Employment Standards Act in British Columbia: Terminations

by

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1. TERMINATIONS

a. Alleging Just Cause or Not?

An employer has every right to terminate an employee's employment with or without just cause.[1] If the employer has just cause to terminate an employee's employment, then no notice or severance is required. The employer should state fairly the reasons for the termination and provide a brief explanation. The employer should be honest and forthright in its comments. It is important to consider and research the issue carefully before a just cause allegation is made. The courts have held that employers expose themselves to lengthier notice periods, punitive damages, and special costs if the employer is unable to prove the just cause alleged.

b. Termination With Notice

In the event that the employer does not wish to allege just cause, or just cause does not exist, the employer has the unfettered right to dismiss an employee without just cause by providing both minimum notice under the *Employment Standards Act*[2] and common law notice. The British Columbia *Employment Standards Act* provides that where no just cause is alleged, the employer must provide the following compensation as determined by an employee's length of service:

after 3 consecutive months of employment	one week's wages
after 12 consecutive months of employment	two week's wages
after 3 consecutive years of employment	an amount equal to 3 week's wages, plus one additional week's wages for each year of employment to a maximum of 8 week's notice

Working Notice of termination outlined above can also be provided.

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[1] Just cause can cover a wide range of reasons for terminating an employee's employment. This may include theft, or chronic absenteeism. An employer also may be justified in terminating an employee for poor performance, provided the employer gives the employee a warning that unless their performance improves, over a reasonable period of time, the employment will be terminated. (This warning should be documented in writing.)

[2] *Employment Standards Act*, R.S.B.C 1996

In addition to minimum notice under *Employment Standards Act*, 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. The employer should review BC court decisions to determine an employee's reasonable notice entitlement. This research will likely produce a range of potential notice awards which could then be used to design a severance package. In British Columbia, reasonable notice is based on four key factors as follows:

- Length of service;
- The age of the employee
- 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 than to short term employees. Likewise, a court will usually award higher notice periods to older employees than to younger ones.

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 holds a position which has no supervisory functions. The theory being is that it is more difficult for a general manager to obtain a similar position than an employee who occupies a clerical position.

The last criterion is also important. If a particular industry is going through an economic downturn, then it is likely that more employees in that sector are chasing fewer jobs and there is a stronger likelihood that the length of notice will be longer.

i. Existence of an Employment Contract

The common law provides that absent a written employment agreement, there is an implied term of a contract of employment for an indefinite duration 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 employee's employment contract. It must be clear that the amount of notice provided for in the written employment contract cannot be less than minimum notice under the *Employment Standards Act* referred to above.

In one BC court decision, the 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 5 years or longer. The court held that it was neither practical or 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".[3]

The employer can also establish an employee policy manual which provides for notice of termination, again, providing that the notice provided for in the employment manual is not less than an employee's entitlement under the *Employment Standards Act*. However, it is absolutely critical that the employer bring this policy manual to the attention of all new employees who are hired. It should do so by requiring them to sign a memorandum confirming they have read the employee policy manual including the termination provisions.

The employer should enter into written contracts of employment with all of its employees. These can be written on the employer's letterhead and can be written in the form of a letter confirming the terms of the employment such as confirmation of the position, start date, salary, compensation and benefits, vacation time, and most importantly, what notice provisions apply in the event that the employer chooses to terminate the employee.

Most employment lawyers advise the employer to adopt the minimum notice under the *Employment Standards Act*, which can be done by the inclusion of a simple paragraph. This may be appropriate for junior level employees such as clerical staff or first line supervisors, however, there is case law which suggests that the more senior the person becomes within the employer's organization, the less enforceable will be the provisions limiting notice to *Employment Standards* notice. In other words, if an employee joins an employer as a first line supervisor at a salary of $30,0000 per year and then rises after ten years to the position of General Manager with a salary of $150,000 per year, it is unlikely the court will enforce the minimum notice provisions. Once the employee reaches the higher management positions, consideration should be given to amending the employment contract to provide for lengthier notice.

ii. Illness/Disability

If the employee is ill or is disabled at the time of dismissal or if there is a risk that he or she may become ill or disabled during the notice period, then the employer should consult with a lawyer before proceeding with a termination. The employer

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[3] *Shore v. Ladner Downs*, [1998] B.C.J. No. 1045, para. 16 (C.A.)

should seriously consider whether dismissing an employee while they are ill or disabled raises an issue of alleged discrimination because of a disability. An employee may have a complaint under the *Human Rights Act*. In some cases, an employer has a duty to accommodate the disability. Depending on the circumstances, the prudent thing would be to postpone the decision to dismiss the employee until the employee has recovered from their disability or illness. An employer typically puts the employee on an unpaid leave of absence or the employee may be entitled to long term disability, therefore, great care should be taken when dealing with an ill or disabled employee.

