Wrongful Dismissal

Improper Termination of Employment By Failure to Provide Proper Notice or Pay-In-Lieu

A Guide to Understanding What Constitutes as a Wrongful Dismissal Being Termination Without Proper Notice or Pay In Lieu of Notice

Eventually every employment arrangement ends; unfortunately however, planning the 'end' is often a failing when the employment arrangement begins. While it is commonplace and quite reasonable that both employer and employee wish to discuss the employment in a positive atmosphere during interviews and the hiring process, much future grief could be avoided by carefully discussing and agreeing to the termination terms in advance.

Termination Pay (pay in lieu of working notice)

It is common that employer and employee are unfamiliar with the laws that apply in an employment termination situation. Often the employer and employee are under the false notion that termination pay, among other issues, is entirely prescribed by the ***Employment Standards Act, 2000***, S.O. 2000, Chapter 41. This is not so; the ***ESA*** merely prescribes the minimum requirements!

It is important to remain aware that there is no 'Rule of Thumb' despite the popular myth that a dismissed employee is entitled to one month of compensation for every year of service. In 1999, this 'myth' was explicitly rejected by the Ontario Court of Appeal in the case of ***Minott v. O'Shanter Development Company Ltd.***, 42 O.R. (3d) 321.

Unless an enforceable clause within a written contract exists that expressly states that the ***ESA*** minimum is indeed what applies, there is a "presumption that the contract is terminable without cause only on reasonable notice"; ***Machtinger v. HOJ Industries Ltd.***, [1992] 1 S.C.R. 986 at 1005; accordingly, an employee is entitled to 'reasonable notice'; based on a variety of factors established and loosely defined by the precedent case of ***Bardal v. Globe & Mail Ltd.***, [1960] O.W.N. 253 (H.C.). The factors from the ***Bardal*** case, which are expanded upon by other subsequent cases, include:

1. The employee's age at the time of termination;
2. The employee's position and level of responsibility;
3. The employee's length of service;
4. The employee's compensation including wages and value of benefits; and
5. The availability of similar employment to which the employee is reasonably suited given the employee's experience, training, and qualifications.

It is important to note that, "availability of similar employment" is not the same as whatever time it takes to find a similar position.

Additionally, as per the case of ***Jamieson v. Finning International Inc.***, 2009 BCSC 861, if the employee's position was highly specialized, and therefore it is reasonably expected that the employee will have greater difficulty finding a similar position, and perhaps resolve to taking a less specialized position, such an employee will be deserving of an even greater notice period.

Avoiding ESA Provisions

Often an employer will require an employee to agree to accept a specified notice period or pay-in-lieu such as a clause that limits the notice or pay-in-lieu to that prescribed within the ***ESA***. To apply and be enforceable, the specified notice period or pay-in-lieu stated within an employment contract must be in writing, must be within an enforceable contract (or severable clause), must be complete by referencing all entitlements including continuation of benefits (if any), among other things, including and of recent great significance, must expressly and clearly show that the specified notice clause, such as an ***ESA*** limiting clause, rebuts the presumption of the 'reasonable notice' provided for by the common law; ***Singh v. Qualified Metal Fabricators Ltd.***, 2016 CarswellOnt 8795 at paragraphs 9 to 16.

Failure to Mitigate

It is important for the wrongfully dismissed employee to take heed of the 'duty to mitigate'. Essentially, the employee must make a reasonable effort to get back into the workforce. Getting back into the workforce does not mean that the employee must accept any position but a reasonably similar position with reasonably similar compensation. Quite simply, the employee is unable to 'rest away'. For this reason, the wrongfully dismissed employee should keep a well documented record of efforts to find suitable employment. At a wrongful dismissal trial, the court will need to see that the employee put in a legitimate effort to find new work. With this

said, it is recognized by the courts that a wrongfully dismissed employee will need a 'mental break'. Accordingly, the courts generally accept that a wrongfully dismissed employee takes a few weeks off before beginning a work search. A wrongfully dismissed employee can 'null & void' all liability owed by an employer due to a 'failure to mitigate'; accordingly, it is imperative that the employee put in a genuinely valiant effort towards finding new employment.

