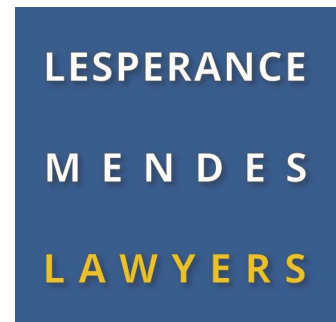


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## **GUIDELINES FOR EMPLOYMENT TERMINATIONS IN BRITISH COLUMBIA**

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## INTRODUCTION

Work is one of the most fundamental aspects of a person's life. It provides the individual with both a means of financial support and a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.<sup>1</sup>

Given this recognition of the integral nature of work to an employee's life and identity, there are principles of law that govern when and how the employment relationship may be terminated. Employment relationships are typically characterized by unequal bargaining power. This places employees in a vulnerable position vis-à-vis their employers. The courts have acknowledged that such vulnerability becomes especially acute at the time of dismissal.

Not only is employment itself fundamental to an individual's identity, but "the manner in which employment can be terminated is equally important".<sup>2</sup>

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<sup>1</sup> *McKinley v. BC Tel*, 2001 SCC 38

<sup>2</sup> *Wallace v. United Grain Growers Ltd.* (1997), 3 S.C.R. 701 (S.C.C.) at para. 95

## **ALLEGING JUST CAUSE OR NOT?**

In general, an employer has the unfettered right to dismiss an employee at any time, with or without “just cause” for termination.

If there is no cause for termination, then working notice or severance (payment instead of notice) is required. The length of notice or amount of severance depends on a number of factors that are discussed below.

### **OPTION 1: TERMINATION WITHOUT CAUSE**

In the event that an employer does not wish to allege just cause for termination, or cause does not exist, the employer may dismiss an employee by providing both minimum notice under the *Employment Standards Act* and contractual or common law notice.

Section 63 of the BC *Employment Standards Act* provides that an employer’s liability for compensation for length of service is as follows:

- a. after 3 consecutive months of employment, an amount equal to one week’s wages;
- b. after 12 consecutive months of employment, an amount equal to 2 weeks’ wages;
- c. after 3 consecutive years of employment, an amount equal to 3 weeks’ wages plus one additional week’s wages for each additional year of employment, to a maximum of 8 weeks’ wages.

The amount the employer is liable to pay becomes payable upon termination of the employment. Working notice can also be provided.

#### **a. Common Law Notice**

Absent a fixed term contract or contractual notice provision, an employer may dismiss an employee at any time by giving the employee minimum notice under the *Employment Standards Act* plus “common law reasonable notice” or payment in lieu of notice.

In BC, the length of common law reasonable notice is based on four key factors:

- 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, courts tend to award longer notice periods to long-term employees than to shorter term employees. Likewise, a court will usually award higher notice periods to older employees than to younger ones.

In addition, a court will likely award lengthier notice to an employee at the management level who supervises a number of employees versus an employee who holds a position with no supervisory functions. The rationale for this approach is that, in general, it is more difficult for a 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. In that scenario, the employee will receive a longer notice period.

The employer should seek legal advice to determine an employee's reasonable notice entitlement before taking steps to terminate an employee. The range of potential notice awards may be used to design a severance package, to be offered to the employee in exchange for a release of all claims relating to the employment. Severance packages are discussed later.

#### ***b. Contractual Notice***

It is an implied term of any employment contract that an employer may dismiss an employee at any time by giving the employee reasonable notice or payment in lieu. However, that implied term can be varied by express provisions in a written employment agreement.

An employer should enter into written contracts of employment with all of its employees. The agreement may be written on the employer's letterhead in the form of a letter. The letter should confirm the terms of the employment such as the employee's position; start date; salary; compensation and benefits; vacation time; and, most importantly, what notice provisions apply in the event of termination by either party.

An employer who wishes to require an existing employee to sign a new or revised employment agreement must give the employee "consideration" for signing. Consideration can include a bonus, raise or benefit to which the employee would otherwise not be entitled. Except in some rare probationary or disciplinary situations, the employee's continued employment is *not* a bargaining chip to be traded for a signature on a new or revised employment agreement.

An employer should consult an employment lawyer to ensure its new or revised agreement is enforceable. Employees should be given the opportunity to obtain independent legal advice prior to signing any new or revised agreement.

Where an employment contract fails to comply with the minimum notice periods set out in the *Employment Standards Act*, the employee can only be dismissed without cause if he or she is given reasonable notice of termination. In one case, the BC Court of Appeal held that an employment agreement that permitted an employer to dismiss an employee with 30 days' notice was unenforceable. 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 *Act* if the employee had worked for 5 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".<sup>3</sup>

Lawyers will often advise employers to adopt the minimum notice under the *Employment Standards Act* in their employment contracts. This may be appropriate for junior level employees such as clerical staff or first line supervisors. However, there are cases suggesting that, the more senior a person becomes within the organization, the less enforceable will be the provisions limiting severance based on *Employment Standards* notice.

