

Termination of Employment

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Overview

- With Cause vs. Without Cause
- With Cause Terminations
 - The Basics
 - Misconduct that Constitutes Cause
- Without Cause Terminations
 - The Basics
 - Notice of Termination
 - Severance



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Overview Con't

- Common Law Notice
- Contractual Notice
- Termination Meeting



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“With Cause” vs. “Without Cause”

- Employer’s choice between “with cause” and “without cause”
- This is in the non-unionized environment only
- Union setting – Generally only “with cause” terminations



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2 Major Differences

1. Reason for termination
 - “With cause” – employer has to establish reason for termination (based on employee’s conduct) (not on business conditions, i.e. lack of work)
 - “Without cause” – Can terminate whenever you want. No reason or explanation required (as long as basis for termination not prohibited by law (e.g. human rights considerations))



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2 Major Differences, Con’t

2. Notice or pay in lieu of notice (i.e. termination or severance pay)
 - “With cause” – not required
 - “Without cause” – required



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With Cause

- Very few terminations are “with cause” because “cause” is difficult to establish
- Cause:
 - Misconduct by employee – Ordinary misconduct not enough
 - Employee undermined the employment relationship and employer’s trust irreparably
 - Employment relationship no longer viable



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Definition of “Cause”

- No definitions in employment statutes
- Have to look at decided cases
- It’s a matter of judgment and different people (judges) can make different judgments
- Uncertainty of judgment makes a “with cause” termination risky



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Risk of a “with cause” termination

- Employer believes it has cause and terminates; provides no notice or termination/severance pay
- Employee sues for “wrongful dismissal”
- Matter goes to trial and court finds no “cause”
- Employer has to pay
 - amount for reasonable notice of termination (termination/severance pay)
 - Legal costs – its own and some of the employees
 - Additional damages if court believes the cause argument not sincere



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Courts Treatment of “Without Cause” Cases

- Court’s view of employment
 - Fundamental aspect of a person’s life
 - Essential to person’s identity, self-worth and emotional well being
 - Employees are vulnerable group
 - Power imbalance exists between employees and employers



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Courts Treatment of “Without Cause” Cases, Con’t

- Most cases decided in employee’s favour. Although this is balancing out lately
- Cause based on misconduct must be really egregious
- In most cases, can’t establish cause without progressive discipline
- Employment policies also gaining importance



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Misconduct that Constitutes “Cause”



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Violence/Sexual Harassment

- Windsor Regional Hospital v. CAW (Serdena Grievance), [2010]
- Don't assume it is automatic grounds for immediate dismissal
 - Hodgins v. St. John Council for Alberta (2007)
 - Stone v. SDS Kerr Beavers Dental (Ontario, 2007)
 - Coca-Cola Bottling Co. Brampton (McNabb Grievance) [2009]



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Serious Financial Misconduct

- Seriousness depends on the amount, the position and the facts
 - People in finance dept. or who hold positions of trust, held to higher standard of accountability
 - Cupe v. Ottawa (Ontario, 2010)
 - Others who commit "petty" violations may be given a second chance
 - Leitner v. Wyeth Canada (Ontario, 2010)
 - Bravo v. Etobicoke Ironworks (Ontario, 2005)



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Poor Performance

- Difficult, but not impossible
- Employer must establish:
 - The level of the job performance required
 - That the standard was communicated to the employee
 - Suitable instruction and/or supervision was given to the employee to meet the standard.
 - May require exploring with employee the reasons for his poor performance and what he can do to correct it



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Employer Must Establish, Con't

- That the employee was:
 - given reasonable time to correct the situation
 - incapable of meeting the standard
 - warned that failure to meet the standard would result in dismissal



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Poor Performance, Con't

- Amount of time required to establish cause related to length of employment. For employees of 10 years or more, expect at least 6 months to 12 months
 - Boulet v. Federated Co-operatives Ltd (Manitoba, 2002)
- Condoning past poor performance may increase this time
- Gross dereliction of duties may not require counselling or warnings
 - Community Living Kirkland Lake v. Cupe (Hofmaier Grievance), [2009]
 - However see Ewert v. West Park Manor Personal Care Home (Manitoba, 2007)



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Insubordination

- Refusing to follow authorized directions
- Swearing or other comments that show lack of respect for management, especially if done in view of other employees
 - Parmalat (Brampton) [2010]
 - Chen v. Sable Fish Canada Inc. [B.C. 2010]



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Mitigating Factors

- Courts don't just look at the misconduct but other mitigating factors such as:
 - Employee's position, more senior = more accountability
 - Years of service
 - Previous disciplinary record
 - Willingness to accept responsibility
 - Remorse


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Assessing Whether to Terminate for Cause

1. Nature and seriousness of offence, how does it affect the organization and other employees
2. Deliberateness of conduct
3. Prior disciplinary record
4. Employee's work record
5. Impact of offence on future performance


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Assessing Whether to Terminate for Cause, Con't

6. Consistency with penalties for similar offences
7. Warning/notification
8. Potential for rehabilitation
9. Mitigating circumstances, i.e. life issues, provocation
10. Disciplinary procedures followed

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Assessing Whether to Terminate for Cause, Con't

- Other assessment factors
 - Proper investigation of matter
 - Existence of written rules of conduct
 - Consistent application of enforcement of company rules of conduct, written or unwritten
 - Previous condoning of conduct by employer
 - Credibility and sympathy factors



