

WRONGFUL DISMISSAL – AN EMPLOYER’S GUIDE

PART II

This is Part II of our article which examines, in general terms, the legal issues relating to wrongful dismissal claims from an employer’s perspective. In this second part, we examine the concept of “just cause” and the implications of the “common law” standards of notice on termination.

Just Cause

As set out in Part I of this article, employers are not required to provide any notice of termination where just cause for the dismissal exists. However, while just cause can be based on various types of misconduct, ranging from chronic absenteeism, to insubordination or disobedience, to theft, many allegations of just cause are not based on specific incidents, but rather on the employee’s general performance over a period of time.

In such cases, employers should keep in mind that they have the burden of demonstrating the existence of just cause should the case proceeds to court and it is a burden which is not easily discharged.

Except in cases of gross incompetence, the employer will be expected to have employed a system of progressive discipline before dismissing an employee for poor performance. While in some circumstances progressive discipline could include suspensions, or even demotions, when dealing with an employee who is not performing in the manner expected, or where there have been isolated incidents of misconduct, the discipline process will generally involve a combination of performance reviews and verbal and/or written warnings and must permit the employee a realistic opportunity to improve.

In order to establish just cause in these circumstances, the employer should be prepared to prove:

- (a) that it had established reasonable and objective standards of performance;
- (b) that the employee failed to meet those standards;
- (c) that the employee had been informed that he/she was failing to meet the standards;
- (d) that the employee had been warned that his/her job was in jeopardy if he/she failed to meet the standards within a reasonable period of time.

Dismissal Without Just Cause – Improving the Employer’s Position

If the employer cannot establish just cause, the employer should be prepared to negotiate a “severance” package with the employee. At minimum, the severance package must include payment of termination pay and, if applicable, severance pay under the ESA.

However, as set out above, these statutory minimums may not be accepted by employees and will likely not be if they seek legal advice. More importantly, the courts have found that the statutory minimums do not amount to “reasonable notice”, with the result that employers will generally be found liable to compensate employees in accordance with the principles of common law notice discussed above.

However, employers can improve their position by entering into written employment contracts prior to the commencement of employment (agreements signed after employment may not be enforceable unless the employee receives something new of benefit in return). A written employment contract may set out an agreed notice period, which may be expressed as a fixed period of time, or a specified number of weeks for each year of service and may or may not include an agreed upon upper limit.

Employers should keep in mind that written agreements which provide for less than the ESA requirements are void and those which simply provide for the payment of ESA amounts may not succeed in relieving the employer of the obligation to provide reasonable notice if the matter proceeds to court.

However, if the court is persuaded that a fair and reasonable notice period was freely negotiated by the parties, and is consistent with the expectations of the parties at the time the agreement was signed, it will generally give effect to such agreement, even if it calls for somewhat less than what the employee may have been entitled to at common law. Accordingly, an agreement to provide a fixed period of notice, or to provide a specified number of weeks for every year of service, may be enforceable as long as the result produced is reasonable.

In determining whether an agreement is fair, the court will often consider the inequality of bargaining power between the parties. If the notice period was dictated to the employee and not subject to negotiation, it is less likely to be enforceable (especially if it results in a fairly short period of notice relative to the employee’s length of service) than if the provision was freely negotiated.

While the inherent inequality of bargaining power often leads to agreements being interpreted in a manner more favourable to the employee, employers can improve their position by ensuring that their employees have a genuine opportunity to obtain legal advice before signing an employment agreement.

While it is advisable to include a provision in the agreement in which the employee acknowledges having had an opportunity to obtain legal advice, such provisions may be meaningless unless the employee is actually afforded such opportunity. Accordingly, the practice of presenting the employment agreement to the employee and having it signed the same day he/she commences employment is generally discouraged.

