



COMMENTARY

What you're owed if you get laid off

A tough economy usually translates into employee layoffs and dismissals as employers tighten their belts to survive the leaner times. Employees have to face this harsh reality, but they should also know they have the right to receive compensation.

While an employer has every right to terminate an employee's job absent just cause, the employer must provide the employee not only minimum notice under employment standards legislation, but also reasonable notice or severance at common law. This could translate into a significant amount of money depending on how long an employee worked for the company.

Most employment-standards legislation in Canada provides that, where no just cause is alleged, the employer must provide the following compensation as determined by an employee's length of service: one week's wages after three consecutive months of employment; two weeks' wages after 12 consecutive months of employment; and, after three straight years of employment, an amount equal to three weeks' wages, plus one additional week's wages for each year of employment to a maximum of eight weeks' notice.

But an employer's obligation doesn't stop there. In addition to minimum notice under employment standards legislation, an employer — absent a written employment agreement or policy manual setting out termination — will be required to provide the employee with what is referred to as common law notice.

In most common law provinces, like British Columbia, reasonable notice is based on four key factors: length of service; the employee's age; the type of position held, including salary, and whether supervisory responsibilities are present;

and the availability of similar employment in the job market at the time of termination.

Generally, the courts award longer notice periods to long-term employees. Likewise, a court will usually award higher notice periods to older employees.

In addition, the court will likely award lengthier notice to an employee at the management level who supervises a number of employees over an employee who does not have supervisory responsibilities — the theory being that it is more difficult for a general manager to obtain a similar position than an employee who occupies a clerical position.

However, even a wage-earning labourer who has a specialized trade would be entitled to longer notice, especially if a particular industry is going through an economic downturn. In these harsh economic times, especially in the mining industry, it is likely that more employees in that sector are chasing fewer jobs and under these circumstances, the length of notice will be longer.

Sometimes non-unionized labourers can band together and start a class action or representative action to get compensation from an employer.

This is what a group of former Echo Bay Mines employees did. In 1998, due to low gold prices, the company carried out a mass layoff of more than 250 non-unionized miners, including heavy-duty equipment operators, long-hole drillers, production blasters and facemen.

The miners began a representative action in the Northwest Territories Supreme Court, claiming they had not received sufficient compensation in the form of reasonable notice. Their



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employment was terminated at a time when the mining industry in Northern and Western Canada was in a severe economic downturn. These miners were ultimately successful in obtaining a reasonable settlement of their claims and their settlement packages were approved by the court.

So, the common law provides that absent a written employment agreement, there is an implied term of a contract of employment for an indefinite duration, and that the contract can only be terminated by providing the employee with reasonable notice.

However, that implied term can be varied by express provisions in an employment contract. It must be clear that the amount of notice provided for in the written contract cannot be less than minimum notice under the employment standards legislation referred to above.

In one decision, the B.C. court held that a termination provision in the employment agreement was unenforceable because it permitted the employer to dismiss the employee any time with 30 days' notice. The court held that even though the employee was *only* entitled to less than 30 days notice at the time of dismissal, the 30-day notice provision would have been contrary to the Employment Standards Act *if* the employee had worked for five years or longer. The court held that it was neither practical nor reasonable "to leave the individual employee in the position of having to keep an eye on the relationship between the statutory minimum and the contractual term."

The common law does not recognize a severance package *per se*. The common law provides that an employer is



required to provide reasonable working notice of dismissal. The whole purpose of working notice of dismissal is to permit the employee a reasonable amount of time to look for alternative work while being paid his or her regular compensation. However, once the employer makes the determination that the employee must go, the employer usually does not want the employee working through his or her notice. That's because the disgruntled employee may affect morale, and there is a risk that he or she could harm the business interests of the employer.

In the event the employer chooses to provide the employee with a severance package and the employee has been wrongfully dismissed, the issue becomes whether the severance package is an adequate one. An employer has two options: it can provide the employee with a lump-sum payment, or salary and benefit continuance.

A lump-sum payment provides certainty to both the employee and the employer. Usually, it is offered in exchange for the employee signing a release that discharges the employer from any and all claims related to employment. The employee receives the money up front and the employer has no further obligations to the employee.

An example of how this might work is where an employer determines, after receiving legal advice, that an employee, based on the four criteria described earlier, is entitled to six months' notice. An employer may offer an employee one of two choices: salary continuance for six

months, or a lump-sum payment of four months.

The latter option benefits both the employer and the employee. The employer's liability is only for four months and the employee can obtain four months' severance and obtain another job without reporting mitigation income. However, a lump-sum payment does not force the employee to go out and look for alternative work. If the employee finds a job within a month, then the employee obtains a substantial windfall.

Another way to structure it is that salary and benefits continue during the six months' notice, but in the event that the employee obtains a job, all salary and benefits cease and the employee receives a 50% payment of the remaining salary. This provides an employee an incentive to look for work.

The advantage of salary and benefit continuance is that it spreads the employer's costs out over time and gives the employer an opportunity to take advantage of any mitigation income the employee might earn during the notice period.

However, once again, the courts have held that salary and benefits will only succeed if the length of the salary and benefits continuance is equivalent to the common law reasonable notice and if the employer continues salary and all benefits. Further, the courts have held that in order for this approach to work, the notice period chosen by the employer must be at the high end of the common law range.

If the employer chooses to provide the employee with lump-sum severance, then the employer is required to make statutory deductions to account for income tax, Canada Pension Plan and Employment Insurance, and must remit such amounts to the CRA.

These payment amounts and withholding percentages are as follows: less than \$5,000 payment, 10% withholding; \$5,000 to \$15,000 payment, 20%; and over \$15,000 payment, 20%.

Both employers and employees should be aware of employees' rights. Absent an employment contract, an employer must act very carefully when determining whether or not to dismiss an employee and it is advisable to consult both a lawyer and a human resources professional or consultant before a decision is made.

If an employer does provide the employee with a severance package, it's always worth it to have the package reviewed by a lawyer to make sure it's fair and reasonable.

Losing your job is a bitter pill to swallow but knowing you have been treated fairly makes it easier to take.

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