Wrongful Dismissal Made Easy

by Milena Celap

Those who have lost their job due to termination know the psychological, social, and financial effects of a sudden job loss. After all, it is ranked among death and divorce as one of the most difficult times of one's life. Likewise, some employers have a difficult time terminating an employee. What is surprising is that many employees and employers do not understand what makes a dismissal unjust or wrongful.

This article simplifies the basic concepts associated with wrongful dismissal. While this article is not a substitute for legal advice, it hopes to educate the reader about basic concepts relating to the law on wrongful dismissal.

Just Cause for Dismissal

"Wrongful dismissal" is the most widely used phrase to describe a firing that is wrong in the eyes of the law. Other terms that are used from time to time are "unjust dismissal" and "wrongful termination".

The Supreme Court of Canada has set out when a dismissal (also called "summary dismissal") may be just in the following wording from one of its wrongful dismissal appeal cases:

> "If an employee has been guilty of serious misconduct, habitual neglect of duty, incompetence, or conduct incompatible with his duties, or prejudicial to the employer's business, or he has been guilty of willful disobedience to the employer's orders in a matter of substance, the law recognizes the employer's right to summarily dismiss the delinquent employee."

In deciding whether there is just cause for dismissal (or whether there is a wrongful dismissal), the courts take a case-by-case approach, analyzing the particular facts of an individual case.

Wrongful Dismissal

A wrongful dismissal claim can be said to be a claim for a breach of contract. Therefore, before we can discuss the law on wrongful dismissal, we must look at the legal relationship between the employer and the employee. That relationship is defined by the employment contract.

The Employment Contract

Some employment contracts are written, others are merely verbal agreements. Either way, the contract defines the benefits and obligations of both the employer and employee. Some of the terms of employment include the position to be filled, the hours to be worked, the salary to be earned, and any other terms that govern the relationship. In other words, the employee promises to fill a certain position in exchange for pay.

There are "express terms" of contract, which are terms that are expressed either in writing or orally. Those are usually terms such as the position, the hours of work, the benefits, the amount of vacation and when it can be taken, the amount and timing of pay and so on.

An employment relationship also involves implied terms of contract. Those "implied terms" are deemed to be the intentions of both the employer and employee.

Examples of implied duties of employees are:

1. to perform work in a competent and non-negligent manner;
2. to be honest in workplace dealings;
3. to demonstrate loyalty to the employer;
4. not to compete with the employer's business; and
5. not to claim entitlement to inventions achieved during the employment.

Examples of implied duties of employers are:

1. to not change the fundamental terms of the employment contract without the employee's agreement or without providing to the employee reasonable notice of that change;
2. to maintain the position for which the employee is hired;
3. to deal respectfully and fairly toward the employee;
4. to not dismiss an employee who has become ill; and
5. to pay reasonable notice of termination if there is no just cause for that termination.

Finally, it is understood that both employers and employees are subject to comply with employment, health and safety, and human rights laws, although the appropriate terms are not always written into employment contracts. In Ontario, governing laws are the *Employment Standards Act, 2000*, the *Ontario Human Rights Code*, the *Occupational Health and Safety Act*, and so on.

It is important to note that this article applies to non-unionized employment situations only, as unionized settings are governed by collective agreements and laws that fall under the heading of "labour law". It is not to say that unionized workers are not wrongfully dismissed from time to time, but laws and mechanisms for dealing with those dismissals are handled in accordance with a different set of laws. Federally regulated employees are governed by the *Canada Labour Code*, which has its own set of rules and mechanisms for terminations. Examples of employees who fall under the *Canada Labour Code* are bank, railway, and airline employees, among others. The *Canada Labour Code* contains provisions that deal with termination and, as such, a lawyer should be consulted as to whether or not a court action for wrongful dismissal may be appropriate in a particular case. Both unionized and federally-regulated employees usually have benefits that do not exist at common law (judge-made law). Also, Quebec residents should consult with a lawyer for other considerations.

Employment standards legislation in each province sets out the minimum requirements that employers must follow for termination and severance pay, pregnancy and parental leave, vacation pay, sick leave, family or emergency leave, and so on, as appropriate to each province and territory.

One of the reasons that these provisions are not typically written into contracts is that the employment relationship is a relationship of contract. This means that, although minimum standards have to be met, the parties are free to negotiate an employment contract that exceeds legislated minimum requirements. In other words, employers cannot contract out of the employment standards legislation, so in a case of termination without just cause, the minimum termination pay must be paid.

