

Cause for thought

Employers should know if and how much notice is required when firing employees

| BY BETTY PSARRIS |

FIRING AN EMPLOYEE is rarely a simple task and carrying it out incorrectly will expose an employer to the risk of a wrongful dismissal lawsuit. Therefore, understanding the concepts of “just cause” and “reasonable notice” is an important step toward protecting employer interests.

Termination without cause

An employer can end an employment relationship without having to legally justify its decision, provided it doesn't breach a contract or statute, such as health and safety or human rights legislation. However, this type of termination comes with a cost.

In every employment contract, whether verbal or written, there is an implied term that the employer will provide “reasonable notice of termination” either by way of working notice or pay equal to the amount the employee would have earned during the reasonable notice period — known as “pay in lieu.” The “wrongful” in “wrongful dismissal” is therefore not the act of dismissal itself, but rather the employer's failure to provide “reasonable notice.”

Just cause termination

Sometimes employment may be terminated for just cause without any notice to the employee. In such cases, the terminated employee has no claim to reasonable notice or pay in lieu.

It is impossible to outline all the activities that could constitute just cause. However, the following types of conduct generally constitute just cause for dismissal:

Serious misconduct. Theft, dis-

honesty and assault are generally seen by the courts as serious misconduct warranting dismissal. By contrast, absenteeism, tardiness and poor performance are usually not viewed as serious unless the employee has been subject to a consistent form of progressive discipline.

Habitual neglect of duty or incompetence. For such behaviour to constitute just cause, an employee must clearly understand the requirements of his job, the requirements have to be reasonable and the employee must have been afforded the opportunity to improve.

Conduct incompatible with the employee's duties or prejudicial to the employer's business. If an employee engages in an activity during working hours that interferes with his employment obligations or is competitive with the employer's business, the employer will generally have just cause to terminate the employment relationship.

Wilful disobedience. In certain situations, just cause will be found when a clear instruction is given to an employee by his manager and the employee wilfully disobeys or challenges the instruction.

The onus is on the employer to prove just cause beyond a balance of probabilities. Just cause must be based on real incompetence or misconduct, rather than simple dissatisfaction with performance or concern for potential misconduct. If an employer is unable to demonstrate just cause, an employee will be entitled to damages for wrongful dismissal.

What is reasonable notice?

Where there is not just cause to

terminate, employers must determine the period of reasonable notice.

Ontario's Employment Standards Act, 2000 (ESA), like employment standards legislation in other jurisdictions, sets out the minimum period of reasonable notice based upon the length of employment service — usually one week for every year of service up to a maximum of eight weeks. This statutory minimum cannot be contracted out of by the employee or employer. An employer relying on the minimum standards should ensure this is expressly stated in the written employment contract.

Without a valid and enforceable termination clause in a written contract, an employee is usually entitled to a reasonable notice period beyond the ESA minimum. This is known as “common law notice” — notice periods awarded by the courts. Common law notice is assessed by considering factors which, taken together, replicate the amount of time the employee would reasonably require to find similar employment, including: length of employment; training and experience required for the position; responsibility attached to the position; availability of equivalent alternative employment; relevant education, training and experience; and the employee's age.

An employer can limit its exposure to common law notice by ensuring the employee signs a written contract clearly outlining the amount of reasonable notice he will receive if he is terminated without cause. A termination clause usually provides for a notice period less than what an employee would receive under common law notice and at least equal to the statutory minimum of reasonable notice.

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