In the event that the employer chooses to terminate an employee, most group insurance plans discontinue benefits including long term disability coverage and life insurance upon the termination of the employee. An employer has a duty to inform an employee at the time of dismissal of any existing options to convert the group insurance coverage to a private or individual plan. Usually the employee has 30 days to convert to the private policies. An employer should advise the employee in writing of the option to convert to a private plan and the time period in which the employee must do so. Otherwise, the employer may run the risk of being saddled with a significant lump sum disability or life insurance award if the employee falls ill during the notice.

c. Severance Packages

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. The reasons for this are obvious. The disgruntled employee may affect morale or there is a risk that the employee will harm the business interest 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: They 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 the lump sum payment is offered in exchange for the employee signing a release which releases the employer from any and all claims related to employment. The employee receives the money up front and the employee has no further obligations to the employer. 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 month's 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 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 per cent payment of the remaining salary. This provides an employee 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.

One disadvantage of the salary and continuance benefits is that most insurance carriers will not permit the employee to continue long term disability benefits for persons who are no longer actively employed. Most employees accept this but an employer can purchase special disability insurance to cover the employee during the period of salary and benefit continuance. It is very important to continue other benefits during the notice period including car allowance, medical services plan payments and bonus if accrued during the notice period.

If the employer chooses to pay either lump sum or salary and benefit continuance, the employer should obtain a written release where the employee releases the employer from any and all claims related to their employment.

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, CPP and EI, and must remit such amounts to the Canada Revenue Agency.

These amounts are as follows:

Amount of Payment	Withholding
Less than $5,000	10%
$5,000 to $15,000	20%
Over $15,000	30%

i. References

An employer has no obligation to provide a letter of reference to an employee. However, it may be a bargaining chip during negotiations for a severance package. If the employer does decide to provide a written reference, it should be fair and balanced. In addition, if a potential employer follows up on a written reference, an employer should not deviate from the written reference. If so, the employer can expose themselves to liability.

d. Implementation

Once the employer has chosen the type of severance package to be offered, the employer should carefully consider how the actual dismissal will be implemented. The employer should take the following into consideration:

1. An employer should never terminate an employee on a Thursday or Friday. The termination should occur on a Monday or Tuesday. The reason for this is that if a termination occurs on a Friday, the employee cannot do anything during the weekend to consider his or her options, look for alternative work, speak to an accountant or financial manager or even seek legal advice. By terminating the employee at the beginning of a week, it allows the employee several working days to react constructively to the dismissal rather than go home and stew about the dismissal all weekend without being able to take any positive steps to “get on with their lives”.

2. The dismissal should be carried out by a supervisor and the employee should be provided with a letter of termination at that time. The employee should be told about the dismissal in private and not in front of any other employees. The employer should have a human resources or another person with them to act as a witness of anything that might be said. Conversation should be kept to a minimum and the employer should refrain from debating with the employee. The termination should happen in a businesslike manner. If the employee is dismissed in front of another employee or degrading and abusive language are used during the

dismissal process, an employer may be faced with *Wallace* damages for the manner in which the termination occurred.

3. The employer should also request the return of all equipment, documents, keys, passes, credit cards, cell phones, laptops, and any other equipment owned by the employer. Most human resource managers will have prepared a checklist in advance of what items the employee has in their possession.

4. It is appropriate either to allow the employee to take their personal belongings at the time of dismissal, or arrange for a mutually convenient time after hours for the employee to return, under escort, to retrieve their personal belongings. Again, the employee should be allowed to do so with as much dignity as possible.

5. Care should be taken to ensure that confidential information contained on a computer, or sensitive or confidential information concerning the employer's customer lists, pricing, and other trade secrets be preserved.

6. The employer may have to arrange to change locks or access codes.

7. The employer should also decide how the dismissal will be announced to other employees, customers, suppliers and other persons that may have been in contact with the employee. If cause is being alleged, the employer should be very careful in terms of how this is handled. In most cases, a simple statement that the employer and employee have parted company should be enough reason.

8. Finally, the employee must be provided with a Record of Employment with the appropriate code filled in within three business days of the dismissal.

2. CONCLUSION

There is no easy way to terminate a person's employment but by following the guidelines outlined in this paper, an employer should be able to minimize the exposure from a dismissal. As stated earlier in this paper, an employer can reduce the exposure to damages if it enters into a written employment contract with an employee setting out all the terms and obligations of the parties, including what happens on termination. 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.