

Background - EMPLOYEE DISMISSAL

The dismissal of an employee is never an easy or pleasant task and is also one that, if not handled properly, can result in future costly and time consuming problems. However if a few simple rules are followed, the potential problems of cost and time may be avoided.

Any employee (other than a unionized employee covered by a Collective Agreement)* can be released at any time, with or without just cause, if the relevant rules and regulations of the applicable provincial or territorial Employment Standards Legislation are adhered to.

*(A Collective Agreement covering unionized employees will contain provisions concerning discipline, suspension, discharge and an arbitration procedure which must be followed in an employee dismissal process).

The applicable Employment Standards Legislation will include a required notice period (a number of weeks based on length of employment) that must be provided to an employee whose employment is to be terminated. The employer has the unilateral right to provide pay in lieu of the notice period which is the usual choice in the case of an employee dismissal.

An employer is not required to provide any notice, or pay in lieu of notice, if an employee is dismissed for what is commonly referred to as “Just Cause”. What is “Just Cause”? Jurisprudence, in the case of an employee dismissal, considers it as follows.

“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 if he has been guilty of willful disobedience to the employer’s orders in a matter of substance, the law recognizes the employer’s right summarily to dismiss the delinquent employee”. *R v. Arthurs (1967)62 D.L.R. (2d) 342 at 348(Ont.C.A.); affirmed [1969]S.C.R.85.*

To justify the dismissal of an employee on the basis of “Just Cause” an employer must comply with certain words and phrases in the above paragraph that are open to interpretation.

For example:

“guilty of serious misconduct” - Certainly one would think that theft would be considered serious misconduct. But is the employee guilty? The employer may have irrefutable evidence or evidence that would prove beyond a reasonable doubt that an employee is guilty of theft. However, in law, an individual cannot be considered guilty of theft unless he or she pleads guilty or is found guilty in a court of law.

“habitual neglect of duty” – Obviously one occurrence of neglect, incompetence or misconduct cannot be considered habitual. Therefore what is often referred to as the “three strikes and you’re out” rule has become the benchmark to meet the definition of “habitual”. With the first such occurrence, the employer should verbally (or in writing) inform the employee that the occurrence is unacceptable and should not happen again. If there is a second similar occurrence, the employee should receive a letter, signed by a recognized official of the employer, wherein reference is made to the previous warning and a statement such as “any further similar occurrences will result in disciplinary action up to and including dismissal”. If the above steps are completed and well documented and there is a third occurrence resulting in the employee’s dismissal the required definition of “habitual” should be met.

It is often difficult therefore to substantiate a dismissal for “Just Cause” and it can often be rather costly and time consuming to attempt to do so. As a result many employers forego the argument of “Just Cause” and simply comply with the applicable legislation and terminate the employee without cause.

If a dismissed employee believes that he or she has been denied their rights, they may seek the assistance of the appropriate employment standards office where their case will be reviewed. At this review stage, an Employment Standards Officer will, in the majority of cases, find in favour of the dismissed employee. They do so to force the issue to either a resolution acceptable to the ex-employee or to a formal judicial hearing where an order binding on the parties can be made. It should be noted that the burden of proof for a “Just Cause” dismissal will rest with the employer.

Furthermore, even if the employer does comply fully with the applicable Employment Standards Legislation or meets the qualification of a “Just Cause” dismissal there is no guarantee that there will not be future problems to deal with concerning the ex-employee. For example, he or she may decide that their sore back results from their former employment and seek compensation from the appropriate provincial or territorial workers compensation office. Or they may believe that their dismissal resulted from some form of discrimination or harassment and seek redress from the appropriate provincial Human Rights Tribunal.

To avoid the possibility of future concerns with a dismissed employee, the employer should seek to have a “Full and Final Release” document signed by the individual. Generally, there is an employer cost involved in having a dismissed employee sign a release document. However, such a document is invaluable and it is recommended that an employer make every reasonable effort to convince the individual to sign such a document.

There are a number of attractive incentives that may be offered to an employee in return for a signed Release document including the following:

- Allow the employee to submit a letter of resignation stating that he or she is resigning for personal reasons. The letter would then become part of the employee's record of employment rather than a dismissal.
- Provide the employee with a letter of recommendation. Such a letter could simply state e.g. "John Smith was employed as a bartender at the Big Rock Curling Club from October 1, 2005 until March 18, 2007. John resigned for personal reasons and we wish him the best of luck in his future endeavors".
- Exercise the employer's option to provide pay in lieu of the notice period for termination required in the applicable Employment Standard Legislation.
- Increase the applicable minimum required provisions of the Employment Standards Legislation. If for example the employee would have been entitled to two weeks notice (or pay in lieu of notice), offer him or her three weeks pay.
- If the employer is convinced that a "Just Cause" dismissal is justifiable thus avoiding the normally required notice of termination (or pay in lieu of notice), inform the employee of this fact and suggest that, in return for a signed Release document, the employer would pay the employee the amount that would have been required for a dismissal without cause.

Included in this package is a suggested "Full and Final Release" document as well as a worksheet to assist in the completion of the document.