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THE INS AND OUTS OF WRONGFUL DISMISSAL FOR CHARITIES AND NON-PROFITS

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A. INTRODUCTION

The dismissal of an employee is never an easy or pleasant task. However, in these difficult economic times, the dismissal of an employee may be necessary to maintain the economic viability of your organization. The purpose of this *Charity Law Bulletin* (the "Bulletin") is to set out the legal requirements for dismissing an employee and the risks and costs associated with a wrongful dismissal claim. Finally, the Bulletin will provide some guidance on how to decrease the risk of facing a wrongful dismissal claim by a former employee.

B. THE LEGAL RELATIONSHIP BETWEEN EMPLOYER AND EMPLOYEE

The basic principle of wrongful dismissal law is that there is a contractual relationship between the employer and the employee. Therefore, the parties are free to negotiate the terms and conditions that will govern the employment relationship, including the termination of the relationship. However, these terms and conditions may not be incompatible with the relevant statutes in your jurisdiction, such as the *Employment Standards Act, 2000* (Ontario), and the *Human Rights Code* (Ontario). Neither the employer nor the employee may enter into an employment contract which would violate the standards set out by these statutes.

While there are advantages to having a written employment contract, the fact remains that the majority of employment contracts are not written. Whether the employment contract is written or oral, unless the parties otherwise agree, it is implied in all employment contracts that they are of indefinite duration and are subject to termination by the employer only for "just cause" or by giving reasonable notice of termination or pay in lieu

of that notice. Where an employer terminates an employment contract without just cause, or without giving reasonable notice or pay in lieu thereof, the employer is considered to have breached the contract of employment and wrongfully dismissed the employee. In those circumstances the employer may be liable to the employee for monetary damages.

C. STATUTORY REQUIREMENTS

In Canada, all provinces and territories have employment law statutes setting out the minimum level of entitlements that an employee must receive upon dismissal without just cause. In Ontario, the *Employment Standards Act, 2000*, provides that employees are entitled to:

- one week's notice if employed between three months and a year;
- two week's notice if employed between one and three years; and
- one week's notice per full year of service, up to a maximum of eight weeks, if employed more than three years.

It is also important to note that employers must continue benefit plan contributions during the statutory notice period. The employer is also required to provide "severance pay" where the employer's payroll exceeds $2.5 million, and the employee has completed at least five years of employment. The severance pay owing is one week's pay for each year of service, up to a maximum of twenty six weeks pay.

It is important to emphasize that these statutory payments are minimums to which an employee dismissed without cause is legally entitled. Depending on the circumstances, he or she may also be entitled to additional pay in lieu of notice under the common law, as discussed below.

D. COMMON LAW NOTICE

Common law notice is much different than statutory notice, in that it is not determined by a particular statutory formula based upon the number of years of employment. However, over the years, Canadian courts have determined that an employee's reasonable common law notice must be determined by a number of factors. The Ontario judgment most often cited with respect to these factors is *Bardal v. Globe and Mail Ltd.* ("*Bardal*"), a 1960 case of the Ontario High Court (as it was then called). In *Bardal*, the court set out the following factors that determine the applicable notice period:

- the character of the employment (i.e. the position held by the employee);

- the length of service;
- the age of the employee; and
- the availability of similar employment, have regard to the experience, training and qualifications of the employee.

The purpose underlying these factors determining the length of notice is to provide sufficient opportunity for the dismissed employee to obtain alternative comparable employment. Therefore, in many instances, the longer the length of service, and the older the employee, the longer the notice period will need to be. Courts have imposed a rough upper limit on common law notice of twenty four months. While there have been a few cases exceeding that period, these are quite rare. Many of the disputes that end up going to court deal with what the reasonable notice ought to be in the circumstances, along with the compensation to be properly included in the termination package.

Formerly, some judges applied a so called "rule of thumb" that an employee is entitled to roughly one month pay in lieu of notice for each year of service to the employer. While this rule of thumb has been rejected by the courts, it is still fairly regularly applied by employers in practice as a fair starting point to establish a reasonable notice period. Moreover, there are many reported judicial decisions where wrongfully dismissed employees have been awarded roughly one month of pay for each year of service.

E. ADDITIONAL COMMON LAW DAMAGES FOR WRONGFUL DISMISSAL

Unlike statutory notice, an employer who wrongfully dismisses an employee is required not only to pay the former employee's regular pay over the notice period, but also may be required to pay the following additional amounts:

- any bonuses or commissions that would have likely accrued during the notice period;
- the value of any benefits that the employee would have enjoyed during the notice period, such as car allowance, etc;
- the replacement value of the employee's health benefit plan;
- the value of any stock options that the employee could have exercised during the notice period or any increase in value during the notice period of shares that the employee owned, which he or she was required to redeem at the time of dismissal;
- the increased value of the employee's pension during the notice period.

The above items are the most commonly claimed as monetary damages in wrongful dismissal cases. Additionally, an employer who dismisses an employee in an unnecessarily callous manner may be required to pay additional damages in light of the decision of the Supreme Court of Canada in *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, and more recently, *Honda Canada v. Keays*, 2008 SCC 39. If the employee can establish that the employer engaged in bad faith conduct, or unfair dealing during the course of dismissal, injuries such as humiliation, embarrassment and damage to one's self worth and self-esteem might well be deemed worthy of compensation. This additional compensation to the employee does not flow from the fact of dismissal itself, but rather from the manner in which the dismissal was carried out. If the court finds that the employer's conduct was particularly egregious, an award of punitive damages may also be made. Punitive damages awards are rare, but not unheard of in employment situations.

