

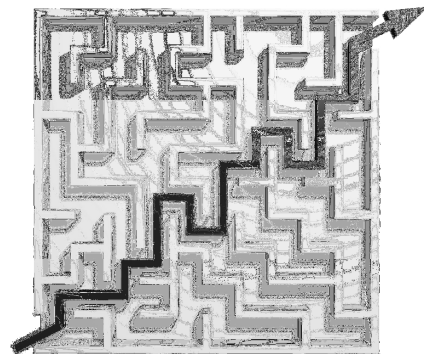
Terminating The Employment Relationship

The contents of this document are intended to provide an overview of concepts relating to the termination of a non-union employment relationship in the province of British Columbia. The termination of relationships in the union context or in other legal jurisdictions is subject to different rules and legal advice should be obtained in relation to those specific rules.

Wrongful Dismissal

The concept of wrongful dismissal is often misunderstood. Wrongful dismissal does not mean that employers cannot dismiss employees without just cause reasons. Rather, “wrongful dismissal” refers to situations where the employer fails to give the employee adequate working notice that the employment relationship is being terminated.

- Working notice of termination must be provided unless the employer has valid just cause reasons for summary dismissal. The *Employment Standards Act* sets out the minimum notice periods required by statute. If the parties want those minimum notice periods to apply, they must adopt them in the contract for employment. Otherwise, the common law will be used to determine a “reasonable” notice period (usually substantially lengthier than the statutory minimums).
- In most cases, equivalent pay in lieu of notice can be provided instead of, or in combination with, working notice. However, the employee’s entitlements in lieu of working notice go beyond wages, and issues relating to continuation of benefits coverage and other perquisites of employment must be considered if the employer intends to provide compensation in lieu of the working notice period.



The Employment Contract

Employment contracts set out the terms of employment. They can be written or oral or a combination of the two. There may also be implied terms that become part of the contract whether or not the parties expressly agree.

- B.C.’s courts now seem settled on the point that the contents of B.C.’s *Employment Standards Act* (claims for items such as payment of minimum wage, vacation pay, overtime pay, etc.) must be pursued before the Employment Standards Tribunal.
- There are very strict and specific legal rules governing the establishment of binding employment contracts. Legal advice should be obtained in this regard.
- An employment contract may contain specific provisions setting out how and when the employment relationship can be terminated and how much notice must be given. If the contract does not set this out, or if the provisions violate the minimum statutory requirements for notice, the notice period will be determined according to the common law.

- The common law consists of a body of rules made by judges. The common law regarding wrongful dismissal is relatively clear. Essentially, the notice period must be “reasonable”. A number of factors are used to determine how much notice is reasonable for a given employee. Each notice period will be different depending on the operation of these factors.

Notice Periods

Adequate working notice must be given when an employee is terminated without cause (although the employer can provide equivalent payment in lieu of working notice). If the employer does not offer payment in lieu of notice, the employee must work throughout the notice period unless there are special circumstances. Working notice of termination is invalid if it is given while the employee is on leave.

a. Statutory Notice Periods

- In order for the statutory minimum to apply (to limit the employer’s exposure to liability for wrongful dismissal damages under the common law), this intention must be clearly written into a binding employment contract. If the contract clearly stipulates that notice will be determined only according to the statute, the *Employment Standards Act* will be used to calculate the notice period.
- It is important to note that, in certain situations, federal operations will be regulated under the *Canada Labour Code* which has different rules than the *Employment Standards Act*. If the employer’s operation is not limited to British Columbia, it can be difficult to predict which statute will apply. In that case, it is wise to consult with a lawyer.
- Pursuant to the B.C. *Employment Standards Act*, an employee’s notice entitlement is calculated as follows:
 - After three months of consecutive employment, one week of notice or pay.
 - After twelve months of consecutive employment, two weeks of notice or pay.
 - After three years of consecutive employment, three weeks of notice or pay.
 - For each additional year after the first three, the employee is entitled to one more week of notice up to a maximum of eight weeks notice or pay in lieu of notice.
- Under the *Act*, a week of pay is calculated by totaling the wages, commissions, etc. earned by the employee in the last eight weeks that the employee worked normal hours (at the regular wage) and dividing that figure by eight.

b. Common Law Notice Periods

- The common law notice period will apply in the absence of a binding contract stipulating otherwise. Calculating the common law notice period is more complicated and unpredictable than calculating notice under the *Act*. Essentially, there are four factors that go to determining “reasonable notice”.
 - Age of the Employee: Older employees usually get more notice.
 - Length of Service: A longer term of employment will entitle an employee to a longer notice period.
 - Availability of Similar Employment: If the type of employment is particularly rare or if the employer holds a monopoly on the industry, this will increase the notice period as it will be more difficult to find new comparable employment.

