
**SMALL BUSINESS ENTERPRISE CENTRE
BUSINESS & THE LAW SERIES**

Orangeville – November 19, 2008

Employment Law Issues: The Essentials

By Paula J. Thomas, B.A., LL.B. & U. Shen Goh, LL.B., LL.M., Trade-mark Agent

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TERMINATION OF EMPLOYMENT

- **Dismissal With Cause**
- **Dismissal Without Cause**
- **Constructive Dismissal**
- **The Importance of Employment Contracts**

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DISMISSAL WITH CAUSE

- **Most common grounds for “just cause”:**
 - 1) **Neglect of duty**
 - 2) **Dishonesty**
 - 3) **Theft and fraud**
 - 4) **Conflicts of interest**
 - 5) **Misconduct**
 - 6) **Incompatible personality**
 - 7) **Incompetence**
 - 8) **Disobedience**
 - 9) **Insubordination**

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- Key points:
- 1) Obtain legal advice prior to terminating an employee for “just cause”
- 2) “Just cause” is grounds for the employer to terminate an employee without providing the employee with reasonable notice
- 3) “Just cause” is not an easy hurdle to achieve and requires more than the employer’s subjective dissatisfaction with the employee

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McIntyre v. Hockin (1889):

“The causes which are sufficient to justify dismissal must vary with the nature of the employment and the circumstance of each case. Dismissal is an extreme measure, and not to be resorted to for trifling causes. The fault must be something which a reasonable man could not be expected to overlook, regard being had to the nature and circumstances of the employment...”

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Regina v. Arthurs, Ex parte Port Arthur Shipbuilding Co.:

“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 order in a matter of substance, the law recognizes the employer’s right summarily to dismiss the delinquent employee.”

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McKinley v. BC Tel.:

- **Employers must demonstrate that:**
 - 1) **The act was in fact an act of dishonesty, theft, misconduct, etc.; and**
 - 2) **The nature of the act and the context in which it was committed actually gave rise to a breakdown of the employment relationship.**

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DISMISSAL WITHOUT CAUSE

- 1) **What is a reasonable notice period?**
- 2) **What payments, benefits and perks should be included in the severance package?**
- 3) **Should the package be structured by providing working notice, a lump sum payment, periodic payments or some combination of these elements?**
- 4) **How likely is the employee to obtain alternative employment and what can the employee expect to earn during the reasonable notice period?**

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1) **What is the reasonable notice period?**

- ***Employment Standard Act 2000 (ESA)* imposes statutory obligations on employers with respect to notice and severance**

| Length of Service | Notice Requirement |
|---------------------------------|--------------------|
| - 3 months but less than 1 year | 1 week |
| - 1 year but less than 2 years | 2 weeks |
| - 3 years but less than 4 years | 3 weeks |
| - 4 years but less than 5 years | 4 weeks |
| - 5 years but less than 6 years | 5 weeks |
| - 6 years but less than 7 years | 6 weeks |
| - 7 years but less than 8 years | 7 weeks |
| - 8 years or more | 8 weeks |

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- Courts may increase the statutory obligations by looking at the following factors:
 - 1) Length of service
 - 2) Age
 - 3) Position
 - 4) Availability of similar employment

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- Other factors affecting notice period
- Inducement – where an employee is induced to leave otherwise secure employment with promise of career advancement, increased responsibilities or greater pay
- Bad faith discharge – concerns the manner in which a termination is carried out

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- No set formula according to *Bardal v. Globe and Mail*:

“There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.”
- Consider other similarly situated employees to see what the courts consider to be a reasonable notice period

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2) What payments, benefits and perks should be included in the severance package?

- **ESA requires the employer to maintain the employee's benefits during the notice period**

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3) Should the package be structured by providing working notice, a lump sum payment, periodic payments or some combination of these elements?

- **Working notice**
- **Lump sum payment upon termination**
- **Periodic payments (salary continuance)**

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4) How likely is the employee to obtain alternative employment and what can the employee expect to earn during the reasonable notice period?