F. THE RIGHT TO REINSTATEMENT

Common law claims for wrongful dismissal are for monetary damages only, and the law does not allow for reinstatement. However, an employee who was dismissed in breach of the anti-discrimination provisions of the *Human Rights Code* (Ontario) may proceed with an application to the Ontario Human Rights Tribunal. If there is a finding of unlawful discrimination, the Tribunal has powers under the *Code* to order reinstatement, with full back wages.

Additionally, the *Canada Labour Code* provides a limited statutory right to reinstatement. The *Canada Labour Code* applies only to federally regulated industries, such as banks, marine shipping, air transportation and railway and road transportation that involves crossing provincial or international borders. For a list of these federally regulated business and industries to which the *Canada Labour Code* applies, you can search the Federal Human Resources and Skills Development website at www.hrsdc.gc.ca.

Under "Division XIV – Unjust Dismissal", employees meeting certain criteria can apply for an adjudicated determination of whether the employer had just cause to discharge them and, if the employer did not, to seek extensive monetary remedies, as well as reinstatement. Those criteria are:

1. they are not managers (s.167(3));
2. they have completed twelve months of continuous employment (s.240(1)(a));
3. they are not subject to a collective agreement, which has its own procedures for addressing whether discipline and/or discharge were imposed without just cause (s.240(1)(b)); and

4. they were not terminated because of lack of work or the discontinuance of a function (s.242(1)(3.1)).

G. TERMINATION FOR CAUSE

The employer is always entitled to dismiss an employee without notice or termination pay for just cause. However, the onus is on the employer to prove that cause exists. The employer must prove incompetence or misconduct and not just dissatisfaction with performance or concern about potential misconduct. The question of just cause has been reviewed many times in the jurisprudence. In a 1967 Ontario case, the Ontario Court of Appeal stated the following with respect to just cause:

> 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.[1]

The existence of just cause is inherently an "all or nothing" proposition. Therefore, many employers are reluctant to dismiss an employee for just cause unless the circumstances are clear and capable of being proven. Therefore, dismissing an employee for just cause should not be taken lightly, as the organization may well be required to defend its actions in court or before a labour standards tribunal, or even possibly before a human rights tribunal.

H. REDUCING THE RISK OF WRONGFUL DISMISSAL CLAIMS

Defending a wrongful dismissal claim can be costly and time consuming for the organization. The following steps may serve to reduce the risk of facing such claims:

1. Use Written Employment Contracts

   Consider using written employment contracts. A written employment contract will specify the notice periods that the employee would be entitled to in the event of termination without cause. The organization will need to make sure that the employment contract does not contravene any of the

[1] *R. v. Arthurs*; *ex parte Port Arthur Shipbuilding Co*., 2 O.R. 49, 62 D.L.R. (2d) 342,67 C.L.L.C. 14,024, (sub nom. *U.S.W.A. v. Port Arthur Shipbuilding Co.*) 1967CarswellOnt 135 [reversed on other grounds, [1969] S.C.R.85, 70 D.L.R. (2d) 693, 68 C.L.L.C. 14,136, 1968 CarswellOnt 90.

provisions of the *Employment Standards Act, 2000* (Ontario) or the *Human Rights Code* (Ontario), or any other applicable provincial or federal legislation. A well drafted employment contract may serve to limit the employer's liability in the event of employee termination. To avoid allegations that the contact was forced on the employee and is unjust, the employer should give the employee the opportunity to seek independent legal advice. Further, a current employee should never be advised that he or she is required to sign an employment contract as a condition of continued employment with the organization, as a court will likely not enforce such an agreement.

2. Full and Final Release

In the event that you are offering your dismissed employee a termination package which exceeds the statutory minimum payments, have the employee sign a Full and Final Release in favour of the organization as a condition of receiving any funds beyond the statutory minimums. Such a release would protect an employer in the event that the employee has second thoughts about the severance package after he or she has been paid out.

3. Working Notice

Consider providing working notice instead of pay in lieu of notice. If the organization believes that the employee will still be able to function effectively after receiving notice that the job will be terminated, it will have the benefit of having a working employee throughout the notice period.

4. Avoid Acting Callously

Avoid acting callously during the course of the dismissal. For example, do not withhold statutory amounts owing, do not make unfounded allegations against the employee, do not refuse a request for a fair and reasonable reference. Do not take steps that would make the employee's job search more difficult, such as disparaging the employee to customers or potential other employers.

5. Documenting

In dealing with a problem employee, make sure to document any warnings, suspensions or other disciplinary actions on the employee's file. Such documentary evidence will be invaluable in supporting the organization's position that just cause existed as of the time of dismissal.

I. CONCLUSION

There are many issues to consider once the decision to dismiss an employee has been made. If the organization has any doubts concerning the legality of the dismissal or the appropriateness of the termination package being offered to the employee, it should consider seeking legal advice prior to any final decisions being made.

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