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THE DO'S AND DON'TS OF TERMINATING EMPLOYEES

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I. Introduction

Terminating an employment contract, no matter what the reason or whose decision it is, is a difficult and complex task. Generally, termination of the contract takes one of two forms; a voluntary action by the employee such as a resignation or an involuntary conclusion of employment instigated by the employer. No matter how an employment contract is terminated employers must be aware of their legal obligations towards their employee and behave accordingly in order to prevent possible wrongful dismissal claims and other potential financial liability.

II. Involuntary Dismissal

Under the common law Canadian employers have the right, subject to human rights legislation, to dismiss an employee, without cause, provided reasonable working or paid notice (severance) is provided. However, no notice or severance is required if the employer has cause for dismissing the employee.

What is Cause?

Cause results when an employee's conduct breaches their obligations to the employer. As the employee is responsible for breaking the employment contract no severance payment is required. However, as a result of the emphasis courts place on the role employment plays in an individual's sense of identity and self worth, it is becoming increasingly difficult for an employer to dismiss an employee without providing severance.

Some common reasons to allege cause are incompetence, disobedience and theft.

- ***Incompetence***

For courts to find cause due to incompetence it is generally required that the employer prove that:

1. The job performance requirements and standards were communicated to the employee.
2. Suitable instruction was given to the employee to allow them to meet this standard
3. The employee was incapable of meeting the standard

4. That there had been a warning to the employee that a failure to meet the standard would result in dismissal.

The court may not find cause due to incompetence if:

1. The performance of the employee was improving when they were terminated
2. If the employee informed the employer of their capabilities at the time of hiring, the employer cannot increase its standards and fire the employee for not meeting those standards.
3. The employer contributed to the incompetence such as by failing to support or motivate the employee.
4. There were recent positive evaluations prior to the termination as these can indicate the employee's performance was satisfactory.

- ***Disobedience***

It is a long established principle that an employer has the right to determine how their business should be run. In doing so they may require employees to comply with procedures they determine necessary so long as they are lawful, safe and within the scope of employment. An employee's failure or refusal to follow the directions of the employer can result in cause for dismissal if the employer can show that:

1. The employee disobeyed a clear order or a policy or procedure well known by the employee that are a matter of some importance.
2. The employee disobeyed an order that was reasonable, lawful and within the scope of the employee's job duties
3. The employee deliberately and intentionally disobeyed rather than made an honest mistake
4. Unless particularly serious, the disobedient act was be repeated by the employee.
5. As a result of the disobedient act the employment relationship was damaged to the extent that it could not be continued.
6. The employee understood or should have understood that termination was a risk of disregarding the order
7. There is no reasonable explanation for the disobedience.

Examples of when disobedience was found to be cause include:

- The refusal of a dental technician to take out garbage when it was the company's policy that dental technicians share in that task
- A traveling sales person who failed to carry samples as instructed and failed to follow the prescribed formula for completing an expense account

- ***Theft***

Theft is the area of cause that is most clear and has the fewest defences available to employees. Even one act of theft can be cause for dismissal. Courts will however fail to find cause if there is a reasonable explanation for the theft. For example, putting personal credit card expenses on the company credit card was not found to be cause since the employee had always acknowledged personal expenses and was prepared to pay for them. Some examples of when cause was found include when an employee:

- Exchanged samples intended for clients for a personal gift.
- Requisitioned a corporate cheque to pay a personal debt.
- Sent stock which was to be sold at his employer's store to a store owned by his son to be sold there.

While theft is usually a cause for dismissal, it is important to note that this is not always the case. In circumstances where the employee is long serving and has a previously unblemished record, the courts are reluctant to find that theft should warrant dismissal. Similarly, if the employee shows immediate remorse or the theft involves a small amount, termination may not always be warranted. The position the employee holds in the company may also be an important factor to consider. Termination is more frequently upheld where the employee is (and will otherwise continue to be in) a position of financial trust.

- ***Constructive Dismissal***

Constructive dismissal is another form of involuntary termination and it occurs when the employer unilaterally alters a fundamental term of the employment contract such as a decrease in compensation or a reduction of status or responsibility. When an employee has been dismissed in this manner they are found to be dismissed "without cause" and entitled to severance in lieu of reasonable notice.

