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Employee Terminations – *What Every Employer Should Know*

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No employer likes terminating the services of an employee, but it is inevitable from time to time. Decisions to terminate always begin with business considerations, and the effects on employees – financially and emotionally – can be great. The employer asks: What will it cost? Minimizing that cost is paramount and the process begins with an understanding of the legalities and issues that apply. With proper planning and a reasonable approach, the likelihood of further claims by the employee is reduced.

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Understanding the Basics

Is There an Employment Contract?

Find out if an employment agreement exists. It may be a detailed document or a simple letter offering employment. It may contain specific termination provisions which define the terms of dismissal and can be relied on later as a defence to any claim for a better severance package. Employment contracts are recommended for senior management and professional employees, in particular, to avoid costly departures.

If a collective agreement is in place, it will almost certainly prevent termination for any business reasons other than specific employee misconduct, unauthorized absence, or excessive absenteeism. Lay-off by seniority is the typical provision to be used in down-sizing. Unlike the situation in which non-unionized employees can sue for wrongful dismissal, grievance arbitration is the required method of resolving any dispute.

Termination for Cause

There is always a valid business reason for termination but is there legal cause? Courts recognize only the most serious forms of employee misconduct as legitimate cause. Stealing, breach of trust, serious insubordination and gross incompetence are a few. An employer who considers termination for cause should do so only in the clearest situation. In such cases, no further pay of any kind (except vacation and that already earned) are required and no advance notice is needed. If the matter is at all vague, the employee is more likely to fight the decision.

Termination Without (Legal) Cause

Whether for good business reasons, bad reasons, or no reasons, employers are free (if no written employment contract exists) to dismiss an employee at any time. The law implies a term in the verbal agreement that employers must give reasonable notice in advance of termination, so the employee has an opportunity to seek work before the job ends, thus minimizing financial loss. If the employer fails to give actual notice, they must give pay in lieu.

Employment Standards Act

Minimum notice periods are set out in the Employment Standards Act and apply to most employers in this province. These provisions cannot be contracted away, and apply regardless of the circumstances of employee or employer. The Act requires notice in writing of up to eight weeks based on length of service or, if notice is not given, "termination pay" instead. For companies with over $2.5 million in annual payroll, or in the terminations of over 50 employees, there is an additional requirement to pay "severance pay" for employees with five or more years of service, calculated at one week per year of service to a maximum of 26 weeks. This must be paid and cannot be satisfied by additional notice to those employees.

Reasonable Notice

Courts consider a number of factors in deciding what a reasonable period of notice should be. Most important are the employee's age, length of service, and position. In theory, a younger person can find a job more easily than an older one, as can an employee with less service, or one in a junior position. Whether they were hired away from secure employment, relocation costs, or long-term promises are considered in appropriate cases. There is no rule that provides a reliable measure of notice, so a lawyer should review each individual situation, if possible.

Employee Job Search

The law implies an obligation for each terminated employee to actively seek work. This obligation to "mitigate" is the flip side to the employer's obligation to provide notice. The same basis applies: notice (or pay in lieu) is designed to provide a financial bridge from one job to another. Pay in lieu of notice is not a bonus to the employee or a penalty to the employer. If an individual finds a new job at the same pay starting the day after the termination, his claim is zero. Similarly, if the new job pays less than the old one, the damages would be the "top up" from the new wage to the old one, during the reasonable period of notice. Any amount earned during a notice period is deducted from the final settlement in a lawsuit.

Constructive Dismissal

If major changes are made to an existing job (demotion, significant loss of status, substantial increase in responsibility, etc.), an employee could allege they have been "constructively dismissed". Similarly, if the employer treats the employee in a way that is abusive or disrespectful, the conduct may give rise to constructive dismissal. This is equivalent to a termination and arises from the theory that an employer should not be able to avoid the obligation to give notice or pay in lieu by forcing an employee to quit. Only if a reasonable employee could not tolerate the change will

that employee be excused from the obvious opportunity to mitigate by staying in the old job while exploring employment opportunities elsewhere.