Take for example an employee who starts out as a first line supervisor at \$30,000 per year. Over the course of 10 years and several promotions and raises, the employee becomes General Manager with an annual salary of \$150,000. In that scenario, the court may not enforce the minimum notice provisions of an employment contract. Once an employee reaches the higher management positions, an employer should consider amending the employment contract to provide for a longer contractual notice period, taking into account common law notice.

## **OPTION 2: TERMINATION WITH CAUSE**

In general, just cause for termination is employee behavior that, viewed in all the circumstances, is seriously incompatible with the employee's duties. It is conduct which goes to the "root" of the employment contract, fundamentally strikes at the employment relationship and consequently fractures the employment relationship in such a way that the employer cannot be expected to provide the employee with a second chance.

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

The law recognizes an employer's right to summarily dismiss a delinquent employee for:

- a. serious misconduct;
- b. habitual neglect of duty or poor performance;
- c. incompetence;
- d. theft or fraud involving the employer's property;
- e. conduct incompatible with his duties;
- f. conduct prejudicial to the employer's business; or
- g. willful disobedience.

If the employer shows cause, the employee may be dismissed without notice or payment in lieu. However, the employer, not the employee, has the onus to prove, on a balance of probabilities, that it had sufficient cause to terminate the employee.

It is important to consider and research the issue carefully before alleging just cause for dismissal. An employer is exposed to lengthier notice periods, punitive damages and special costs if it is unable to prove just cause for termination.

Two common reasons for dismissing an employee for cause are as follows:

***a. Employee Misconduct***

In order to establish just cause for dismissal based on an isolated incident of misconduct or a single act of dishonesty, the employer must demonstrate that the employee has, by reason of the misconduct, repudiated the employment contract or one of its essential conditions.

The "employee's misconduct does not inherently justify dismissal without notice unless it is 'so grievous' that it intimates the employee's abandonment of the intention to remain part of the employment relationship".<sup>4</sup>

In order to determine whether repudiation has occurred, one must carefully examine both the circumstances surrounding the alleged misconduct and the degree of misconduct. Underlying the court's approach is the principle of proportionality. An effective balance must be struck between the severity of an employee's misconduct and the sanction imposed. The importance of this balance is better understood by considering the sense of identity and self-worth individuals derive from their employment.

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<sup>4</sup> *McKinley* at para. 33

### ***b. Poor Performance***

An employer also may be justified in terminating an employee for poor performance or chronic absenteeism, provided the employer gives the employee adequate written warnings.

The warnings should be clear and unambiguous. Each warning should be in writing, in the form of a memo or letter. It is a good idea to have the employee sign a copy of the memo or letter acknowledging that the memo has been received and read.

In order to terminate an employee for poor performance for just cause, the warning must contain the following four critical elements:

1. The employee must be given clear reasons why the performance is sub-standard.
2. The warning must include a detailed explanation of what the employee needs to do to improve performance, with clear targets or performance standards or objectives.
3. The employee must be given a reasonable amount of time in which to improve the performance.
4. The warning must state that if the performance standards or objectives are not met in the time frame given, or any time thereafter, the employee will be terminated.

The amount of time the employee is given to improve depends on the circumstances of each case. For example, an employer may need to give a commission salesperson a longer period of time to improve, depending on the sales cycle or if the products are seasonal. The employee should be granted enough time to make a meaningful attempt to improve the performance at issue.

The employer should also attempt to provide guidance and reasonable assistance to the employee who is struggling, as the real goal is to bring that employee back to an acceptable level of performance. Assistance could be in the form of mentoring with a supervisor, courses, seminars, reading materials or training.

If the employee has been given clear performance objectives, assistance and a reasonable period in which to improve and the performance is still below standard, the employer is justified in terminating the employee without reasonable notice.

As stated above, the onus to prove just cause is on the employer, not the employee. If the warnings do not contain the above four essential elements, it will be difficult or impossible to prove just cause for termination on the basis of poor performance.

## **ADDITIONAL CONSIDERATIONS**

### ***a. Severance Packages***

As described above, an employer is required to provide a dismissed employee with working notice or payment instead of notice. The purpose of notice is to give the employee a reasonable amount of time to look for alternative work while being paid his or her regular compensation.

Once an employer determines that an employee must be let go, the employer usually does not want the employee working through his or her notice. The reasons for this are simple: the disgruntled employee may affect morale and there is a risk that the employee could harm the business interests of the employer.

Where an employer elects to provide the employee with a severance package, the issue becomes whether the severance package is adequate. An employer can offer the employee, in exchange for the employee signing a release: (a) a lump sum payment, (b) salary and benefit continuance, or (c) a combination of both.

The employee should be given a reasonable opportunity to obtain independent legal advice prior to accepting a severance package.

Any severance package and payment should be contingent on the employee signing a release stating that the employee releases the employer from any and all claims related to his or her employment, including claims under the *Employment Standards Act* and *Human Rights Code*.

Consider a scenario where an employer wishes to dismiss an employee who never signed an employment contract. After receiving legal advice and considering the four factors described above, the employer determines that the employee is entitled to 8 weeks' statutory notice under the *Employment Standards Act*, plus an additional 6 months' common law notice.

