
20TH ANNUAL CHURCH AND CHARITY LAW SEMINAR

Mississauga – November 14, 2013

The Do's and Don'ts of Employee Terminations for Charities

By Barry W. Kwasniewski, B.B.A., LL.B.

bwk@carters.ca

1-877-942-0001

© 2013 Carters Professional Corporation

CARTERS

Carters Professional Corporation / Société professionnelle Carters
Barristers · Solicitors · Trade-mark Agents / Avocats et agents de marques de commerce
www.carters.ca www.charitylaw.ca www.antiterrorismlaw.ca

Toronto · Ottawa
Mississauga · Orangeville
Toll Free: 1-877-942-0001

CARTERS <small>BARRISTERS SOLICITORS TRADEMARK AGENTS</small>	THE 20TH ANNUAL CHURCH & CHARITY LAW™ SEMINAR Mississauga – November 14, 2013
	The Do's and Don'ts of Employee Terminations For Charities By Barry W. Kwasniewski, B.B.A., LL.B. bwk@carters.ca 1-866-388-9596 © 2013 Carters Professional Corporation <small>CARTERS PROFESSIONAL CORPORATION Ottawa Toronto Mississauga Orangeville TOLL FREE: 1-877-942-0001 www.carters.ca www.charitylaw.ca www.antiterrorismlaw.ca</small>

2	
A. INTRODUCTION	
<ul style="list-style-type: none">• Terminating employees is one of the most difficult decisions that boards/managers of churches and charities must make• Charities as well as not-for-profits face additional considerations that for-profit businesses do not normally face:<ul style="list-style-type: none">– The effect of the termination on the employee and the donors, members and other staff members– The potential effect of the termination on the reputation of the charitable organization should the organization be sued for wrongful dismissal	
<small>www.carters.ca</small>	<small>www.charitylaw.ca</small>

3	
<ul style="list-style-type: none">• When terminating an employee, an organization needs to consider:<ul style="list-style-type: none">– Cost to terminate<ul style="list-style-type: none">▪ Does it have the financial resources to pay the employee his/her legal entitlements?– “Wrongful dismissal”<ul style="list-style-type: none">▪ Did the organization provide legally adequate notice that the employee’s employment will come to an end? or▪ Did the organization provide legally adequate compensation in lieu of that notice?– “For cause” termination<ul style="list-style-type: none">▪ Sometimes not necessary to provide notice or pay in lieu of notice▪ Reserved for instances of serious misconduct	
<small>www.carters.ca</small>	<small>www.charitylaw.ca</small>

4

- In most cases, employees are legally entitled to a fair and reasonable termination package
 - Either in accordance with their employment contract or with their rights at common law
- Right ways and wrong ways to carry out a termination
 - How you handle a termination makes a huge difference in the risk
 - Carrying out a termination in a proper, fair and professional manner will save your organization:
 - Aggravation, stress and embarrassment of having to deal with a lawsuit
 - Amounts which your organization may be required to pay out a terminated employee

www.carters.ca www.charitylaw.ca

5

B. ONTARIO LEGAL FRAMEWORK

- Most federally and provincially incorporated charities and NFPs are governed by the Ontario *Employment Standards Act, 2000* (the “ESA”)
 - ESA sets out the minimum employment standards
 - Standards cannot be lessened, even by an agreement between an employer and an employee
 - Minimum obligations touch on a number of issues:
 - Minimum wage, overtime pay, vacation entitlements, statutory holidays, job protected leaves of absence (such as pregnancy and parental leave) and termination obligations

www.carters.ca www.charitylaw.ca

6

- *Canada Labour Code* (the “Code”)
 - Only certain types of federal incorporations are covered under the *Code*
 - i.e. Banks, airlines, television and radio stations, interprovincial shipping companies
 - *Code* does not apply to federally incorporated charities or NFPs, unless the organization falls under the list of enterprises listed in the *Code*
 - e.g. Christian radio stations

www.carters.ca www.charitylaw.ca

7

- ESA minimum termination notice or pay in lieu of notice requirements:

