

Managing Tricky Termination Issues

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Overview

- Terminations are a leading source of HR issues and employment law claims
- Employers must approach tricky terminations carefully to minimize risk
- This webinar will review how to navigate complex terminations, resignations, retirements, and job abandonment
- This webinar should not be relied on in lieu of legal advice, and you should always consult with your employment lawyer to understand your legal options and obligations

Agenda

1. Identifying and Mitigating Risks Associated with Terminations
2. Best Practices for Conducting Terminations
3. Tricky Termination Scenarios
 - i. Dismissing a chronically absent employee
 - ii. Dismissing an employee on a leave
 - iii. Dismissing spouses or members of the same family
 - iv. Dismissing someone before they start work
 - v. Dismissing someone without cause when there is cause

1) Identifying and Mitigating Risks Associated with Terminations

- If an employment relationship is not working, leaving aside *Human Rights Code* and reprisal considerations, the employee may be dismissed
- When an employee is dismissed, generally the employee will be entitled to their minimum statutory termination entitlements and reasonable notice at common law (judge-based law)
- In Ontario, the *Employment Standards Act* entitlements are termination notice or pay in lieu of notice (capped at 8 weeks), severance pay (applying only after 5 years of service and only where the employer's worldwide payroll is over \$2.5m per annum, capped at 26 weeks), benefits continuance during the termination pay period, and vacation pay on the termination pay

1) Identifying and Mitigating Risks Associated with Terminations

- Common law termination entitlements are normally more substantial than statutory termination entitlements and are based on a consideration of various factors (e.g. position, compensation, length of employment, age of the employee, the job market, and whether they were poached)
- For example, an employee with 20 years of service may be entitled to only 8 weeks' statutory termination pay, but entitled to 22 – 24 months' termination compensation at common law
- Unlike statutory entitlements, common law entitlements are subject to mitigation

1) Identifying and Mitigating Risks Associated with Terminations

- There are three exceptions to these entitlements:
 - 1) where the company is dismissing the employee for cause and for wilful misconduct
 - 2) where there is frustration
 - 3) where the company has properly limited the employee's termination entitlements by way of an enforceable employment agreement

1) Identifying and Mitigating Risks Associated with Terminations

- Before proceeding with the dismissal, it's important to understand the minefield and options
- To properly identify and mitigate risks, you should consider:
 - 1) whether the employee is limited to their minimum statutory entitlements by way of a written employment agreement;
 - 2) what the employee's statutory and common law entitlements are (or would be if their agreement was unenforceable);
 - 3) whether there are other categories of damages that may be owing to the employee (e.g., unpaid vacation pay, unpaid overtime pay, compensation for a violation of the Human Rights Code, etc.);
 - 4) whether there is just cause and willful misconduct;
 - 5) whether the employee should be given the choice between a Performance Improvement Plan and a mutual separation package;

1) Identifying and Mitigating Risks Associated with Terminations

- To properly identify and mitigate risks, you should consider (continued):
 - 6) whether the employment relationship is coming to an end due to frustration;
 - 7) whether the employee may be open to a mutual separation package (further to a retirement or a desired departure);
 - 8) whether the employee may be open to a demotion or other changes that would make their continued employment tenable;
 - 9) whether you would be open to offering them another opportunity, post-dismissal; and
 - 10) whether working notice is appropriate.

2) Best Practices for Conducting Terminations

- After the decision to terminate has been made, employers need to prepare for the termination process. This involves three things: (i) planning for the termination meeting; (ii) conducting the termination meeting; and (iii) addressing follow up matters after the termination meeting

A. Planning the Termination Meeting

(i) Prepare A Written Termination Letter

- It is important to have a written termination letter which is provided to the terminated employee at the end of the termination meeting (either in a sealed envelope if the meeting is taking place in person or via email if the termination is taking place via video call)

2) Best Practices for Conducting Terminations

- In the termination letter the employer needs to confirm whether the termination is happening immediately or whether some period of working notice is being provided
- If the termination is taking place on a without cause basis, the termination letter should clearly outline the terms of the severance package being offered
- If the employer is alleging that just cause and/or wilful misconduct exists, this should be detailed in the termination letter
- The termination letter should indicate whether the employer is willing to offer a letter of reference in a mutually agreed-to form or will only provide a letter confirming employment
- The termination letter should address how the employee is to return all Company property in their possession
- The termination letter should also outline the process and deadlines for the terminated employee's ability to convert any group life coverages or other benefits they received as employees to individual policies

2) Best Practices for Conducting Terminations

(ii) Prepare a Full and Final Release

- If an employer is offering the terminated employee more than the statutory minimum, the payment of anything beyond the statutory minimum should be made contingent upon the employee signing and returning a Full and Final Release which will be included with the termination letter
- The termination letter should indicate the deadline by which the executed Full and Final Release must be returned
- If a Release is not obtained, then the terminated employee remains free to commence a wrongful dismissal claim even if the employer has already provided the employee with more notice of termination than required pursuant to the relevant legislation

