ humiliation;~ hurt feelings;~ loss of self respect, dignity and confidence;~ experience of victimization;~ vulnerability;~ seriousness, frequency and duration of offensive treatment
Occupational Health & Safety Act	Bill 168 amends the Act (in force on June 15, 2010) to address workplace violence and harassment. If workplace is vulnerable to acts of violence, policies must be put in place to control the risk.
Abuse or harassment	An employee who can demonstrate that this has made their job objectively intolerable can resign and sue for a severance package.