Employment Insurance

On termination, the employee receives the Record of Employment form which can be submitted to Employment and Social Development Canada to establish a claim for benefits. Any amount paid in lieu of notice is considered by ESDC to be income and is spread over time based on the regular pay rate. The employer must keep in mind there is a positive obligation on it to repay ESDC for any employment insurance amount received by the employee if a settlement is made after the employee is in receipt of benefits. From the employee's point of view, the amount actually received from the employer is roughly 45% of the usual salary, since the balance is repaid to the ESDC. This fact is sometimes helpful as a settlement tool.

Human Rights Complaints

It is important you are aware of the possibility of complaints under the Human Rights Code (HRC) for discrimination based on prohibited grounds, such as age, sex, or disability. For example, terminating a person who is off work due to an illness or injury might result in a complaint, and it is important for the employer to avoid the appearance that the prohibited ground has been even part of the reason for termination. Since the Human Rights Tribunal has the power to reinstate employees and award substantial back pay, an employer is well advised to tread carefully and seek legal advice in these areas.

Bad Faith Discharge

Although courts do not second guess an employer's decision to terminate without legal cause, they have been critical of the method of terminating if the employer has not acted in good faith. The obligation is to avoid unduly harsh treatment of the employee. The employer has a duty to be candid and to avoid innuendo or unsubstantiated allegations that could hurt an employee's reputation and ability to find other work. Breach of this requirement can result in punitive damages.

Tactical Considerations: Forewarned is Forearmed!

The Employment File

Where an employee is being terminated for cause, or performance-related "near cause", it is helpful to rely on a well-documented employee file. Previous disciplinary letters, written warnings, and performance reviews are all helpful. The employee who is aware of the problem is less likely to be shocked by the decision to terminate, and is less likely to challenge it.

Notice or Pay in Lieu

Most employers have little trouble deciding whether to give actual notice, or pay in lieu. When there are performance problems, it is rare to keep the employee in place during the notice period. In cases of impending shutdown or downsizing, or in other non-performance terminations, actual notice may carry minimal risk. The cost is certainly lower, since the employee provides value for the wages received.

The Exit Interview

Communicate the termination face to face with the employee. This should be done in a neutral setting or in the employee's workplace (if private), and in the presence of a witness. Communicate the decision briefly and firmly, without opportunity for discussion. Take notes either during or immediately following the conversation. A detailed review of cause may well be a waste of time, and only invite debate. Decide in advance how much need be expressed to make the decision understandable. Provide a letter confirming termination, together with any offer, final pay cheque (including earned vacation) and Record of Employment form. If not available, they should be referred to in the letter and promised within a short time frame. Choose the occasion to minimize embarrassment (for example the end of the day or week), and to accommodate picking up personal belongings and returning company property.

The Financial Offer

The termination letter, except in cases of cause, should always offer at least the Employment Standards minimum. Additional pay in lieu of notice should be considered. Clearly identify what amount over the minimum is being suggested, together with the proposed method of payment. You should seek advice on the appropriate range of notice that applies to the specific situation. Ideally, the employee will not find a lawsuit to be economically feasible, given costs, risk, and delay involved, and will accept the offer made.

Method of Payment

The payment can be by lump sum (as with the Employment Standards amount), or paid out over time. Once a lump sum is paid, there is no incentive to mitigate by finding other work during the notice period. A lump sum can be desireable for the employer if accepted as final settlement, thereby shifting any risk to the employee. Paying by regular instalments for a defined period may be easier on cash flow, and can build in an incentive to find new work. This would happen if a lump sum equivalent to half the remaining notice is paid when the employee finds work, thus giving him a bonus and reducing the employer's total cost. You can make

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payment directly into an RRSP for the employee to the extent of $2,000 per year of service (prior to 1996) as a "retiring allowance" or you can use available current RRSP as per the employee's Notice of Assessment. This avoids the need to deduct any federal income tax from the amount paid, and may work to the employee's advantage tax-wise. It is done only on express written authorization of the employee. Offering the possibility of the tax-deferred payment may be a helpful settlement tool.