Constructive dismissal is an extremely risky position for an employee to take because it amounts to a decision to "walk away" from their employment and hope that a court, will agree with their view that the employer's actions were so egregious as to effectively destroy the fundamental basis of the employee agreement. Some examples of when a court has found that employee has been constructively dismissed are when an:

- Employee held a supervisory position for over 40 years. When the employer was planning a restructure they knew they would no longer need his position so they transferred him to the position of night guard with a significant decrease in pay
- Employee was transferred to a lower position with the same pay. Constructive dismissal found due to humiliation and loss associated with the reduction in responsibility

III. Dismissal Without Cause - Reasonable Notice and Severance Payments

When an employer terminates an employee without cause they are required to provide the employee with reasonable notice; either in the form of working notice or as a severance payment in lieu of notice.

Reasonable Notice- Express Provisions in the Employment Contract

Reasonable notice is a common law concept that can be contracted out of by including a stipulated notice period in the employment contract. This allows employers and employees to agree in advance what will be considered reasonable notice. It is important to note that any provision in the contract will still be subject to the minimum standards laid out in the Employment Standards Act.

The court's preference is to uphold contractual provisions however; they will find a reasonable notice provision to be unenforceable where no consideration was given or if the employee has advanced with the company since agreeing to the reasonable notice provision.

Consideration

"Consideration" is an ancient common law concept fundamental to contract law. The essential requirements of any contract are said to be: an offer, acceptance, and consideration – or the provision of something of value.

If an employee is asked or required to sign a new contract that favours the employer during the course of their employment it will only be enforceable if it provides the employee with new consideration. Consideration is a benefit provided to the employee through the contract, such as a wage increase. Courts have rejected the argument that continued employment can be seen as consideration for the employee to sign the new agreement.

If an employee is asked to sign a new agreement that contains a reasonable notice clause that provides for less notice than they were previously entitled to under contract or common law, or if it includes a provision considerably less favourable to an employee, such as the imposition of a restrictive covenant or lesser compensation, it will not be enforceable unless some benefit, other than continued employment, flows to the employee.

Changed Substratum

Courts have found that the passage of time can result in a contract, that is initially fair, becoming unfair and unenforceable. With respect to reasonable notice this can occur when an employee has been promoted out of the position they were in when they initially signed the contract. To ensure the enforceability of a reasonable notice clause it is recommended that as employees are promoted within the company that updated contracts be signed or at a minimum they should be alerted to the original terms of their contract as they are promoted.

Reasonable Notice- Employment Standards Act

The *Employment Standards Act* (“ESA”) sets out the minimum notice requirement that must be given to employees who are dismissed without cause. The application of the “ESA” is limited to the employees who are covered under the “ESA”. For example professions such as architects, chiropractors, dentists, engineers, chartered accountants, and lawyers are excluded from the “ESA” so the mandatory minimums would not apply.

The “ESA” provides employees with a more convenient way of receiving minimal reasonable notice as they do not have to pursue court proceeding in order to have their employer ordered to pay them severance.

The minimum notice requirements under the “ESA” are:

0 > 3 months	3 months > 12 months	12 months > 3 years	3 years and above
No notice	1 week notice	2 weeks notice	3 weeks notice + one week per each additional year to a maximum of 8 weeks

Reasonable Notice- Common Law

Under the common law determining the proper reasonable notice an employee is entitled to depends upon a number of factors including:

1. The age of the employee and their opportunity for re-employment;
2. The particular management and/ or professional responsibilities of the employee;
3. Whether the employee was induced to accept employment with promises of tenure;

While court decisions do vary it is often stated that management and professional employees are entitled to one month of severance for each year of employment. Additionally, courts have been reluctant to grant any employee more than 24 months severance.

Wallace Damages

Beyond the requirement to pay an employee severance for dismissal without cause, further liability to employers can result from the manner in which they dismiss an employee. The Supreme Court of Canada in *Wallace v. United Grain Growers* [1997] 3 S.C.R 701 held that when terminating an employee an employer owes them a duty of good faith. If this duty is breached the employer is liable in the form of increased severance.

While not strictly defined the duty of good faith includes at a minimum that “employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair, or is bad faith by being for example, untruthful, misleading or unduly insensitive” (*Wallace*).