- Nature of the Employment: If the employee's position requires significant expertise, he or she will be entitled to greater notice.
- In addition to these four factors, other factors may be relevant in certain circumstances. For example, "bad faith" and "inducement" can go towards increasing the applicable notice period. Bad faith would be evidenced in the employer's unfair manner of dismissal. Inducement occurs when the employee has been recruited from a prior secure position and then is subsequently dismissed.
- While common law notice periods are commonly greater than what is required under the statute, they generally do not exceed 24 months. This is considered the "rough upper limit" and is usually only granted in cases where there are special circumstances.
- When an employee is given pay in lieu of notice, damages will be calculated with the goal of putting the employee in the position they would have been in had they throughout the notice period. All amounts that would have been received by virtue of employment during that period must be taken into account. This includes salary and may include amounts for commissions, bonuses, benefits and stock options that would have vested during the notice period. In terms of benefits, such as dental coverage, the employee is only entitled to what he or she suffers as a loss rather than the actual contributions (in the form of premiums) the employer would have made to the plan.
- The burden is on the employee to prove that he or she was actually entitled to the various amounts during the notice period.

Duty to Mitigate

When an employee is wrongfully terminated, he or she has a legal obligation to "mitigate" (or minimize) the resulting losses. In order to mitigate, the employee must make reasonable efforts to find suitable, alternative employment. If the employee finds such employment during the notice period, amounts earned will be deducted from the notice period pay.

- Failure to mitigate may lead to an amount being deducted from the damages where the employee failed to take advantage of opportunities. The burden is on the employer to prove that the employee did not make reasonable efforts to find alternative employment.
- The duty to mitigate applies regardless of whether the employee has been actually or constructively dismissed.

Constructive Dismissal

Constructive dismissal occurs when the employer fundamentally alters an essential term of the employment contract. The difficulty lies in assessing whether the alteration is fundamental and whether the term is essential. Legal advice may be necessary to determine whether a particular act amounts to constructive dismissal.

- Examples of circumstances that may result in a constructive dismissal include large pay cuts, humiliating changes in duties, significant demotions, and ongoing workplace harassment. When the employee does not agree to these conditions or changes, a court may find that he or she has been constructively dismissed.

- An employee who does not, within a reasonable period, object to the treatment and remove him or herself from the workplace, is effectively acquiescing to the treatment and may lose the right to treat it as a constructive dismissal.
- Constructive dismissal is the equivalent to wrongful dismissal. When it occurs, payment in lieu of reasonable notice is required in the same manner as it is required for an actual termination.
- As with termination, there is a duty upon employees to mitigate their losses in a situation of constructive dismissal. In some circumstances, this will require the employee to remain at the job during the notice period or until they have secured new employment. However, in situations where it would be humiliating to do so or where the employment atmosphere is poisoned or hostile, this will not be required.

Just Cause

The above discussion outlines the rules that apply in a situation where employment is terminated without cause. When the employer believes it has “just cause” reasons for dismissal, different rules apply. The key difference is that the employer is not required to give working notice - the employee can be dismissed summarily.

- It is often difficult to ascertain whether the employee’s actions actually give the employer just cause for summary dismissal. Just cause is a high legal threshold to meet and many employers who believe they have just cause grounds are disappointed to discover that the courts do not agree.
- It is important to note that just cause is an ‘all or nothing’ concept. Accordingly, full notice will still be required where the employee’s actions almost, but not quite, give the employer just cause reasons for summary dismissal.
- In order to amount to just cause, the employee’s misbehavior must be very serious. Essentially, the employee’s act must deliberately breach or violate a term of the employment contract. The term that is breached does not have to be a term that is spelled out in the contract. Certain terms are implied in all employment contracts and a breach of such a term can amount to just cause. For example, it is an implied term of every employment contract that the employee will faithfully serve the employer. Thus, proven acts of dishonesty by the employee may give the employer just cause for dismissal.
- Less serious infractions will not give rise to just cause. For instance, poor performance will rarely amount to just cause unless the employee has been given numerous warnings and refuses to attempt to improve.
- If the employer believes the employee has done something that amounts to just cause for summary dismissal, the employer should confront the employee and give them a chance to explain. If there is a satisfactory explanation, it is better to learn of it sooner as opposed to later.
- It is critical, in circumstances of repeated misconduct, that the employer properly document and communicate to the employee the inappropriate nature of the conduct, its expectations in relation to future conduct, any disciplinary measures which are being imposed, and a warning as to the possible ramifications of future misconduct.

Probationary Employees

Employees can be hired on a probationary basis. In order for an employee to be classified as such, the employment contract must clearly provide for it. Specific contractual language is required to establish an enforceable probationary period and legal advice should be obtained in this regard. During the term of probationary employment, an employee can be dismissed without notice or just cause. The probationary period allows the employer to dismiss an employee without notice simply on the basis that the employee is not "suitable".

Mandatory Retirement

Effective January 1, 2008, employers in B.C. (falling within the provincial jurisdiction) are no longer able to require employees to retire at the age of 65. As a result of these changes to the law, terminations of employment which are triggered solely on the basis that the employee is past the age of 65 are unlawful.

- Mandatory retirement policies will no longer serve the role of providing notice of termination to employees reaching age 65. Employers must keep this in mind when seeking to terminate aging employees and provide them with proper notice or pay in lieu of notice. If they do not do so, the employee may have a claim for wrongful dismissal.

This information applies as a general rule but may change depending upon the specific circumstances of your own situation. You should consult a lawyer before acting on any of this information.

If you have any questions, please do not hesitate to contact us:

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