However, termination pay is limited and is at a maximum of eight weeks across Canada. If the employment contract does not restrict the employee to accepting employment standards minimum termination pay, then the employee may be entitled to seek reasonable notice of termination as discussed below.

Just Cause Dismissal

Generally speaking, an employer can dismiss an employee for any reason, unless that reason is tied to a breach of human rights, safety, or employment legislation. For example, in most provinces and territories, employees are protected by legislation from being terminated for reprisal for enforcing their rights under that legislation. An example is when an employee files a human rights or employment standards complaint and is then terminated. That would likely be seen to be an act of reprisal on the part of the employer, unless there is a valid and provable alternative reason to justify the termination.

Likewise, in some cases, "whistle-blowing" legislation protects employees from being terminated when they report a violation of the law. An example is the Ontario's *Occupational Health and Safety Act*. Another example is a termination upon reporting a violation of employment standards legislation, such as the pregnancy or parental leave provisions. However, the protection lies in penalties to employers. Only the breach of human rights can result in reinstatement of an employee to a pre-termination position (e.g., *Human Rights Code* (Ontario), *Canadian Human Rights Act (federally regulated employees*).

However, a termination is a "just cause" termination when the employee has breached a fundamental obligation under the employment contract. For example, an employee *may* be deemed to be dismissed for just cause in the following situations:

- misconduct, insubordination, wilful disobedience;
- absenteeism or lateness;
- incompetence;
- negligence;
- breaching human rights, safety, or other laws;
- breaching the employer's policies;
- dishonesty and breach of trust;
- conflict of interest; and
- leaking confidential information or trade secrets.

Dismissal for cause is often referred to as "summary dismissal". In basic terms, "summary dismissal" means that the employer alleges that the employee has breached the employment contract by behaving in a manner that renders the contract at an end. In such a case, the employer does not have to pay the employee any termination or severance pay or provide any notice of the termination or pay in lieu of notice of termination. In other words, the termination can be automatic, without pay (except for any pay earned prior to the termination), and without further obligation toward the employee (e.g., providing a reference letter). An example that almost always results in summary dismissal, that is, for just cause, is theft from the employer.

The reason it is said that an employee "may" be terminated for just cause instead of "will" be terminated for just cause is a matter of context. Each situation is different and lawyers engage in a complex analysis of facts and law to make this determination. It is usually not a determination that a non-lawyer can make.

For example, in some cases one incident of insubordination will create just cause for dismissal. In other cases, multiple incidents of insubordination will create just cause for dismissal. In very rare cases, incidents of insubordination may be of such a nature that they do not constitute just cause for dismissal at all.

Furthermore, the common law, or judge-made law, is shaped every day and takes into account the economic and social norms of the day.

Reasonable Notice

In cases where there is no just cause for dismissal, the employer must provide notice of termination. This applies even when the termination involves a mass permanent lay-off, a restructuring or a firing that doesn't meet the tough test of "just cause".

The employer has a choice of providing working notice or pay in lieu of notice.

In essence, reasonable notice refers to the number of months it would likely take the employee to find suitable alternative employment if he or she makes reasonable efforts to do so.

In many cases, the employer determines that working notice is inappropriate, in which case the employer must provide pay in lieu of notice. In other cases, the employer may choose to offer a combination of working notice and pay in lieu of notice.

The question of how much notice is required, or what is "reasonable notice", varies from case to case and has been the subject of much litigation in the courts. The main factors influencing the calculation of reasonable notice of termination are:

1. termination provisions in employment contract;
2. age of employee;
3. length of employment;
4. nature of employment; and
5. availability of similar employment, having regard to the employee's experience, training and qualifications.

In considering those factors, together with other circumstances of each case, the courts have developed a considerable body of case law as to how much reasonable notice is appropriate in a given case.

You can find employment standards legislation applying to your province or territory on your provincial government web sites. An employment contract cannot provide less than the legislated minimum requirements. Note that termination pay and severance pay are not the same. Check your employment standards legislation as to the situation in which each of them applies. Reasonable notice is similar to termination pay but differs because it is determined by common law principles established through court cases.

Generally speaking, the notice periods tend to become higher for older employees, employees with lengthy service, and employees in upper management positions or employees whose fields have limited employment potential. For example, it a nuclear physicist may find it takes much longer to find work than a person with career experience in clerical work or general labour. There are other factors that may increase the reasonable notice that is ultimately awarded by the court. Since reasonable notice is not determined by a precise formula, only a properly retained lawyer can advise an employee or employer as to the appropriate range of notice, after canvassing the facts of the case and the applicable case law.