Increased liability in the form of Wallace damages has been found where:

- The employer made a number of false allegations against an employee
- The employer hassles a long time employee while she is on sick leave urging her to come back to work and implying that she is malingering. The employers contacted her doctor in an effort to get him to sign a document stating the employee is fit to go back to work. The doctor refused but the employers lied to the employee and claimed that the doctor said it is okay for her to return to work.
- The employer refused to provide a reference when asked for one.
- An employer repeatedly provided memoranda to employees which stated that their employment was secure but then terminated an employee who was on a graduated return to work.

Punitive Damages

Punitive damages are awarded not to compensate a victim but to punish and deter offenders. Punitive damages can be awarded in a wrongful dismissal context when an independent actionable wrong, apart from the breach of contract, is committed by the employer and their conduct is sufficiently reprehensible to warrant punishment.

Currently, debate exists as to whether a breach of a human rights code can be considered an independent actionable wrong. The Supreme Court of Canada in *Seneca College of Applied Arts & Technology v.*

Bhadhuria, [1981] 2 S.C.R. 181 held that discrimination per se does not constitute an independent tort. This finding is currently under challenge.

The Ontario Court of Appeal upheld a finding of punitive damages against the appellant (defendant) in *Keays v. Honda Canada Inc. (c.o.b. Honda Canada MFG)*, [2006] O.J. No. 3891 based on the finding that the employer's motivation for dismissing the employee was to avoid accommodating his disability. The punitive damages were lessened by the Court of Appeal to \$100,000 from the trial judge's initial award of \$500,000, however the potential liability for employers in this area is significant.

Honda was granted leave to appeal to the Supreme Court of Canada and is to be heard in February, 2008. The outcome of the case will likely determine if breaches of a human rights code can constitute an independent actionable wrong for the purpose of punitive damages.

While Human Rights Code breaches may or may not attract punitive damages, the courts and other tribunals have on a number of occasions, held that the requirements of the Human Rights Code are implied into every contract of employment. Thus, a breach of the Code can attract other forms of damage awards. Moreover, an employee can seek such damages by way of a Human Rights Action and is not obliged to commence a civil law suit. This may be an important practical distinction for a number of reasons including the fact that costs are rarely awarded against unsuccessful litigants by the Human Rights Tribunal.

IV. Voluntary Termination by the Employee

Under most circumstances it is clear when an employee has terminated the employment contract by resigning. Most often the employer is provided with written or verbal communication that states that the employee wishes to cease their employment after an appropriate notice period. When an employee voluntarily resigns the employer does not have any obligation to provide severance to the employee.

Whether an employee has actually resigned can become unclear in situations where the resignation arises out of a confrontation with his or her employer. Generally a resignation will be accepted by the court in such a circumstance when:

1. The employee either provides a verbal resignation or an act indicating an intention to quit such as asking for a final paycheque that includes vacation pay.
2. The employee acts to carry out the intention
3. The employer accepts the resignation. Anytime before the acceptance of a resignation it can be revoked by the employee.

Resignation or Termination ?

Further difficulties can arise when an employee claims they were dismissed while the employer thought the employee resigned. Determining whether a resignation or termination occurred is a fact driven analysis where the employee must show beyond a balance of probabilities that they were dismissed and did not resign.

Resignation has been found when:

- After a confrontation over the maximum hours that could be worked in a week the employee failed to report to work when expected and then continued to be out of contact for a number of days
- When confronted by an employer who said “if you do this one more time, I’m going to fire you”, the employee responded “if you want me to go, I’ll go”. The employee was told to come to work the following day but did not.

Termination was found when:

- An employee stormed out of a meeting was told that it was a “one-way door”. When he returned to work that afternoon his belongings were in the hall and the locks were being changed. The court found that the employee did not intend to resign and was not given a chance to calm down.
- An employer did not intend to dismiss an employee but said if “she did not think she had to account for her behaviour, she had better leave” and then did not attempt to ask her back when she left.

To avoid any confusion about when an employee has voluntarily terminated the employment contract and to avoid having to pay severance it is advisable that employers require written acknowledgement of resignation.

V. Conclusion

The termination of an employee can have serious financial consequences. It is essential, therefore, that employees seek appropriate legal advice both with respect to the manner of the termination and, if applicable, the likely quantum of severance payable.