

# Frequently Asked Questions:

## *Employee Terminations: Factors to Consider*

Issues concerning employment and employees need to be approached with sensitivity, diligence and caution. One of the most emotional, and therefore dangerous, areas of employment law is terminations. This article deals briefly with some of the issues that employers should consider in deciding to dismiss an employee. The information only relates to Ontario law and the termination of non-union employees. If you would like more information about this or any other area of employment law, or if you would like to discuss your particular situation, please [contact us](#).

### **Explain the types of dismissal**

Whether or not an employee is entitled to receive notice of dismissal and compensation depends on how and why their employment is being terminated.

#### **Without cause**

Most dismissals are done without cause. This means that the dismissal is not because of any specific charge or problem in the employee's performance or behaviour. Most often this type of dismissal is simply a business decision to discontinue an employment contract.

An employee who is dismissed without cause is entitled to receive reasonable notice of dismissal or pay in lieu of notice.

#### **Just cause**

To be dismissed for cause, an employee must be guilty of significant misconduct that is not condoned by the employer. Where the dismissal is justified due to the employee's actions, there is no entitlement to compensation.

However, "just cause" for termination of employment must be clearly established and documented. This can be difficult because:

- what an employer may regard as just cause, may not be viewed the same way by the court; and
- an employer's failure to promptly discipline or reprimand an employee for his misconduct, may be viewed as condoning the behaviour.

Employers are well advised to seek legal counsel before dismissing an employee when they believe there is cause for termination.

#### **Constructive dismissal**

An employer cannot unilaterally change a material term of a person's employment unless:

- the employee agrees to the change; or
- the change is specifically permitted by a written employment contract.

If an employee does not accept a material change, then the law will treat it as a "constructive dismissal" of the employee.

The courts are quite liberal in favour of employees in interpreting what constitutes a material or fundamental change. For example, a constructive dismissal usually occurs when an employer significantly reduces an

### **Our expertise**

Mergers & Acquisitions  
Business Law Advice  
Commercial Real Estate & Development  
Investing in Canada  
Financing  
Business Succession Planning  
Estate Planning  
Employment Law

---

*This publication provides an outline of issues for business professionals to consider. The content should not be taken as legal advice. It is not exhaustive and is subject to change. Please consult with an HHS lawyer for information or advice specific to your situation.*

© HHS 2012

employee's salary or changes the employee's work location, hours, authority or position in a negative way.

Constructive dismissal may also occur if an employer harasses or abuses an employee, condones such conduct by other employees, or gives an employee an unreasonable ultimatum. It can occur because of a single change or over time, if the result of a series of minor change is a fundamental alteration of the terms of employment.

Constructively dismissed employees are entitled to compensation as if they were dismissed without cause.

An employee who accepts a fundamental change to their employment without complaint may lose the right to claim constructive dismissal. However, employers should be wary of relying on this. If the employee protests, but continues to work, or continues to try to re-negotiate, it is unlikely that the court will consider that the change was condoned.

### **Early dismissal**

If an employee is hired for a fixed period of time and then dismissed before the end of the term, the employer must pay for the balance of the term unless an employment contract provides otherwise.

An employee who agrees to a fixed employment period is not entitled to compensation which extends beyond that term. Accordingly, if the termination occurs at the end of the fixed term, the employee is not entitled to any notice or pay in lieu of notice.

Employers should remember that any extension of a fixed contract must be done before the contract expires. If an employee continues in employment after the fixed term has expired, without a new or extended contract, they will become an employee for an indefinite term of employment.

## **What compensation are employees entitled to on dismissal?**

The compensation an employee is entitled to receive on dismissal is established by the written employment contract between that person and the employer, and if there is no contract, then by common law and legislation.

### **Reasonable notice**

Ontario Common Law requires an employer to give an employee reasonable notice of termination or a payment for the lack of reasonable notice unless the employee is dismissed for just cause.

The purpose of a notice period is to give an employee a reasonable period of time to find another comparable job with comparable pay in the same general area. The amount of notice depends on factors which may include:

- the character or nature of the employment;
- the length of the employee's service;
- the employee's age;
- the availability of similar employment, having regard to the experience, training, qualifications and the responsibilities of the employee;
- the circumstances surrounding the hiring of the employee; and
- any written employment contract.