The Final Release

A Release is a legal document where the person signing forgoes any further legal action against the employer. It is valuable to you, since the cost of the termination is fixed and no litigation is possible. You should prepare it in advance and include it with the termination letter with a request it be signed and returned within a reasonable time (for example, one week) before you pay any settlement over the minimum. Some employers feel this type of request drives the employee to see a lawyer unnecessarily. If the offer is reasonable, legal advice should confirm that fact, and encourage the settlement. The receipt of legal advice, or at least the opportunity to seek it, is helpful to ensure the deal is binding. The risk of a claim where there is no release outweighs the chance of the employee getting bad legal advice and pursuing unnecessary litigation. These days, most dismissed employees seek out legal advice in any event. Make specific reference in the release to the Employment Standards Act, the Human Rights Code, and to other relevant legislation.

Offer of Resignation

Often the stigma of having been fired, whether real or imagined, makes a matter more difficult to settle. Emotional factors including loss of face, shock, anxiety over the future, etc., come into play. Offering to accept a resignation in lieu of, but on the same terms as the termination, may help minimize hard feelings. There is no difference in the legal effect: a forced resignation is exactly the same as a termination. The option to resign may help the employee to present himself more positively in a subsequent job search. The termination letter should offer a reasonable time (for example, one week), for the employee's decision.

Letter of Reference

It is your choice whether or not to provide a letter of reference. One will not be ordered by a court. If the employee sees the reference as having value, it represents a no-cost "sweetener" to the settlement. There is little downside for the employer in a situation that does not relate to job performance. The matter is trickier if such is not the case. In any event, you should be accurate. While there's no reason to refer to negative features, it is important to be fair to prospective employers who may rely on your words. Some employers provide only factual information: start date, position, etc. This is safe, but can be harsh. In any event, be consistent. Be watchful for "set up" reference calls where the disgruntled former employee is looking for ammunition to allege that they are being blackballed.

Outplacement Counselling

You can soften the effects of termination by the offer of outplacement counselling. This is usually provided by an outside agency on your payment of a fee dependent on the extent of services to be provided. Particularly with senior or long-service employees, outplacement counselling can be helpful and well-received. Courts also recognize the employer's effort as reasonable, and takes it into account when determining the appropriateness of the settlement offer.

Creative Problem Solving

A terminated employee may not accept your offer. The combination of financial and emotional issues may cause a "See you in court!" response, no matter how reasonable the employer has tried to be. The employee may not understand the full consequence of a court action, including the delay (often measured in years), legal fees, and risk involved. It is important for the employer to realize there are more options for damage control than accepting the inevitability of a lawsuit. Consult a knowledgeable lawyer on mediation and arbitration.

Mediation

The mediation process is designed to resolve disputes by helping parties arrive at a settlement. A neutral "mediator" is selected to meet with you and the employee, to explain the issues and work out solutions. Lawyers may or may not be present. Often the case is settled when each party (especially the employee) feels that their concerns have been heard and addressed. Mediation is voluntary, and if no settlement is achieved, the employee can start or continue a lawsuit if they choose.

A Final Note

Although it may be difficult to avoid employee terminations entirely, you can minimize negative consequences. Following a well-planned strategy is preferable to a knee-jerk reaction. Once you have reviewed the options and assembled a reasonable severance package, properly communicating the decision can go a long way toward neutralizing the emotional reaction that may lead to a lawsuit. Knowing the law and following your plan are the best ways to prevent a simple business decision from producing unpleasant consequences.

Employment Law Department

Leanne E. Standryk: Ms. Standryk is the senior partner of the Firm's Labour, Employment and Sports Law Department. She acts for a variety of employers in the private, charitable, not for profit and public sector. She is experienced in the full range of employment and labour issues including employment contract negotiation, terminations, workplace restructuring, labour relations, collective bargaining, wrongful dismissal, workplace privacy issues, occupational health and safety, human rights and human resource policy development, etc. In addition to her negotiation and counsel experience, Leanne provides assistance to our Corporate lawyers regarding labour and employment matters that arise during the purchase and sale of a business. Leanne also acts for several sports organizations regarding contract negotiation, athlete appeals and risk management. She has experience before the SDRCC and has acted as a panel member regarding appeals in amateur sport.

Civita M. Gauley: Vita is a Partner at Lancaster, Brooks & Welch. She was called to the Bar in 2012 and is a member of the Labour & Employment team. Through her focus on detail, positive outlook, motivation and energy, Vita offers her clients great skills and experience.

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