

HR ADVISOR SERIES

How to Lawfully Terminate Employment

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Lawful Termination of Employment

An employment relationship can be lawfully terminated as follows:

Expiration of the employment contract.

If an individual is hired for an agreed upon term of employment, that individual's employment ends at the expiry of the term.

Invoking termination provisions.

If an individual is hired by way of contract of employment and if, the contract provides that the relationship can be terminated by an agreed upon payment or notice, the employment relationship can be brought to an end upon the making of the payment or the provision of the notice.

Just cause.

If an employee does something, or fails to do something, which is so serious that it affects the root of the employment relationship, the employer can dismiss the employee. A single act of misconduct will result in dismissal in exceptional circumstances. Normally, repeated acts of misconduct will be required. Economic downturn, financial difficulties or lack of work do not constitute just cause.

Reasonable notice or pay in lieu of reasonable notice (without just cause).

Any employment relationship can be terminated by the employer by providing the employee with either a reasonable amount of advance notice of termination of employment or payment in an amount equal to the wages and benefits the employee would have earned during the notice period.

Establishing Just Cause

To establish just cause, a single instance of misconduct will suffice as long as extremely serious in nature. For example: theft, dishonesty, misrepresentations on application forms, wrongful and deliberate disobedience of orders, aggravated assault, verbal abuse of management, competing with the employer's business and sexual harassment. However, there are often circumstances where an employer does not have a single incident that can be relied upon to justify dismissal. Usually, an employer encounters recurring minor problems. Common examples of these problems are; absenteeism, personality conflict, insolence, incompetence, poor performance, breach of policy and insubordination. While these instances, in and of themselves, is not just cause, the establishment of a history of these instances can constitute just cause. As these incidents generally occur over a period of time, it becomes critical to properly document each incident in order that it may be relied on in support of a termination for just cause.

Condonation

Even if an employee has breached the employment relationship and thereby given you just cause for dismissal, you may be unable to dismiss that employee if you have condoned his behavior. Condonation occurs whenever the employer, by his behavior, indicates to an employee that he is prepared to overlook the conduct that would be grounds for the discharge. Of course, condonation only applies when the employer is fully aware of the conduct; you cannot condone matters you know nothing about. The most common form of condonation occurs when the employer becomes aware of an employee's wrong doings and does nothing. It is therefore very important to act on an employee's infraction quickly or else you can be seen by the courts to have condoned the behavior

Building a File

In order to successfully make use of an employee's past record of poor behavior, it is critical that the employer both document and bring to the employee's attention, all incidents of misconduct. The best way to do this is to meet with the employee and present a written reprimand. This reprimand should contain a summary of the incident, a statement from the employer identifying that such behavior is unacceptable and a warning confirming that any further misconduct will result in the employee being terminated. The employee should also acknowledge that he has read the reprimand and that he understands it. Ideally, the employee should then sign the reprimand and the original should be kept on the employee's file. It is also critical that employers conduct regular written performance evaluations. These evaluations should detail any difficulties the employee is encountering. When properly completed, performance evaluations can be extremely helpful in establishing an employer's right to terminate for just cause and can act as a defense to a former employee's wrongful dismissal action.

Reasonable Notice of Payment in Lieu

If an employee has not been lawfully dismissed, the employer is required to provide the employee with either reasonable advance notice of the employee's termination or alternatively, payment in an amount equivalent to all salary and benefits that would have been earned by the employee during the notice period.

Notice Period

The determination of a notice period in any particular case entails a careful review of a variety of factors. The fundamental factors considered by the Courts when determining a reasonable notice period are the following:

- The character of the employment;
- The length of service of the employee to the employer;
- The age of the employee;
- The availability of similar employment, having regard to the experience, training, and qualifications of the employee;
- Whether the employer terminated the employee in a "candid, honest and forthright manner".

