MANAGEMENT COUNSEL
Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers

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When All Else Fails:

What every employer should know before dismissing an employee

As every human resources professional knows, despite the best efforts of management, some underperforming employees simply cannot or will not improve. In those cases, ending the employment relationship may be an employer's only option. While each employment relationship should be considered on its own merits, and generalizations avoided, at the very least employers should consider the following issues and best practice tips…

Reason for Dismissal: Anything Goes (Almost)

Contrary to what many employers believe, in the absence of an employment agreement limiting the circumstances in which employment may be terminated, an employer may terminate employment at any time and for any reason, so long as the decision does not breach the employer's human rights obligations, or constitute a reprisal under health and safety or other applicable legislation. For example, it is not illegal to terminate employment because the employer "does not like" the employee. However, it is illegal to terminate employment if the *reason* (in whole or in part) is because, for example, he or she is of a certain colour, race, sex, sexual orientation, *etc*.

Form of Dismissal: With or Without Notice?

Termination is either *with* or *without* notice. A dismissal without notice is generally permitted if the employer has "just cause", meaning the employee's conduct is so bad it has effectively destroyed the employment relationship. Absent just cause, an employee is entitled to notice of termination, which can take the form of working notice, pay *in lieu* of notice, or a combination of both. How much notice is required is addressed later in this article under the heading *The (Potential) Costs of Terminating Without Cause.*

Just Cause: A High Threshold

It is often difficult for an employer to know whether an employee's conduct or poor performance is sufficient to merit dismissal for just cause. Get it right and an unsatisfactory employee can be removed from the workplace without financial cost to the employer. Get it wrong and the risk to an employer could include liability for wrongful dismissal damages, not to mention negative publicity inside and outside the workplace.

So, before making a decision to terminate employment for just cause, the employer should consider – objectively – the severity of

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the misconduct, including whether the employee's conduct has irreparably harmed the trust which underpins the employment relationship. Serious misconduct such as theft, workplace violence or insubordination are often (but not always) sufficient to meet the just cause threshold.

Just cause is more difficult to establish in the case of a chronic underperformer. Thorough documentation and time are required to demonstrate the employee was aware of the performance requirements and that his or her job was in jeopardy, and given sufficient opportunity and assistance to improve, but failed to do so. For these reasons some employers decide it is less onerous and expensive to give the employee notice, or pay *in lieu* of notice, than to allege cause and risk the time and expense of responding to a wrongful dismissal lawsuit.

The (Potential) Costs of Terminating *Without* Cause

If there is a valid employment contract which sets out the amount of notice to be provided upon termination, that amount will be sufficient so long as the notice period meets or exceeds the minimum statutory notice requirements under the applicable employment standards legislation. In Ontario, for example, the minimum statutory notice period is limited to between 1-8 weeks depending on the length of employment.[1]

A well-drafted employment contract can reduce the risk an employer will be exposed to liability for a long common law notice period - in many cases limiting termination entitlement to the minimum amount established by employment standards legislation. A contract also reduces uncertainty for an employer, as the amount of reasonable notice is predetermined.

If the employment relationship is not governed by a valid employment contract, the employee is entitled to "reasonable notice" determined in accordance with the common law; judge-made law developed by courts. In deciding how much notice is reasonable a judge considers a number of factors such as the employee's age, length of service, position, *etc.* The object of the exercise is to attempt to determine how long it will reasonably take the employee to find suitable alternate employment. In some cases, reasonable notice can be 24 months (or higher), amounting to significant financial liability for an employer.

A Written Employment Contract: An Employer's Best Insurance Policy

A well-drafted employment contract can reduce the risk an employer will be exposed to liability for a long common law notice period. In many cases, notice can be limited to the minimum amount required by employment standards legislation. A contract also reduces uncertainty for an employer, as the amount of notice is predetermined.

The best time for an employer to introduce an employment contract is at the time of hire, prior to the employee commencing work. In that scenario the offer of employment is the "consideration" (*i.e.*, compensation) in exchange for which the employee agrees to be bound by the terms of the contract.

However, all is not lost if an employment contract is not entered into prior to an employee starting work. There are opportunities during the employment relationship to introduce an employment contract in exchange for additional consideration (*e.g.*, salary increase, promotion, improved benefit plan, *etc.*). Alternatively, an employer may offer an existing employee a "signing bonus" as consideration for signing an employment contract. The amount of consideration and the preferred approach depends on a variety of factors - so it is best to consult with counsel.

Either way, it is important to appreciate that, in the event of a dispute, most employment contracts will be interpreted strictly against the employer and in favour of the employee. Accordingly, to obtain the maximum protection possible for an employer, any employment contract should be drafted or reviewed by experienced employment counsel. Employment contracts should also be reviewed periodically to ensure the language continues to be enforceable as the law will change over time.

The Gold Standard: Obtaining a Release

Employment-related disputes can be expensive. A properly drafted release gives an employer comfort that, once the matter is concluded, no other claims can successfully be made by the employee arising out of the employment relationship, including for example, under human rights or other employment-related legislation.

Final Thoughts...

When dismissing an underperforming employee, an ounce of prevention really is worth a pound of cure. There are many factors to consider – legal, financial and strategic. When in doubt, prior consultation with expert employment law counsel is very often the best medicine.

To learn more and for assistance preparing employment contracts tailored to your workplace, contact a member of Sherrard Kuzz LLP.

[1] An additional amount for statutory severance is also required in some circumstances.

DID YOU KNOW?

Every private sector organization with 50 or more employees in Ontario must comply with the AODA (Accessibility for Ontarians With Disabilities Act) Employment Standards by January 1, 2016.

For assistance contact a member of Sherrard Kuzz LLP.