Mitigation

Mitigation means taking action to reduce the reasonable notice period. The dismissed employee must make efforts to find suitable alternative employment. The dismissed employee need not take any job, but must show some flexibility. The new employment need not be significantly below the pay and position from which the employee was terminated, but some flexibility is expected. There must be reasonable efforts to find employment; otherwise the entitlement to reasonable notice award may be denied or significantly reduced.

Earnings made during the notice period, including any insurance monies such as employment insurance, are deducted from the reasonable notice because those are losses in earnings that the employee was able to mitigate in some way and this must be credited toward the reasonable notice period.

Damages

Damages are court-awarded monies. In wrongful dismissal cases, damages can be any of the following:

1. damages in lieu of reasonable notice;
2. punitive damages; and
3. damages arising from torts.

The successful employee litigant will also likely recover at least some of the costs of court proceedings.

The term "damages in lieu of reasonable notice" simply refers to monies that reflect the reasonable notice that ought to have been given to the employee. For example, if the notice period was determined to be nine months and the employee's annual salary was $60,000, damages for reasonable notice would be $45,000, minus any monies earned during the reasonable notice period.

A general estimate of reasonable notice is one month notice for every year of service. However, that is not a steadfast rule, but a starting point that is adjusted up or down based on the individual factors in a specific case. The courts have rarely awarded more than two years' reasonable notice, so upper limits may be imposed.

Sometimes, punitive damages may also be awarded by the courts. Such cases are when the circumstances surrounding the dismissal clearly warrant that the employer pay additional damages as punishment for its termination of the employee in the manner carried out. An example might be where an employer accuses an employee of committing a crime for which the employee was terminated. If the allegation of the criminal conduct was untrue or could not be established to be true, the employee would be awarded punitive damages for the horrible behaviour of the employer in making false, damaging allegations. An employer who acts maliciously, vindictively or otherwise in bad faith may be required to pay punitive damages in addition to paying monies in lieu of reasonable notice.

If the employer's behaviour at the time of termination caused mental stress, injury to the employee's reputation, or other behaviour for which the employee can be compensated through the law of torts, the employee may be entitled to additional damages. Similarly, if the employer is aware of a situation that is sensitive (illness) and then chooses to aggravate that situation by its conduct upon termination, then the suffering employee should be able to recover for additional damages caused by the employer's insensitive actions.

Tips for Employees

The following are tips for employees:

- As soon as possible after the termination, the employee should retain a lawyer and candidly provide the lawyer with the details of the termination.
- If there has been mental stress caused by the manner of termination, the employee should pay a visit to his or her family doctor, and get treatment, if required. This will also serve as documentation of the damages caused by the manner of termination.
- It is wise not to sign any documents until you have spoken with a lawyer.
- Termination is stressful, emotional and difficult even if the termination is carried out with respect and sensitivity. Excess emotion can prevent an individual from negotiating a good settlement. Keeping emotions in check is vital because deciding whether to negotiate a settlement or sue can only be made with a clear head. The employee should try to set emotions aside and assist his or her lawyer in negotiating a settlement with the employer. This may avert the need to take legal action in court, which could be financially devastating.
- Keep in mind that a good settlement is not just about money. Sometimes it means a positive reference letter will be provided in spite of the dismissal. Other settlements can include extending health benefits, paying for outplacement training, and so on.
- Remember the duty to mitigate and take reasonable steps to look for suitable alternative employment.

Tips for Employers

The first defence is to ensure that dismissals are not wrongful. However, when served with a demand for payment or, worse yet, a court action, employers must keep in mind that refusing to negotiate can lead to costly litigation that may also be injurious to their reputation. Legal advice about the best way to approach a situation is a sensible start. The following tips may be helpful:

- know the laws in your jurisdiction;
- promptly document problems with an employee;
- deal with problem behaviour as it arises, not at some future date;
- provide an opportunity for the employee to improve, if this is feasible;
- promptly provide letters to the employee explaining the problem and what your expectations are for rectifying it;
- consult with a lawyer as to whether there is just cause for termination in any given situation – while this costs you some fees, it may save you a lot of other expenses down the road; and
- always keep in mind the implied duties of the employer and always act in good faith.

Employment law is complex and this article is just a brief summary of wrongful dismissal law. In our next edition, we will discuss constructive dismissal. Be sure to reserve a copy of *Law for Everyone*.