2) Best Practices for Conducting Terminations

B. Conducting the Termination Meeting

(i) Have Two Persons from the Employer Present

- Regardless as to whether the termination meeting takes place in person or via a video call, there should always be two persons from the employer at the termination meeting
- This prevents situations where, subsequent to the termination, a terminated employee attempts to claim that they were threatened to settle or placed under duress during the termination meeting

(ii) Keep the Termination Meeting Brief

- The termination meeting should be brief
- The reality is the employer's decision will not change
- If terminating for cause, do briefly outline the basis for the termination

2) Best Practices for Conducting Terminations

- Termination meetings should be scheduled in a way that minimizes embarrassment to the employee and visibility of the termination to other employees, such as early morning, end of day or over the lunch hour
- Do not go into the details of any severance package in the meeting, only state that the employer has made an offer to assist the terminated employee in their transition to alternate employment

C. Addressing Follow Up Matters After the Termination Meeting

- After the brief termination meeting, one of the two persons from the employer attending the meeting should escort the employee to their work area in order to permit them to collect any personal belongings
- Following this, the terminated employee should leave the workplace
- Employers should consider before the termination meeting whether it is necessary to make arrangements for the terminated employee to return home either by way of a taxi or an uber if they do not drive themselves to the workplace

2) Best Practices for Conducting Terminations

- It is very important to ensure that all Company property has been collected from the terminated employee before they leave the workplace or, if the employee is working remotely at the time of the termination or if not all Company property is present at the workplace, then the process by which the Company's property is to be returned must be clearly outlined
- Arrangements should be made prior to the meeting to ensure all employee access is being shut down, either during the termination meeting or immediately afterwards
- If the employee is in a sales or marketing role, the employer should be in the position to, immediately after the termination meeting, advise clients that employee "X" is now pursuing other business opportunities and that your new contact at the company is employee "Y"
- Internally, a brief notice should be sent to employees advising that employee "X" is no longer with the Company
- Ensure that the Company's payroll and benefits providers are advised of the termination, as may be applicable
- Diarize the date by which the Full and Final Release must be returned

3)i) Tricky Termination Scenarios: The Chronically Absent Worker

- When an employee is chronically late, leaves early, or frequently requires time off, it can create serious operational issues
- When an employee is late, leaves early, or needs time off, it is important to ask why
- If the issue is not related to any protected grounds (e.g. it's not because of health issues or family obligations), then the attendance issues should be addressed by progressive discipline and the employee can be dismissed
- The discipline paperwork should expressly confirm the reason for the attendance issue (e.g. you let us know you were late today, as your alarm did not go off)
- This will help avoid later claims that the discipline and/or dismissal were discriminatory

3)i) Tricky Termination Scenarios: The Chronically Absent Worker

- If the issue is related to a personal health issue, then they are protected by the *Human Rights Code* and you cannot discipline or dismiss the employee based on their attendance issues
- However, if their attendance issues have caused you to reasonably suspect they are not able to safely perform their duties, then you may place them on an unpaid leave of absence
- If/when the employee states they believe they are fit to return to work, you should provide them with a medical questionnaire for their health care provider to complete
- This questionnaire should confirm that they are able to perform their duties and should confirm if there is any accommodation required
- If there remains concerns after reviewing the questionnaire, you may wish to consider having an independent medical examination conducted

3)i) Tricky Termination Scenarios: The Chronically Absent Worker

- In the matter of Irvine v. Gauthier (Jim) Chevrolet Oldsmobile Cadillac Ltd., the employer placed an employee on an unpaid leave and claimed that it was related to the employee's health problems
- The employee had lost sight in one of his eyes two years prior, but the employer had no reason to believe that the employee now was medically unable to safely perform his job
- The Court found that placing an employee on a leave without any medical basis constituted a constructive dismissal (i.e. effective firing)
- Further to this decision, employers should ensure that they provide the employee with a leave letter that confirms:
 - ✓ the reasons for the unilateral leave (e.g. when are concerned about your health because of...)
 - ✓ that the employee is able to come back to work once it is confirmed that they are fit to work and if any accommodation is required

3)ii) Tricky Termination Scenarios: On a Leave

- If an employee is on a protected leave, they are normally entitled to be returned to their pre-leave position or (if the position is eliminated) a comparable position
- The law works to ensure that they are no worse off as a result of taking a leave
- However, the law does not make them better off than if they had never taken a leave
- In the case of *Peternel v. Custom Granite & Mable Ltd.*, the Court held: “Section 53 of the ESA does not guarantee that an employee who takes a statutory leave will be in a better position than if he or she had not taken the leave. It simply protects the employee from being disadvantaged because he or she took the leave.”