Employees are typically given a payment instead of notice since dismissal is likely to affect the employee's productivity, and may have an adverse effect on the workplace in general.

At Common Law, the compensation payable for lack of reasonable notice is based on the employee's total compensation. If the employee's compensation includes commission, bonus and benefits, these will

usually be factors in determining the payment in lieu of notice. All of these factors can be varied by a written employment contract.

The courts have generally interpreted reasonable notice for employees to be in the range of 3 to 4 weeks per year of service. This can increase substantially for senior management and older employees in recognition that increased time is required for such employees to find comparable employment. Presently, maximum reasonable notice is in the range of 20 to 24 months.

Reasonable notice required by Common law usually substantially exceeds the legislated minimum standards.

## **What are the minimum standards regarding termination?**

If an employee is terminated without cause, the employer must meet minimum standards set out in the *Employment Standards Act* (Ontario).

The Act establishes minimum standards for notice of termination, or pay in lieu of notice, which fall into two categories: termination and severance pay.

Termination pay is based on the length of an employee's service:

- employees having more than three months but less than one year of service are entitled to one week notice;
- employees with more than one year but less than three years of service are entitled to two weeks.

Thereafter one additional week of notice is added per year of service up to a maximum of eight weeks of termination pay.

Severance pay is in addition to termination pay. It applies where an employee with five years of service is dismissed, and:

- the employer has a payroll of \$2.5 million dollars or more; or
- severance is in connection with the permanent discontinuance of all or part of the employer's business at an establishment and 50 or more employees are terminated within six months.

If severance pay applies, each dismissed employee is entitled to notice or pay in lieu of notice up to a maximum of 26 weeks. The Act provides a formula for calculating severance pay. For more information, please speak with us.

The Act also requires that in addition to notice of termination, employees must be paid accrued and unpaid vacation pay. Vacation pay is calculated based on 4% of wages unless the employer provides more than two weeks annual vacation.

### **Payment of wages on termination**

Under the Act, all wages owing to an employee to the date of termination, including accrued and unpaid vacation pay, wages in lieu of notice and severance pay, must be paid by the later of:

- the next regular pay date; or
- seven days from the date of termination.

Wages cannot be withheld for any reason.

## **What wages and benefits are available to an employee during the notice period?**

Under the Act, if an employee works during their notice period the employer may not alter the employee's rate of wages, benefits, or any other term or condition of employment.

**Wages in lieu of notice**

Under the Act, if an employee is paid instead of working during the notice period, the employee must receive their usual wages for the notice period. The employee's benefits must also be maintained during the notice period.

**Practical suggestions**

- **BE WELL PREPARED.** Carefully review the facts of the situation and any contracts. Make sure that all required documentation is prepared in advance of your meeting with the employee.
- **BE CLEAR AND SUCCINCT.** Make certain the employee understands that they are dismissed. Give only general reasons and avoid being drawn into a debate.
- **TIME IT RIGHT.** Meet with the employee in a private room at the office toward the end of the day. Try to avoid meeting on Friday afternoons, dates of significance to the employee (e.g. birthday, anniversary, etc.), or immediately before a public holiday.
- **NEVER DO IT ALONE.** Always have another manager present at the meeting.
- **CONFIRM IT IN WRITING.** Give the employee a letter confirming the termination and summarizing what the employer is offering. Do not ask the employee to accept an offer or sign anything at the meeting. Allow the employee time to consider it. Suggest that the employee obtain legal advice regarding your offer.
- **GET A RELEASE.** If the employer is offering more than what is required by the Act, make the offer conditional on receiving a full and final release of all the employee's claims against the employer.

Dismissing an employee should be done carefully and calmly. Terminations should be planned. The right documentation must be prepared and the employer must ensure that all obligations under the Act are observed. A prudent employer will consult with their legal advisor before dismissing an employee.

---

**About Houser, Henry & Syron LLP**

For over 75 years, Houser, Henry & Syron has helped entrepreneurs and private companies of all sizes grow and prosper. We provide a range of business law services - from assisting with day-to-day legal requirements to providing strategic counsel on highly complex transactions. We are uniquely positioned to provide high-quality legal advice, tailored to the specific needs of our clients, at a reasonable price. [Read what our clients have to say about working with our firm.](#)