The employer must pay the employee 8 weeks' statutory notice. The employer may also offer the employee the following options in exchange for a written release:



1. Salary and benefits continuance for an additional 6 months. In the event the employee obtains a job before the end of the six months, all salary and benefits cease and the employee receives a 50% lump sum payment of the remaining salary and benefits; or
2. Lump sum payment of an additional 4 months' salary and benefits.

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

In contrast, the lump sum payment option provides certainty to both parties. The employee receives the money up front and the employee has no further obligations to the employer.

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 or two, the employee obtains a substantial windfall. If after six months the employee has still not found work, the employer will end up paying less overall.

One disadvantage of the salary and benefits continuance is that many insurance carriers will not continue long term disability benefits for persons who are no longer actively employed. An employer can purchase special disability insurance to cover the employee during the period of salary and benefit continuance. It is important to continue other benefits during the notice period including car allowance, medical services plan payments and bonuses accrued during the notice period.

#### ***b. Statutory Deductions***

An employer is required to make statutory deductions from severance payments to account for income tax, CPP and EI, and must remit such amounts to the Canada Revenue Agency.

#### ***c. References***

An employer has no obligation to provide a letter of reference to an employee. However, it may be a bargaining chip while negotiating a severance package.

If the employer agrees to provide a written reference, the letter should be fair and balanced. If a potential employer follows up on a written reference, the former employer should not deviate from the written reference or it can expose the employer to liability.

#### ***d. 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, the employer should take greater care and consult with an employment lawyer before proceeding with a termination. The employer should seriously consider whether dismissing an employee while he or she is ill or disabled raises issues of alleged discrimination based on disability. Terminating an ill or disabled employee will often result in a complaint to the BC Human Rights Tribunal.

When an employer is aware, or reasonably ought to be aware, that a medical condition is affecting an employee's performance, the employer has a duty to inquire into a possible relationship between the disability and the employee's underperformance before taking steps that adversely affect the employee. It is the employer's responsibility to obtain relevant information about the employee's medical condition, prognosis for recovery, ability to perform job duties and capabilities for alternate work. If those inquiries disclose that there is a relationship between the disability and the poor performance, then the employer has a duty to accommodate the employee to the point of undue hardship.

Depending on the circumstances, it is often prudent to postpone the dismissal until the employee has recovered from his or her disability or illness and returned to work.

Most group insurance plans discontinue benefits, including long term disability coverage and life insurance, upon termination. 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 runs the risk of being saddled with a significant lump sum disability or life insurance award if the employee falls ill during the notice period.

#### **IMPLEMENTING THE DISMISSAL**

An employer should carefully consider how to implement a termination. The employer should take the following into consideration:

1. If a termination occurs on a Friday, the employee cannot do anything productive during the weekend to consider his or her options. The employee will go home and stew about the dismissal without being able to take any positive steps to get on with

his or her life. Terminating the employee earlier in the week (on Monday or Tuesday) gives the employee several working days to react constructively to the dismissal by looking for alternative work, speaking to an accountant or financial manager and seeking legal advice.

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 other employees. The employer should have a human resources manager or another supervisor attend to act as a witness of anything that might be said. Conversation should be kept to a minimum. The employer should refrain from debating with the employee.
3. The termination should happen in a businesslike manner. Where an employer engages in bad faith conduct or unfair dealing in the course of dismissal - such as terminating the employee in front of other employees; humiliating or embarrassing the employee; using degrading or abusive language during the process; or being untruthful, misleading or unduly insensitive - the employer may be faced with a claim for damages for injury to dignity for the manner in which the termination occurred.
4. The employer should 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 prepare a checklist in advance of items in the employee's possession that must be returned.
5. It is appropriate either to allow the employee to take his or her 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 personal belongings. Again, the employee should be allowed to do so with as much dignity as possible.
6. 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.
7. The employer may have to arrange to change locks or access codes.
8. The employer should decide how to announce the dismissal to other employees, customers, suppliers and other persons that have been in contact with the

employee. The employer may want to consult with the employee. If cause is being alleged, the employer should be particularly careful in terms of how this is handled. In most cases, a simple statement that the employer and employee have parted company should suffice.

9. Finally, the employee must be provided with a completed Record of Employment within three business days of the dismissal.

## **CONCLUSION**

Terminating an employee is very stressful. It affects the employee, the manager concerned, and other employees in that person's department.

It is important to remember that the eyes of this person's co-workers and indeed senior management will be on you as the manager. Your conduct will be under scrutiny and may have long-term consequences on how you are perceived by your subordinates and upper management alike. The employee's co-workers will be looking at the termination as if it might happen to them. They will be looking to see if the process used by the manager was fair and whether the person was terminated with dignity. Upper management will be assessing how well the manager handled this stressful situation and how effective the manager was in keeping the remaining employees motivated and productive.

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 fallout from a dismissal.

An employer can reduce its exposure to damages by entering into written employment contracts with its employees. The agreements should set out, in writing, all the terms and obligations of the parties, including what will happen upon termination.

Absent an employment contract, an employer must act very carefully when determining whether or not to dismiss an employee. It is advisable to consult both a lawyer and human resources professional before a decision is made and steps are taken to dismiss an employee.