Length of Employment	Notice Required
Less than 3 months	None
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

- Note: If the employee is covered by a group benefit plan, the employer must extend the former employee's benefits for the same number of weeks as the notice required

www.carters.ca www.charitylaw.ca

8

- Severance Pay
 - Regulated by ESA
 - Only applies to employees who have been employed with the same employer for 5 years or more; and
 - Employer has an Ontario payroll of at least \$2.5 million per year
 - Based upon number of years of service
 - May substantially exceed termination pay
 - Maximum amount of severance pay is equal to 26 weeks of pay
 - Maximum amount of ESA termination pay is 8 weeks

www.carters.ca www.charitylaw.ca

9

C. EMPLOYMENT CONTRACTS AND TERMINATION PROVISIONS

- In drafting employment contracts, organizations must ensure that the terms do not violate any of the minimum standards set out in the ESA
- Employment contracts should have termination clauses
 - Set out termination pay
 - Upon termination on without cause basis
 - Should be clearly worded and enforceable
 - Best way to limit an organization's potential liability

www.carters.ca www.charitylaw.ca

10

- Contractual termination provisions are legally enforceable so long as they:
 - Meet the minimum statutory requirements of the ESA; and
 - Are not in violation of any other law (i.e. Ontario *Human Rights Code*)
- If unsure whether contracts are enforceable, have them reviewed by a lawyer
- If there is no written employment contract (or the contract does not have a termination clause), then the employee is entitled to **common law** "reasonable notice" (or compensation in lieu of that notice)

www.carters.ca www.charitylaw.ca

11

- Employers must provide reasonable notice, or pay in lieu of notice of termination, when termination is without cause
- If contract does not specify the notice to which the employee is entitled, then a court will determine how much is "reasonable" under the circumstances
- Court will look at the employee's:
 - Age, education, skills, length of service and seniority of their position within the organization
- Court will estimate how long it will take the employee to find a comparable new job - the "reasonable notice period"
- Called "Common law notice periods"
 - Usually significantly greater than the minimum standards mandated by the ESA

www.carters.ca www.charitylaw.ca

12

- Compensation is not limited to employee's regular pay
 - Also includes anything of value the employee would have been entitled to receive during the reasonable notice period:
 - Cash bonuses/incentives/commissions;
 - Pension plan contributions;
 - Group RRSP contributions;
 - Group benefits;
 - Car allowances;
 - Tuition subsidies;
 - Club or membership dues; and
 - Any other items of value which the employee was receiving while employed

www.carters.ca www.charitylaw.ca

13

D. THE DON'TS OF THE TERMINATION PROCESS

1. Be Careful in Alleging Just Cause

- “Capital punishment” of employment law
 - Only allege if you are certain you will be able to prove in a court of law
- Employer has the burden of proof that just cause existed and will need to prove that:
 - Reasonable grounds existed (with evidence); and,
 - A process of progressive discipline was followed:
 - Employee was provided with verbal and/or written warnings on at least one or more occasions; and
 - Employee was notified that any further improper conduct would lead to a with cause termination

www.carters.ca www.charitylaw.ca

14

- Only very serious misconduct considered just cause
 - i.e. Theft, fraud, assault or sexual harassment, excessive unexplained absences, serious insubordination
- Poor performance, incompetence rarely considered just cause, unless there have been prior warnings
- “Border-line” cases
 - Harder cases to decide on what to do
 - Prior to alleging cause, manager/board needs to assess whether they want to take on the battle or not
 - If they terminate for cause, the likelihood of litigation rises substantially

