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## Essential Employment Issues For Churches and Charities (Power Point Presentation)

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### Termination of Employees

Churches and charities often have questions about termination of employees. Some of the essentials of employment law as it relates to the termination of employees are:

- § How to structure a fair and effective severance package?
- § What is just cause?

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An employer structuring a severance package should ask the following questions:

- 1) What is the 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?

- Upon an employee's termination, the *Employment Standard Act 2000* (ESA) imposes statutory obligations on employers with respect to notice and severance
- The ESA outlines the statutory minimum requirements imposed upon employers with respect to notice

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- The length of notice that is required to be given to an employee is determined by an employee's length of service as follows:

Length of Service	Notice Requirement
– 3 months but less than 1 year	1 week
– 1 year but less than 3 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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**Bardal v. Globe and Mail (1960), 24 D.L.R. (2d) 140**

- “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.”

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- The four Bardal factors are:

- 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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- Is there a formula for determining the reasonable notice period?
- No set formula
- Consider other similarly situated employees to see what the courts consider to be a reasonable notice period
- Is there a maximum notice period?

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

- Equivalent of salary
- Benefits and Pensions
- Perks
- Other – Outplacement Counselling

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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
- § Periodic payments (salary continuance)
- § Lump sum payment upon termination

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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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- Termination based on “just cause”:
  - Common law principle of reasonable notice applies in the majority of cases
  - There are exceptions to the common law principle for example “just cause”

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**Regina v. Arthurs, Ex parte Port Arthur Shipbuilding Co. (1967), 62 D.L.R. (2d) 342 at 348 (Ont.C.A.), rev'd 70 D.L.R. (2d) 693 (S.C.C.)**

**“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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**McIntyre v. Hockin (1889), 16 O.A.R. 498 (C.A.) at p.501**

**“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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- **Onus on employer to prove “just cause” on a balance of probabilities**
- **Requires more than employer’s subjective dissatisfaction with the employee**

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- **Most common grounds of “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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**McKinley v. BC Tel. [2001] 2 S.C.R. 161 at para.29:**

- **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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- **Key points:**

- 1) **“Just cause” is grounds for the employer to terminate an employee without providing the employee with reasonable notice**
- 2) **“Just cause” is not an easy hurdle to achieve**
- 3) **Obtain legal advice prior to terminating an employee for “just cause”**

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**Conclusion**

- **Everyone involved in planning and implementing a termination will have an emotional reaction to the event**
- **Attention must be given to all affected parties including the terminating manager, human resources representatives and remaining employees**
- **A high level of care must be given to the individual who will be terminated**

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- **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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