While these factors are useful in determining the appropriate notice period, they are by no means the only matters the Courts consider. The actual notice period awarded by a Court will depend upon the details of the particular case. While there is no set formula for determining the notice period, the following details are considered:

- A senior, high-level management employee will be entitled to longer notice;
- Job content, not job title, will be used to determine character of employment;
- A highly specialized or unique position will normally increase the length of notice;
- If the industry is small, thereby reducing the opportunities for comparable employment, the amount of notice required will increase;

- Length of service and age are interwoven in most cases. An older employee with long service will be entitled to longer notice. Younger employees with less service receive shorter notice;
- If the employee was enticed to join the employer or lured away from a competitor, the notice period will be greater;
- The time remaining until a pension vests;
- An employee in a specialized position, with considerable on-the-job training, will receive longer notice, regardless of his/her formal training;
- Experience limited to a particular industry or field will warrant greater notice;
- Poor general economic 'climate is a reason for giving greater notice, but economic problems of the employer may shorten the notice;
- Offers to provide relocation counseling will tend to reduce the notice period;
- Any malice on the part of the employer will increase the notice period and could result in an award of further damages.

Any lack of due process in investigations leading up to termination can operate to increase the notice period.

Benefits Included

Once the notice period is established, the next issue is to determine the factors to consider in setting the remuneration. The goal of the Courts in awarding damages is to place the employee in the same position he or she would have been in had proper notice been given. Past judicial decisions establish that the courts consider the following:

- Remuneration usually received, including any cost of living and location supplements;
- Scheduled or other across the board increases that would have been implemented during the notice period;
- Tips or gratuities that would have been received during the notice period;
- All bonuses that are not discretionary where all conditions of entitlement have been met;
- Compensation for sponsored medical health plans;
- Insurance coverage (both life and short term disability is usually awarded based on replacement cost);
- Canada Pension Plan contributions (to be continued for the notice period);
- The company pension plan;
- While the employee will not receive damages for car allowances, mileage allowance, or parking, Courts normally award a sum for loss of the use of a company car;
- Loss of accruing vacation pay during the notice period is often awarded as part of the damage award;
- Reasonable costs for searching for new employment such as long distance telephone charges, resume printing, and career counseling;
- Moving and relocation expenses have recently lost favor in judicial awards, but where the terminated employee was lured away from his former employer these expenses have been awarded;
- Damages for mental distress caused by wanton or reckless termination have been awarded.

Miscellaneous items such as;

- Club dues;
- Professional association fees;
- Employee discounts;
- Loss of opportunity for sales prizes.

However, all of the above are limited to the amount likely to have been received by the employee during the notice period.

Constructive Dismissal

Where an employer fundamentally alters the term of the employment relationship, the employee is entitled to take the position that they have been constructively dismissed. Whether a change in the term of employment gives rise to constructive dismissal depends on the nature and degree of the breach, the intention of the parties and the prevailing circumstances.

In the past, courts felt that a demotion, a reduction in salary, a unilateral change in job responsibilities, a forced transfer, a reduced work week, unpaid overtime, and a forced resignation all constituted constructive dismissal.

Recently, the courts have decided that in circumstances where the working conditions are not substantially different or the work demeaning and the personal relationships are not acrimonious, it is reasonable to expect the employee to accept the position in mitigation of damages for a reasonable period. This decision has been said to have eliminated ninety percent (90%) of constructive dismissal claims.

Mitigation

Once an employee has been terminated, he is obligated to take all reasonable steps in order to secure comparable, alternate employment. If the employee fails to do so, the employer is not entitled to make any payment as the courts view the employee's loss as one, which could reasonably have been avoided. It is therefore important that terminated employees make reasonable attempts to obtain other employment and maintain detailed records of these attempts.

Investigations

If the employee's conduct results in there being an investigation, the employee should, in most circumstances, be advised of the investigation and should be given an opportunity to respond during the course of the investigation. Any lack of perceived due process can result in an increase in the amount of damages awarded.

Tips on Termination

When terminating an employee, it is recommended that there be a meeting between the employee and two representatives of the employer. The presence of an employer witness is important as it can prevent the employee from later successfully alleging that he was mistreated during the meeting. During this meeting, the employee is advised that he will be terminated and provided with

a summary explanation of the reasons for the termination. It is important that the employer avoid getting into details. This is because:

- At this point the decision to terminate has been made; there is nothing to be gained by reviewing the incidents in detail; and
- If an employer relies upon an incident that cannot be proven later, or forgets to include particular incidents or circumstances, the employer's case could be prejudiced.

