

## **WRONGFUL DISMISSAL – AN EMPLOYER’S GUIDE**

### **PART I**

#### **Introduction**

As many have discovered, employers facing a wrongful dismissal claim in Ontario often find the process to be highly unpleasant and often find the court to be sympathetic to their former employees’ claims. However, there are a number of things employers can do to avoid wrongful dismissal claims, or to at least improve their position when such claims arise. The first step is for employers to have a realistic expectation of how such claims are dealt with in the courts. With such an understanding, it is often possible to negotiate a reasonable settlement and avoid costly and time-consuming litigation. In this series of articles we will examine in general terms the legal issues relating to wrongful dismissal claims from the employer’s perspective. In this first article we examine the basic grounds for wrongful dismissal claims and the concept of “notice”.

#### **Wrongful Dismissal**

Generally speaking, employers are entitled to terminate the employment of any employee at any time. Terminations of employment can generally be grouped into two broad categories: (i) dismissals for just cause; and (ii) dismissals without cause.

Employees may also resign their position and claim constructive dismissal in circumstance where the employer unilaterally and fundamentally altered the employee’s position, remuneration or working conditions. Without getting into the complexities of a constructive dismissal claim, such claims can generally be dealt with in the same manner as dismissals without cause for the purposes of settlement, unless the employer strongly believes that the facts suggest an unwarranted resignation.

Where an employer elects to dismiss an employee without cause, the dismissal only becomes “wrongful” where the employer fails to provide reasonable notice of termination, or pay in lieu of notice. Where the dismissal is for just cause, the employee is not entitled to notice of termination, or pay in lieu of notice, but the onus will ultimately be on the employer to establish that just cause existed. If the employer cannot demonstrate cause, the dismissal is wrongful and the employee will be entitled to damages in lieu of notice.

## Notice Requirements

Many employers are under the mistaken impression that their notice obligations are limited to those set out in the *Employment Standards Act, 2000* (the “ESA”). The ESA requires employers to give one week’s notice during the first year of employment, plus one additional week of notice for every full year of employment thereafter (up to a maximum of eight weeks) or a lump sum payment in lieu thereof. The lump sum payment is referred to in the ESA as termination pay. Regardless of whether the employer gives actual notice, or termination pay in lieu thereof, the employer is also generally required to continue making all benefit contributions it normally would have made during the notice period.

In addition to termination pay, some employers may also have an obligation to pay severance pay to certain employees. Severance pay generally amounts to an additional week of notice for each year (or partial year) of service up to a maximum of 26 weeks. For example, an employee who has worked for 12½ years may also be entitled to severance pay equal to 12.5 weeks of his/her regular wages. However, employers are only required to pay severance pay to employees who have been employed by them for five years or more (whether or not such employment was continuous) and where the employer either: (i) dismisses 50 or more employees within a 6 month period; or (ii) has a payroll of \$2.5 million or more. Employers should seek legal advice if they are unsure whether ESA severance pay obligations are applicable.

What many employers do not realize is that the termination pay and, if applicable, severance pay obligations are only the minimum requirements at law. In reality, the Courts of Ontario (and other jurisdictions in Canada) have long since determined that employers must, in the absence of just cause, provide dismissed employees with “reasonable notice” of termination, or pay in lieu thereof. This extra period of notice is often referred to as common law notice and encompasses both termination pay and severance pay (i.e. employers are not required to give common law notice in addition to termination pay and severance pay).

What amounts to reasonable notice will depend on the particular facts of each case and should be assessed with a legal advisor on a case by case basis. That being said, it is useful to consider that the purpose of the notice period is to provide the employee with compensation for the period of time it should reasonably take such employee to find alternate employment. While there are certainly variations from case to case (and sometimes significant ones) a commonly cited rule of thumb in Ontario is that wrongfully dismissed employees are entitled to notice, or pay in lieu thereof, of approximately one month for every year of service. While I would not describe this as a hard and fast rule, it is certainly a good starting point. The precise notice period can be increased or decreased based on the following factors:

- (a) Age - Older employees may be entitled to a longer period of notice to reflect the fact that it may be more difficult for them to find alternate employment;
- (b) Position - It used to be common for more senior level employees to receive longer periods of notice to reflect the fact that such positions were harder to find, although this theory is no longer automatically applied;

- (c) Inducement - Where an employee was actively persuaded to leave long-term secure employment, the new employer may be responsible for providing a longer than usual period of notice, especially where the employee is dismissed within the first couple of years after having been hired; and
- (d) Market - Given the objective of having the notice period provide the employee with a reasonable opportunity to find alternate employment, the courts will consider the specific skills of the employee and the general availability of suitable positions in the marketplace. As a result, employees with very specialized skills may be entitled to longer notice periods.

While employers may feel that a certain employee is not “deserving” of a lengthy period of notice, employers must recognize that mediocre performance or even isolated incidents of misconduct, which generally do not amount to just cause, will not cause a court to decrease the notice period to which such employee would otherwise be entitled.

In the following articles in this series we will deal with the concept of just cause for dismissal and the steps an employer can take to improve their position in facing a wrongful dismissal claim.

*Editors: David Bleiwas                      416-368-5956*  
*Stephen Lamont                     416-368-6763*

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