- **Duty to Mitigate**
 - **The general rule is that an employee is entitled to be put back into the same position the employee would have been in, if they were permitted to continue in employment to the end of the reasonable notice period**

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CONSTRUCTIVE DISMISSAL

- **Constructive dismissal is a unilateral change by an employer of a fundamental term of the employment contract without reasonable notice**

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- *Farber v. Royal Trust Company:*

Where an employer decides unilaterally to make substantial changes to the essential elements of an employee’s contract of employment and the employee does not agree to the changes and leaves his or her job, the employee has not resigned, but has been dismissed. Since the employer has not formally dismissed the employee, this is referred to as “constructive dismissal”

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Examples of fundamental breach of employment contract are:

- **Reduction in salary**
- **Change in duties or responsibilities**
- **Change in working conditions**
- **Significant geographic relocation**

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- A constructively dismissed employee is entitled to resign, and be compensated for damages suffered as a result of the constructive dismissal
- A constructively dismissed employee is required to negotiate with the employer and to mitigate damages, just as in a case of wrongful dismissal

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Employers can protect themselves through use of:

- Flexible employment contracts
- Providing reasonable notice of changes
- Obtaining consent

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THE IMPORTANCE OF EMPLOYMENT CONTRACTS

- While an Employment Contract is not a complete solution to all the problems that an employer may face, a properly drafted and implemented employment agreement can be a strong ally in the deterrence of wrongful dismissal litigation, should a dispute with an employee escalate to litigation
- However, in order to benefit from the advantages of a written employment contract, it is important not only to include necessary provisions but also to avoid common mistakes that may render the agreement unenforceable

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Common Mistake #1

- Often employers have new employees sign written employment agreements after they have been hired. This is a common mistake but one that has serious consequences for the employer particularly where the employer attempts to have its new employee sign unfavourable terms relating to termination without receiving the benefit of any fresh consideration from the employer in exchange for having executed an unfavourable agreement

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Common Mistake #2

- Employers having many employees tend to treat employment contracts as a formality
- Employers should ensure that all terms and conditions of the employment relationship is communicated at the outset so that the offer of employment includes all contractual terms and conditions

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Common Mistake #3

- To limit the extent of their financial liability at the end of the employment relationship, employers often insist on terms that provide the employee with a substantially reduced notice period entitlement than is otherwise available to the employee at law
- While such planning makes good financial sense, employers should obtain advice of an employment lawyer to ensure that the employment contract does not provide the employee with less entitlement than provided under the applicable legislation

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Seven Steps Employers Should Follow

- **Employers are well advised to take proactive measures to ensure that their written employment agreements will withstand any challenge to enforceability in the event of litigation**
- 1. Ensure that prospective employees obtain a copy of the employment contract no later than the time when employment is offered**
- 2. Ensure that the employer routinely explains what the employment contract means, including termination provisions within the employment contract**
- 3. Take note of the fact that such explanation has been taken, who provided the explanation and the details of what was communicated**

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- 4. Always offer the individual the opportunity and time to obtain independent legal advice and ensure that the individual is given some reasonable period of time to consider the employment contract**
- 5. In your discussions with a prospective employee, never minimize the importance of the employment contract. There have been many otherwise enforceable contracts that have not been upheld when employers hide the employment agreement amongst other paperwork and refer to the employment agreement as a formality**

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- 6. Ensure that the employment contract is signed and dated. Ensure that the employer obtains an acknowledgement that the employee has obtained a copy of the employment contract. As indicated earlier, contracts of employment provided after the commencement of employment may be unenforceable**
- 7. If employment is being implemented following the commencement of the employment relationship, caution should be exercised and steps should be taken to ensure that fresh and valid consideration is being provided to the employee to ensure that the employment agreement will be enforceable**

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CONCLUSION

- Everyone involved in planning and implementing a termination will have an emotional reaction to the event
- Careful attention must be taken by an organization to ensure that the staff and those carrying out the termination are aware of the employer's and employee's rights and to carry out the termination in accordance with the law

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