3)ii) Tricky Termination Scenarios: On a Leave

- There are four circumstances where an employment relationship can properly end for an employee on a leave:
 - 1) The employment relationship comes to an end as a result of frustration (e.g. the employee is unable to perform their fundamental duties for the foreseeable future)
 - The key is to ensure that you have medical documentation that confirms the employee is unable to perform their fundamental duties for the foreseeable future
 - If you do not have documentation, you should provide the employee with a medical questionnaire for completion
 - 2) They are dismissed for legitimate business reasons and there is no open comparable position
 - It is important to have proper internal documentation, such as emails between the management team members about the restructuring, who is being selected, why they are selected, a consideration of other positions, etc.
 - If the employee is on a parental leave, to be supportive, you may wish to structure it so that the dismissal occurs at the end of their leave

3)ii) Tricky Termination Scenarios: On a Leave

- There are four circumstances where an employment relationship can properly end for an employee on a leave (continued):
 - 3) They are dismissed for just cause, which was only uncovered during their leave
 - Before proceeding with the dismissal, you should go through a proper investigation into the cause allegations and allow them an opportunity to respond
 - If it would be inappropriate or impossible to conduct the investigation during their leave, then you should let them know that when their leave ends, they will be placed on an administrative leave so that an investigation can be conducted
 - It is critical to have proper documentation that confirms the on-leave discovery, the proper handling of the cause allegations, and the basis for the dismissal
 - 4) They accept a mutual agreeable package
 - Employers should be careful in presenting a possible separation package, so that it is couched in supportive and respectful language (e.g. we want to support you, you can stay if you want to, etc.)
 - The mutual separation package letter should confirm that the employee requested to be presented with the package and that the company is seeking to be supportive

3)iii) Tricky Termination Scenarios: Spouses and Family Members

- It is common for spouses and family members to work together, especially when employers rely on referrals to find strong employees
- Good employees often help attract other good employees, including family members
- However, when employment ends for spouses or individuals who are family members, employers must carefully manage perceptions of discrimination
- The decision to dismiss a spouse or individuals from the same family must be based on objective, legitimate reasons
- It cannot be based on their relationship, as that would be a violation of the *Human Rights Code*
- For example, in the matter of *B. v. Ontario (Human Rights Commission)*, the employee was dismissed because two members of his family had accused the owner of criminal conduct
- The Supreme Court of Canada held that as the dismissal was based on the employee's familial relationships, not job performance, it was discriminatory

3)iii) Tricky Termination Scenarios: Spouses and Family Members

- To protect against any possible claim of discrimination, it would be helpful to have internal documents that confirm the reasoning behind the decision (e.g. emails between management team members)
- Employers should also be mindful that the employees will no doubt work together to obtain appropriate separation packages

3)iv) Tricky Termination Scenarios: Dismissing Someone Before They Start Work

- On occasion, after an offer of employment has been provided and accepted, an employer's circumstances can change
- While not an everyday occurrence, this did become more prevalent during the COVID-19 Pandemic
- In such circumstances, an employer now faces the need to withdraw an offer or to terminate a person who has accepted an offer of employment but has not yet started work
- It is important to note that the fact that the employment relationship has ended before the first day of work, does not necessarily relieve the employer from having to provide the terminated "employee" with pay in lieu of notice of termination

3)iv) Tricky Termination Scenarios: Dismissing Someone Before They Start Work

- In the 2020 decision of *Kim v. BT Express Freight Systems*, the Ontario Superior Court held that employers can be liable for damages if an accepted offer of employment is either withdrawn or if the employment is terminated on a without cause basis prior to the start date
- In this case, the Plaintiff was employed, and while he was not actively searching for new employment, his resume was posted on a job search site
- The Defendant saw the Plaintiff's resume and ultimately offered him a position which had a base salary 60% higher than what the Plaintiff was currently receiving
- Five days prior to the Plaintiff's start date, however, the Defendant sent the Plaintiff a letter advising that its offer of employment was being withdrawn
- While the Plaintiff had been employed when he was provided the Defendant's offer, in the interim, his employer had already hired his replacement
- As such, the Plaintiff was not able to return to work with his prior employer

3)iv) Tricky Termination Scenarios: Dismissing Someone Before They Start Work

- The Plaintiff then brought a wrongful dismissal claim
- The Defendant attempted to argue that no amounts were owing to the Plaintiff given the fact that the Employment Agreement had a three-month probation period
- The Court held that the Defendant could not rely on the probation period given the fact that, as a result of the termination, the Plaintiff was not actually given the opportunity to prove himself in the position
- The Employment Agreement did not have an enforceable termination provision
- As a result, the Court held the Plaintiff was entitled to reasonable notice at common law
- When considering the relevant common law factors, including the fact the Plaintiff had been solicited from secure employment, the Court awarded the Plaintiff three months' notice of termination