Claiming General Damages (distress injuries)

When an employment is terminated, the Plaintiff often experiences some level of distress. A sudden state of unemployment can, and often is, very distressing; however, so long as the Plaintiff experiences such distress solely as a result of the termination of employment, the Plaintiff will find that litigation against the employer for this distress will be unfruitful. This is because a contract of employment is always eventually going to end and there is a certain amount of distress presumed and expected. Often a newly unemployed Plaintiff will also 'feel' that the past employer should pay something simply for making the Plaintiff feel sad about the loss of a job; however, the law requires more before an employer can be successfully called upon in law to compensate for causing distress. This 'more' is known as "an independently actionable wrong". This "independently actionable wrong" is generally some improper conduct beyond the termination of employment such as a wrongful conduct in the manner or reasons for the termination such as an allegation that the employee engaged in a theft or other unlawful conduct. An employer that attempts to support a termination with harsh allegations had better be well prepared to demonstrate that the allegations were accurate; otherwise, the employer may be placed at risk of paying much more than just compensation for breach of the employment contract.

In addition to the requirement of "an independently actionable wrong" beyond just the breach of the employment contract, it is common that a claim for general damages (distress injuries) will require medical expert evidence. In the past, and therefore the viewpoint of 'old school' legal people, distress injuries were compensable only where proof in the form of medical expert evidence was provided, such as reports from a psychologist. Subsequently, in 1997, the Supreme Court of Canada ruled in ***Wallace v. United Grain Growers Ltd.***, [1997] 3 S.C.R. 701 that distress for "an independently actionable wrong" should be compensated by

bumping up the notice period - so if for example, an employee was found to deserve six (6) months notice, the Rule became such that a few extra months could be tacked on. However, in 2008, the Supreme Court changed its mind in ***Honda Canada Inc. v. Keays***, [2008] 2 S.C.R. 362 and stated that awards for distress injuries, where appropriate, should be compensated in the usual way via a monetary award for the value of distress caused as determined by a court. This return to the requirement of a genuine formulation in establishing appropriate monetary compensation to compensate for distress injury rather than simply 'bumping up' the notice period as a means of punishing the employer for whatever "independently actionable wrong" was committed appears to result in a system that more accurately provides compensation when compensation is due except of the added challenge to the Plaintiff of once again needing to both prove that distress injuries occurred and what is the reasonable amount due for the level of distress injuries suffered. Many courts require that this 'proof' come solely in the form of medical expert evidence while some courts will also accept the testimony of the Plaintiff. While it is always best to provide medical expert evidence if such is available, it is clear from the case of ***Canadian Pacific Railway Company v. Unifor and its Local 101R***, 2014 CanLII 22982 (CA LA) that such is not absolutely necessary:

> 79. The amount of damages awarded depends on the seriousness and severity of the injury suffered. Expert evidence, including medical reports, would be a useful aide in the assessment of damages. However, expert evidence is not a requirement and damages can be determined through other means, including the credible testimony of the claimant. An award of $5000 is substantially less than the amount awarded by the Courts in a number of recent cases where there was little or no medical evidence to support a finding of mental distress. (see *Chappell v. Canadian Pacific Railway Company*, 2010 ABQB 441 (CanLII) - $20,000; *Simmons v. Webb* (2008), 2008 CanLII 67908 (ON SC), 54 B.L.R. (4th) 197 (Ont. S.C.) - $20,000 ; *Coppola v. Capital Pontiac, Buick, Cadillac, GMC*, 2011 SKQB 318 (CanLII) - $25,000).

Constructive Dismissal

An employer that makes a fundamental and unfavourable change to the employment relationship may be deemed to have constructively dismissed the employee. While the employee may resign, the common law courts may deem that

the employee suffered from constructive dismissal.