If the employee is to receive a severance payment, it is critical that the employer first obtain a release of all claims prior to advancing any money to the employee. Failure to do so often results in the employer financing the employee's lawsuit. It is also critical that the employee be given a reasonable amount of time to review the release with his family and/or legal counsel. Failure to do so can result in the employee taking the position that he was pressured into signing the release. This can result in the release becoming invalid. If payment is to be made to the employee, there are a number of options available to the employer in structuring the payment amount. The employer can:

1. Make payment of a lump sum equal to the amount of salary and benefits that would have been earned by the employee during the notice period;
2. Continue to pay the employee's salary and provide benefits for the duration of the notice period as if the employee continued to be employed;
3. Enter into an agreement with the employee providing that the employee continue to receive continuation of salary benefits, but that should the employee obtain employment during the notice period, the employee would be entitled to half the amount payable in the remaining notice period.

Option (1) has the advantage of ending the relationship between the parties. However, if the employee is able to secure alternate employment immediately, the employee obtains a windfall.

Option (2) results in there being ongoing contact between the parties. This is often undesirable. However, if the terminated employee obtains comparable alternate employment, the employer's obligation to make the payments cease, resulting in a reduced severance payment.

Option (3) is identical to Option (2), except that it contains a built-in incentive for the employee to obtain alternate employment. It therefore encourages the employee to obtain alternate employment, which results in the employer being responsible for a reduced severance payment.

Tax Considerations

Employers must be aware that the Income Tax Act and the Unemployment Insurance Act provide that the employer is responsible for source deductions on severance payments. Therefore, income tax, unemployment insurance contributions and Canada Pension Plan contributions must be deducted and remitted to the Receiver General. In addition, unemployment insurance benefits received by a terminated employee will also have to be repaid to the Unemployment Insurance

Commission. As liabilities arising from these obligations can be considerable, we recommend that employers obtain professional advice prior to forwarding any severance payments to employees.

Employment Contracts

The uncertainty that exists in determining just cause and reasonable notice can be eliminated by the use of written employment contracts. Such contracts detail the entire employment relationship thereby eliminating any uncertainty. Typical contracts include the following:

- Duration of employment;
- Salary benefits and other entitlements;
- Duties and responsibilities;
- Vacation and holidays
- Performance expectations;
- Non-competition clauses;
- Confidentiality requirements;
- Matters constituting cause for termination;
- Severance entitlement.

It is important to recognize that while employment contracts establish certainty between the parties, they also create obligations. For example, if the contract provides for termination upon written notice, failure to provide notice in writing will prevent the employer from terminating the contract.

Employment contracts must not offend applicable Employment Standards Code provisions. If they do, the Employment Standards Code provisions prevail and the contracts may be void.

Although Employment Contract provisions can be scrutinized by the courts, the certainty that can be achieved through their use far outweighs any resultant difficulties in interpretation. It is therefore recommended that they be used whenever possible.

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ALLAN MACKENZIE BACKGROUND

Allan MacKenzie is the Director of Client Fulfillment at Mpower Business Guides, a management consultancy that specializes in human resource solutions for evolving enterprises.

His diverse professional background in teaching and working with businesses has spanned over 20 years. His adventurous career path has had many interesting stops: managing partner of an executive coaching firm; teaching Contract Management, Entrepreneurship, and Leadership as an associate professor at Sir Sandford Fleming College; co-owning and operating a successful consulting and training company serving the eco-tourism industry for 12 years; working as a professional mountaineer and rescue guide; and several years in management positions at various retail and service organizations. His work has also included corporate sales, wholesale distribution, and government agencies, including Parks Canada and the Ministry of Social Services.



He holds a Bachelor of Physical Education and Health from the University of Toronto. In addition, he is a graduate of the Human Resources Management Program from Conestoga College in Kitchener, Ontario and the Strategic Business Management Program from the E-Myth Academy in Santa Rosa, California.

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Mpower Business Guides is a boutique management consultancy that translates human resource solutions into measurable business results for evolving enterprises.

We plan, design and implement client-specific HR solutions that help you:

FIND the right people
PROTECT your business
SYSTEMIZE your HR practices

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