Some employers may even wish to consider reimbursing employees for some portion of their legal fees to encourage employees to actually obtain legal advice. While the added up front cost may seem unnecessary to some employers, the benefits of having an enforceable employment agreement down the road can be significant, and not just in terms of having established an enforceable notice period.

No Written Agreement

While written agreements may be useful for future employees, it is likely that many current employees will either have no written agreement, or one which does not adequately deal with notice of termination.

As a result, employers will often find themselves negotiating a “common law severance package” upon termination. As discussed above, employees (and their lawyers) will often claim entitlement to one month’s notice per year of service, or more, as a starting point. While the employee may ultimately be entitled to a notice period in that range, the employer can employ strategies to minimize their exposure.

Even before the employee is advised of his/her dismissal, employers should consider that they are permitted to offer actual working notice instead of termination pay in lieu of notice under the ESA. Similarly, the employer could offer an extended period of working notice in full satisfaction, or at least in partial satisfaction, of the employer’s common law obligations.

Understandably, the working notice option may not be attractive to many employers who may not want employees who have already been given notice of their dismissal to remain involved in the business and have ongoing access to clients and confidential information. However, depending on the nature of the business and the role of the employee, it is an option which some employers may wish to consider when contemplating a termination of employment.

In cases where working notice is not an option, employees will generally want to receive their entire “package” as a lump sum payment upon dismissal. While the ESA requires that statutory termination pay and, for the most part, severance pay be paid as a lump sum, employers may be able to negotiate other arrangements, at least in relation to the common law portion of the severance package.

Employers are sometimes understandably concerned that the employee will realize a windfall by the payment of a lump sum, since the employee may secure alternate employment quickly. Employers can protect against this by offering something close to what the employee wants in terms of the length of notice period, but offering to pay it as salary continuation instead of a lump sum.

For smaller employers, spreading out the payment over time may be preferable from a cash flow perspective. More importantly, this type of offer can also provide that the salary continuation payments either: (i) terminate when the employee secures new employment; or (ii) are subject to some pre-determined claw-back or buyout at that time. When the offer is presented in this manner, employees may elect to take a smaller lump sum payment, especially if they are confident in their ability to find alternate employment, reducing the employer’s overall cost.

For example, if an employer is faced with a six year employee demanding a payment equal to eight months notice (which is not unusual) the employer could offer to settle by continuing to pay the employee’s salary for a period of six months, with a provision that upon the employee commencing new employment, the payments will cease and the employer will pay the employee a lump sum equal to 50% of the balance of the package.

Accordingly, if the employee finds new work after three months, the employer's obligation is limited to 4½ months remuneration. This type of offer motivates employees to find new work, since they will receive extra compensation once they find a new job, while still limiting the employer's obligations.

In some cases, the employer may wish to present the employee with the option of selecting either a lump sum payment equivalent to a shorter notice period, or a longer notice period with on-going payments subject to a claw-back. In either case, the employer's exposure is likely to be reduced.

The added benefit of proceeding in this manner is that it makes the employee's decision to commence a wrongful dismissal law suit more difficult, since the employee will have to incur significant legal costs to do so, with no guarantee that he/she will achieve a significantly more favourable result in court. Further, in refusing the offer the employee runs the risk that they may succeed in mitigating their loss by finding alternate employment shortly after their termination and may thereafter actually be entitled to less than what was offered initially.

If a settlement cannot be reached quickly, or if a law suit is commenced, mitigation can often be one of the employer's best defences. Accordingly, inquiries should be made as to the employee's employment status (or for evidence of the employee's efforts to find alternate employment) if negotiating a settlement some time after the dismissal.

Conclusion

The process of planning for and minimizing the cost of employee dismissals should start even before the employee is hired, with a proper written employment agreement. The process continues throughout the course of the employment with regular evaluations and appropriate documentation of performance issues or other problems. Finally, if it becomes necessary to dismiss an employee, each situation should be carefully assessed and an appropriate strategy developed to minimize the employer's obligations and to avoid unnecessary litigation.

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