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WITHOUT CAUSE TERMINATIONS



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The Basics

- Employer has discretion to terminate at any time, **without any reason** as long as:
 - The basis for the termination is not legally prohibited
 - Sufficient notice of termination is provided
 - Terminating because of lack of work or reorganization is a “without cause” termination – notice required



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Legally Prohibited Reasons

- Human Rights = race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, same-sex partnership status, family status and **disability**
- Reprisal for pursuing legal rights
 - Workplace Safety and Insurance Act
 - Employment Standards Act
 - Occupational Health and Safety Act



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Notice of Termination

- 3 types of notice of termination
 - Statutory minimum notice (ESA)
 - Common law notice – Judge made
 - Contractually agreed to notice – Can't be lower than ESA notice



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Statutory Minimum Notice

- Employment Standards Act of Ontario sets out the **minimum** notice to which employees (with some exceptions) are entitled
- The amount of the notice is;
 - Nothing for the first three months of employment
 - 1 week between 3 months and 2 years of employment
 - 1 week for every year of employment after that to a maximum of 8 weeks



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Types of Notice

- Notice must be in writing
- Notice can be provided as:
 - Working notice
 - Pay in lieu of notice
 - A combination of both

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Working Notice

- Terms and conditions of employment must continue
- Working notice can save you money but be cautious

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Pay in Lieu of Notice

- Includes all compensation that employee would have been entitled to if he had continued working during the notice period
 - Salary/wages
 - Vacation pay
 - Car allowance
 - Bonuses (unless discretionary)
 - Pension contributions

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Benefit Continuation

- Must continue benefit contribution during notice period
- Don't cut off short-term or long-term disability during notice period
- Insist that your carrier continue all benefits, especially long term disability



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Severance

- Another minimum standard under ESA
- 2 conditions to severance entitlement
 - Employed for 5 years or more
 - Employer has annual payroll of 2.5 million or more (ESA has a specific formula for determining this)



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Severance, Con't

- Calculating severance
 - One weeks wages for every year of service and part thereof to a maximum of 26 weeks



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Payment of Notice/Severance

- Within 7 days of termination (last day of work)
- Lump sum payments
- Director of Employment Standards can authorize payment of severance in installments
- Practically speaking, salary continuation and not lump sum is common



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Taxation of Notice and Severance

- Notice = Wages, regular deductions
- Severance = Retiring allowance; flat rate of
 - <\$5000 = 10%
 - >\$5000 but < \$15000 = 20%
 - >\$15000 = 30%



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Exemptions to Notice/Severance

- Notice - Fixed term employees, less than one year term
- Notice and severance - Termination for wilful misconduct or wilful neglect of duty – higher standard than with cause terminations



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Common Law

- Judge determines the reasonable notice period
- ESA entitlements represent the lowest amount, the minimum amount
- Common law notice can far exceed that amount
- Failure to agree on common law reasonable notice leads to “wrongful dismissal” action



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Calculating Reasonable Notice

- Unofficially - General rule of thumb, one month per year of service > for senior positions, < for clerical/blue collar
- Maximum is generally:
 - 24 months for senior/professional
 - 12 months for blue collar, clerical positions
- Fixed term contracts - be careful



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Factors

- Length of employment
- Age
- Character of position
- Availability of other employment given employee's training and qualifications
- Inducement from other employment



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Providing Reasonable Notice

- Can be working notice or pay in lieu of notice
- As with statutory entitlement, it's not just wages but all benefits, including
 - Health and disability benefits
 - Fringe benefits
 - Bonuses, commissions
 - Pension contributions



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Mitigation

- Employees are required to make best efforts to find *comparable* position
- Any income earned in another position during reasonable notice period is deducted from the payment for reasonable notice
- E.I. payments received by employee also have to be repaid
- Problem is at time of termination, no one knows if, when or how the employee will mitigate



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Preparing a Severance Package

- Give ESA minimum entitlements plus \$X in exchange for a release:
 - A lump sum amount representing something less than the reasonable notice period
 - Salary continuation for a period of time with a 50% claw back



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Contractual Notice

- Common law notice is the default position unless you have a termination provision which limits reasonable notice of termination
- Recommended that all employment relationships have contracts that provide for notice of termination
- If properly drafted, will avoid the cost associated with common law notice negotiations and wrongful dismissal lawsuits



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Contractual Notice

- Contractual notice cannot be lower than ESA minimum amounts
- Many variations of termination provision
- Precise drafting required or will be struck down by a court



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Termination Meeting: Where and When

- Where
 - Neutral
 - Privacy
- When
 - Avoid holidays and vacations
 - Avoid Fridays
 - End of day



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Termination Meeting: Who and What

- Who
 - Two members of management

- What
 - Termination letter that sets out
 - When termination effective
 - Payment



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Termination Meeting: How

- Have script prepared
- Be brief
- No debate; time for discussion is over
- Avoid personal and emotional remarks
- Explain how it will be communicated to others
- Review termination letter



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Termination Meeting: How, Con't

- If settlement offer, DO NOT allow employee to sign off at termination meeting
- Discuss reference letter
- Return of company property
- Explain immediate next steps, where they go now, how to get personal property
- Offer taxi ride home



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QUESTIONS



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