Supreme Court Clarifies Test for Constructive Dismissal

In a recent decision, *Potter v. New Brunswick (Legal Aid Services)*, the Supreme Court of Canada clarified the test for constructive dismissal, offering important lessons for employers about the significance of open communication with employees, and the propriety of a workplace suspension.

What Happened?

David Potter ("Potter") was the Executive Director of the Legal Aid Services Commission of New Brunswick (the "Commission"). Four years into his seven-year appointment, Potter commenced a leave for medical reasons. Prior to his leave, the employment relationship had deteriorated resulting in negotiations for a buyout of the balance of his contract. Unbeknownst to Potter, the Commission had also sent a letter to the Minister of Justice recommending Potter be dismissed for cause.

As he was about to return to work Potter was told not to do so "until further direction", although he continued to be paid his regular wages. Eight weeks later, Potter commenced an action for constructive dismissal.

Trial Decision

The New Brunswick Court of Queen's Bench held against Potter, concluding he had not been constructively dismissed but rather resigned by virtue of having launched the constructive dismissal lawsuit. According to the trial judge, the Commission had not done anything that could have led an objective observer to conclude Potter had been removed from his position permanently, so as to constitute a constructive dismissal.

Critical to this finding was the trial judge's conclusion the Commission had the discretion to supervise Potter in his role as Executive Director, including the power to suspend in order to allow the Commission to continue buyout negotiations. On the other hand, by taking the "dramatic move" to sue for constructive dismissal, Potter essentially destroyed any chance of a productive working relationship between the parties, amounting to a resignation.

Court of Appeal

The New Brunswick Court of Appeal found that Potter had not been constructively dismissed as there had not been a "fundamental or substantial change to [his] contract of employment". While his suspension was indefinite, there were no other *indicia* of constructive dismissal: no one was appointed to replace Potter; he was not asked to return his cellphone, laptop or other belongings; and he continued to be paid his regular salary.

Supreme Court of Canada

Overturning the decisions of the lower courts, the majority of the Supreme Court laid out a two-part test for constructive dismissal:

Part 1: An express or implied term of the employment contract has been breached.

Part 2: The breach is sufficiently serious to constitute constructive dismissal.

In the case of an administrative suspension, the burden of proof rests with the employer to demonstrate the authority to suspend is an implied term of the employment contract and reasonable in the circumstances. If not, the employment contract has been breached.

Once a breach has taken place, the question becomes: At the time of the breach, would a reasonable person have believed an essential term of the employment contract had been substantially changed? This is a highly fact specific analysis involving an assessment of whether the change is within the reasonable scope of the employee's job. To this end, a substantial change can take the form of a single unilateral act by an employer, or a series of acts which, taken together, demonstrates the employer no longer intends to be bound by the contract.

Because the Commission had not been forthright with Potter about the reasons for his suspension this led him to reasonably conclude he had been constructively dismissed.

Turning to Potter, the Supreme Court found: (i) His suspension breached the employment contract because the Commission lacked authority under the *Legal Aid Act* to suspend him with pay (Part 1 of the test); and (ii) Because the Commission had not been forthright with Potter about the reasons for his suspension this led him to *reasonably conclude* he had been constructively dismissed (Part 2 of the test).

Lessons for Employers

The Supreme Court's decision offers the following important lessons for employers:

- Absent express or implied authority to do so, an employer may not have unfettered discretion to withhold work from an employee even if the employee continues to be paid.
- Absent reasonable justification, a suspension, particularly one of indefinite duration, could amount to a constructive dismissal of employment.
- When drafting an employment agreement, consider including a provision which expressly permits an employee to be suspended for an administrative reason.
- An employer should be forthright with an employee about the reasons for a suspension.
- Prior to changing any term or condition of employment, an employer should carefully consider whether the change could be viewed as "substantial", so as to trigger constructive dismissal liability.
- The recently stated "duty of honest performance" (see our January 2015 Newsblast: *"New legal duty of honest performance: What it could mean for employers"*) has now been applied in the employment context, reinforcing the importance of maintaining lines of communication with employees and providing honest reasons for decisions made.

To learn more and for assistance, contact a member of Sherrard Kuzz LLP.

MANAGEMENT COUNSEL

HReview Seminar Series

Please join us at our next HReview Breakfast Seminar:

Drugs and Alcohol in the Workplace

The fact that some employees misuse alcohol or drugs is not news and, generally speaking, what happens outside of the workplace is of no concern to an employer. However, all bets are off when substance abuse spills into the workplace. Not only can impairment on the job cause a serious workplace accident but it can negatively impact productivity, damage workplace morale, and hurt the corporate brand.

Join us as we discuss the following topics and more:

1) **Understanding Drug and Alcohol Testing**
   - For what are we testing?
   - Is employee consent required?
   - Types of testing: pre-employment; pre-access; random; post-incident; return to work
   - New developments in the law

2) **Responding to a Workplace Incident Involving Drugs or Alcohol**
   - Post-incident impairment testing
   - Duty to accommodate

3) **Discipline for Drug or Alcohol-Related Misconduct**
   - Last Chance Agreement – when and how?

4) **Drug and Alcohol Policies**

DATE: **Thursday October 1, 2015; 7:30 – 9:30 a.m.** (breakfast at 7:30 a.m.; program at 8:00 a.m.)

VENUE: **Hilton Garden Inn Toronto Vaughan**, 3201 Hwy 7 West, Vaughan ON

COST: Complimentary

RSVP: **By Friday September 18, 2015 at www.sherrardkuzz.com/seminars.php**

Law Society of Upper Canada CPD Hours: This seminar may be applied toward general CPD hours.

HRPA CHRP designated members should inquire at www.hrpa.ca for eligibility guidelines regarding this *HReview Seminar*.

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Jean Cumming Lexpert® Editor-in-Chief

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