www.carters.ca www.charitylaw.ca

15

2. ESA Entitlements Do Not Require Signed Release

- Termination pay and severance pay are statutory obligations on an employer
- Not appropriate to require an employee (being dismissed without cause) to sign a full and final release as a condition of being paid the minimum ESA entitlements
 - If offering more to the employee than the minimum ESA entitlements, then the signing of a release is justified
 - But only for those amounts in excess of the ESA minimums

www.carters.ca www.charitylaw.ca

16

3. Do Not Require Employee to Sign a Release for Termination Package on the Same Day Being Terminated

- A terminated employee should be allowed at least a full week to consider a termination package
 - Gives the employee an opportunity to review the package with their lawyer and/or financial advisor
 - Also, court could rule that the employer put undue and improper pressure on the employee to sign a release
 - Could hold that the release is consequently not binding on the employee

www.carters.ca www.charitylaw.ca

17

4. Do Not Misinform Employees About Their Termination Entitlements

- Need to make sure that information provided (i.e. group benefit extension or conversion, pension options, accrued but unused vacation) is accurate
- If not court could set aside the agreement on the basis of misrepresentation
 - i.e If the employee signed off on a termination package and was misinformed

www.carters.ca www.charitylaw.ca

18

5. Do Not Discuss Matters Regarding the Former Employee

- If a troublesome employee is terminated there may be the temptation to engage in gossip (i.e. internally or externally and verbally or online)
 - Matters discussed could imply dishonesty, incompetence or otherwise harmful allegations
- If it comes to the former employee's attention, the organization may be faced with defamation claims as well as a wrongful dismissal suit
 - Need to control the flow of information regarding the departed employee
 - The less said the better

www.carters.ca www.charitylaw.ca

19

6. Do not Refuse to Give the Employee a Positive Reference

- Positive (but accurate) references are better than neutral references, which
 - Confirm dates of employment, position, title and duties without further comment
- A reference may help the employee find a new position more quickly, which
 - Limits the organization's legal obligation if a settlement cannot be reached with respect to a termination package

www.carters.ca www.charitylaw.ca

20

E. THE DO'S OF THE TERMINATION PROCESS

1. Do Terminate as Kindly and Respectfully as Possible

- Need to avoid saying or doing anything that would give the employee any ammunition in any future legal dispute

2. Do Consider Giving Working Notice

- Not always necessary (or desirable) to terminate an employee immediately and give pay-in-lieu of notice
- Working notice may be a preferable option
 - This is when the employer tells the employee that their employment will end at some future date
 - Benefit to employer as they have an employee actively working for the duration of the notice period

www.carters.ca www.charitylaw.ca

21

- Employers need to consider whether working notice will work, on a case by case basis
 - An employee who is on working notice may not put forth the expected effort
 - He/she may be more concerned with finding a new job than carrying out duties
- Also, employers may want the process to end quickly
 - Do not want an employee negatively affecting the morale of the workplace

3. Do Consider "Salary Continuation"

- Employee does not come to work, but he/she is paid his/her regular salary and benefits for the duration of the reasonable notice period

www.carters.ca www.charitylaw.ca

22

- Benefit to employer as the cost of termination is spread over several weeks or months
 - No upfront cost involved (i.e. lump sum payment)
- Salary continuation terminations are quite common
 - Especially with longer term employees with long notice periods
 - Long serving employees could have a salary continuance period of a year or more
- 4. Do Have All the Paperwork Ready**
- Have all termination paperwork ready for the meeting with the employee
- Include:
 - Termination letter (which will set out the package to be offered); and
 - Full and final release

www.carters.ca

www.charitylaw.ca

23

- 5. Do Keep the News Confidential Between Only Those Who “Need to Know”**
- Do not want news of an impending termination to be leaked to the affected employee or other employees in the organization
- 6. Do Select the Right People to Meet with the Employee**
- Always preferable to have two people
 - Should include the immediate supervisor
 - Helps prevent “he said, she said” situations
 - If serious conflict between the employee and the immediate supervisor
 - Then someone else should attend on behalf of the employer