3)iv)Tricky Termination Scenarios: Dismissing Someone Before They Start Work

- A similar decision was reached in **Buchanan v. Introjunction Ltd.** where the British Columbia Superior Court awarded pay in lieu of notice to an employee who was advised three days before his start date that the position no longer existed
- This employee was also solicited from secure employment
- As it happens, however, the Plaintiff was only unemployed for six weeks after the offer was withdrawn
- This, in all likelihood, was the reason why the Court only awarded six weeks' pay in lieu of notice
- The Court also rejected the employer's probation period argument, holding that a probationary period is intended to monitor performance issues and not to limit an employee's termination obligations in this context

3)iv) Tricky Termination Scenarios: Dismissing Someone Before They Start Work

- There are a number of key takeaways from this Decision:
 - Written employment agreements are considered binding even before the new employee actually begins work;
 - If the Employment Agreement does not contain an enforceable termination provision, the terminated “employee” will be entitled to receive reasonable notice of termination at common law;
 - If faced with these circumstances, when advising the prospective employee that the offer is being withdrawn, employers should consider making some form of offer to the employee;
 - Note that employers may still terminate before an employee starts work and not be required to provide any pay in lieu of notice if:
 - The job offer had certain conditions which were not met (such as reference checks or criminal reference checks); or
 - It is determined that the prospective employee lied in their job interview, in their resume or in the application materials

3)v) Tricky Termination Scenarios: Dismissing Someone Without Cause When There is Cause

- As all employees know, terminating an employee on a with just cause basis in Canada is very difficult
- First, from a legal perspective, it is technically difficult for employers to successfully terminate on a with just cause basis
- Unless an employer is dealing with one of the rare instances where a single event or behaviour can justify an immediate with cause termination, a system of progressive discipline needs to be followed by the employer before a with cause termination takes place
- This is generally a time-consuming process and a Court can rely on any missteps an employer makes during the process to invalidate a with just cause termination
- Also, there can also be circumstances where an employer can demonstrate just cause at common law, but not establish wilful misconduct pursuant to the Ontario *Employment Standards Act, 2000*

3)v) Tricky Termination Scenarios: Dismissing Someone Without Cause When There is Cause

- Second, terminating an employee on a with just cause basis can be difficult on an interpersonal and an emotional level
- While all termination meetings can be uncomfortable, a for cause termination can be even more uncomfortable
- As such, there may be a tendency amongst employers who believe they have just cause to terminate to instead just terminate on a without cause basis
- This tendency needs to be avoided

3)v) Tricky Termination Scenarios: Dismissing Someone Without Cause When There is Cause

- The recent decision of **Ayalew v. The Council for the Advancement of African Canadians in Alberta** demonstrates the risk in taking the above approach
- In this case, the Plaintiff had been employed for about ten years
- Prior to the termination, a number of employees had alleged the Plaintiff bullied, harassed and acted in a discriminatory manner towards a number of employees who reported to him
- The employer engaged a third-party investigator to investigate this matter
- Following the employer's receipt of the Investigator's Report, the employer terminated the Plaintiff
- The Plaintiff then brought a wrongful dismissal claim at which time the employer attempted to defend on the basis that it did have just cause to terminate the Plaintiff

3)v) Tricky Termination Scenarios: Dismissing Someone Without Cause When There is Cause

- The Court did not accept the employer's Defence, given that:
 - The employer provided a termination letter which explicitly stated the employee was being terminated without cause;
 - At no time, either prior to the termination or at the termination meeting, did the employer advise the Plaintiff that it had any cause to terminate;
 - The employer provided the employee with his statutory entitlements under the Alberta *Employment Standards Code* (the Alberta Code does not have the same wilful misconduct threshold that the ESA does); and
 - There was no indication that the employer had gained any new information post-termination which could have permitted it to terminate based on *after acquired cause*.

3)v) Tricky Termination Scenarios: Dismissing Someone Without Cause When There is Cause

Key Takeaways:

- If an employer has facts to justify a termination either on a with just cause basis and/or based on wilful misconduct, the employer should take this position at the time of termination and the relevant facts should be referenced in the termination letter
- Without putting the employee on notice that cause/wilful misconduct exists, the employer can lose the ability to defend any claim the terminated employee may bring on the basis it can terminate for just cause
- A possible middle position an employer may decide to take is to advise that it has the ability to terminate based on just cause and/or wilful misconduct, but to also provide a without prejudice offer to the terminated employee, which would be for less pay in lieu of notice of termination than the employee would be entitled to in a “normal” without cause termination

Managing your HR Issues

Wilson Vukelich LLP can help ensure that your employment and labour law matters are handled effectively and efficiently, and in a manner that is reflective of new legal developments and obligations. If you have any questions or require further information, please contact:

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