www.carters.ca

www.charitylaw.ca

24

- 7. Do Hold the Meeting in Private**
- Boardroom or manager’s office
- 8. Do Be Professional**
- Be direct and to the point
- Do not exchange excessive small talk
- Rehearse the meeting in advance
- The termination meeting should be short, focused and calm
 - Employee may react negatively and wish to argue his or her case
 - If the employee does get very agitated, end the termination meeting gently but firmly

www.carters.ca

www.charitylaw.ca

25

9. Do Consider Security Issues

- Make advance arrangements where necessary
- Should avoid the “security march to the door” scenario
 - Unless there are serious trust issues with the employee
- Is reasonable to ask for a return of all keys and pass cards
- Also reasonable to cancel access to all building facilities and equipment (i.e. computer, phone, email)

www.carters.ca www.charitylaw.ca

26

10. Do Allow Employee to Pack Up Belongings in Privacy

- Arrange for a trusted manager or human resources staff person to meet the employee after hours
- Do not force the employee to pack up his or her belongings in front of other staff members

11. Do Exercise Judgment on Whether Employee may Say Goodbye to Co-Workers

- Each termination different
 - Base decision on the situation and the personalities involved

www.carters.ca www.charitylaw.ca

27

12. Do Create a Communications Plan in Advance for Terminations of High Profile Employees

- Need to cover off how the termination will be announced internally, externally and (if applicable) in the media
- Do not announce the departure internally or externally until after the employee has been informed

13. Do Be Conscientious and Responsible About Follow-up Items

- Need to ensure that any promised payments and termination related documents (i.e. Records of Employment) are issued on time
- Have payroll double check its calculations for accuracy

www.carters.ca www.charitylaw.ca

28

F. FINAL THOUGHTS

- The termination process requires advance planning and professional implementation
- Employers should handle terminations in a very discreet and compassionate manner
 - If not, there is a much greater risk of litigation
- Important to remember that even if responsibilities are carried out in such a manner, the employee still may not be satisfied with the termination package and may retain a lawyer
 - Employers should be prepared to receive a lawyer's letter
 - Sometimes rather strongly worded
 - Will allege that the termination was unfair and that the employee is entitled to more compensation than offered

www.carters.ca www.charitylaw.ca

29


- However, vast majority of employee claims settle without litigation
 - Those that end up in litigation rarely go all the way to trial (most settle prior to trial)
- **Best Advice**
 - Always be aware of the Ontario employment standards laws
 - Always have a carefully drafted employment contract
 - Want certainty around the employee's entitlements on termination,
 - Reduces the risk of legal disputes
 - If there is any question relating to the termination, you should seek legal advice beforehand

www.carters.ca www.charitylaw.ca

30

- A termination letter and full and final release should be carefully drafted
 - Need to ensure that if the employee accepts the termination package, the settlement is final
- Legal disputes can most often be avoided by:
 - Offering a fair termination package in exchange for the employee signing a full and final release of claims
 - Helps protect staff member, donor morale and the reputation of the organization

www.carters.ca www.charitylaw.ca

 <p>CARTERS BARRISTERS SOLICITORS TRADEMARK AGENTS</p>	<h2>Disclaimer</h2>
<p>This handout is provided as an information service by Carters Professional Corporation. It is current only as of the date of the handout and does not reflect subsequent changes in the law. This handout is distributed with the understanding that it does not constitute legal advice or establish a solicitor/client relationship by way of any information contained herein. The contents are intended for general information purposes only and under no circumstances can be relied upon for legal decision-making. Readers are advised to consult with a qualified lawyer and obtain a written opinion concerning the specifics of their particular situation.</p> <p>© 2013 Carters Professional Corporation</p>	
<p>CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001</p>	<p>Ottawa Toronto Mississauga Orangeville www.carters.ca www.charitylaw.ca www.antiterrorismlaw.ca</p>
