SECTION 8

Employee Terminations: The Employer's Rights and Responsibilities

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EMPLOYEE TERMINATIONS
THE EMPLOYER'S RIGHTS AND RESPONSIBILITIES

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A. *Determining Jurisdiction*

Both the federal and provincial legislatures have the power to deal with the termination of non-union employees in the workplace. as do the Canadian courts. The jurisdiction of the provincial and federal governments arises from the Constitution 1867. Sections 91 and 92. For the purpose of this discussion. we are not concerned with those situations where there exists a collective agreement between an employer and a union (acting on behalf of the employees). In those situations, it would be clear whether provincial or federal legislation applies and the employment relationship would be governed by the collective agreement.

The first question that must be answered when considering a "not for cause" termination of an employee where an employer/employee relationship exists outside of a unionized setting, is which legislation applies - federal or provincial? Does the *Canada Labour Code* or a provincial Employment Standards Act apply?

There are number of differences between the *Canada Labour Code* and provincial Employment Standards Acts. One of the most crucial differences between the two regimes that there a power under the *Canada Labour Code* to reinstate an employee who has been unjustly dismissed. That is not something that is usually available under provincial legislation. and is not something usually done at common law. There are absolute time limits set out under the *Code* for an employee to file a complaint of wrongful dismissal, so care should be taken in determining jurisdiction. If a complaint is made under the *Canada Labour Code.* the employee may still have an option to pursue other legal remedies as well. It is suggested that you contact your lawyer if a complaint is filed or an allegation of wrongful dismissal is made.

Notwithstanding provincial and federal employment standards regarding termination, the courts also have a say in an employee's entitlement upon a "not for cause" termination. The federal and

provincial governments regulate only the minimum obligations of an employer upon an employee termination.

i) Aboriginal Bands

The Federal Government has jurisdiction in some areas as a result of paragraph 91(24) of the *Constitution Act*, which grants the Federal Government jurisdiction with respect to Indians and lands reserved for Indians.

The courts have held that where there is a necessary incidental relationship between the activity and the status, identity and character of Indians. then federal employment legislation will apply. Given the somewhat vague nature of this test, it is not surprising it is often difficult to determine which legislation will apply to a particular fact situation. The following basic propositions can be made:

- If a Band employs Band members for matters relating the administration of the Band. then the *Canada Labour Code* would very likely apply.

- If a Band-owned company operates a commercial operation, even if the office is on reserve, then provincial legislation will likely apply and the employees will be subject to the provincial *Employment Standards Act.*

At one time it was thought that the identity of the employer was crucial. For example, if the employees were employed by the Band itself, then federal legislation would apply and if employed by a Band-controlled company, then provincial legislation would apply. However, recent case law holds that the identity of the employer is not determinative. Rather, the key is whether or not an operation controlled by the Band is primarily for purposes that benefit members of the Band. For instance, a drug and alcohol treatment program, a company that builds Band housing, or any other service such as education or healthcare for the Band, would likely be governed by federal legislation. If, on the other hand, the operation predominantly served the general public and only incidentally served Band members, then provincial labour legislation would likely apply. For example, if there was a Band-owned corporation that

provided contract logging services both on and off reserve, provincial labour legislation would probably apply.

The situation which is most difficult to predict is where an operation is for the benefit of both members of the Band and for the general public. Given the degree of uncertainty in this a Band should obtain legal advice if an operation does not clearly fit within either situation I or 2 above.

B. Termination Of Employment under the Canada Labour Code

The *Canada Labour Code* provides that for non-union employees, an employer who terminates the employment of an employee who has completed three consecutive months of continuous employment by the employer shall. except where the termination is by way of dismissal for just cause. give the employee either:

> *(a)* notice in at least two weeks before a date specified in the notice. of the employer's intention to terminate his employment on that or
>
> *(h)* two weeks wages at his regular rate of wages for his regular hours of in lieu of the notice.

An employer who terminates the employment of an employee who has completed twelve consecutive months of continuous employment by the employer except where the termination is by way of dismissal for just cause, pay to the employee the greater of

> *(a)* two days wages at the employee's regular rate of wages for his regular hours of work in respect of each completed year of employment that is within the term of the employee's continuous employment by the employer, and
>
> (*b*) five days wages at the employee's regular rate of wages for his regular hours of work.

The *Canada Labour* further provides that an employer shall be deemed to have terminated the employment of an employee when the employer lays off that employee. An employer shall be deemed not to have terminated the employment of an employee where, either immediately on ceasing to be employed by the employer or before that the employee is entitled to a pension under a pension plan contributed to by the employer that is registered pursuant to the *Pension Benefits Standards Act,* 1985, to a pension under the *Old Age Security Act* or to a retirement pension under the *Pension Plan* or the *Quebec Pension Plan,* R.S.,) c.

If the Employee is terminated for cause, s/he is terminated without notice or pay in lieu of notice. He is not entitled to severance.

Once terminated, if an employee has a claim of wrongful dismissal under the *Canada Labour Code*, s/he must meet the following criteria to make a complaint:

minimum of 12 months of consecutive employment:

- not a unionized work force:
- not a manager; and
- termination is not due to discontinuance of a job function or redundancy.

If these conditions are then a complaint for unjust dismissal must be made within 90 days of termination. The complaint leads to a hearing before an adjudicator appointed by the federal government.

Where the adjudicator finds the dismissal unjust, he/she may make any order considered fair in the circumstances. In practice this could mean any or part of the following:

- lost wages and benefits since termination;
- reinstatement;
- legal costs;
- interest on (1) above: and/or

- mandatory letter of reference.

Typically it may take as long as 12 to 18 months to complete a hearing from the date of termination.

In addition, where reinstatement is not ordered, an award still may be made for future losses beyond the hearing date. In other words. the only acceptable reason to terminate the employment of a federally regulated employee. is due to restructuring or lay-off. What an employer is not allowed to do. however. is to pretend that the reason was a job discontinuance when really it was terminating a problem employee and avoid the Canada Labour Code remedy.

In short, the elimination of the position has to be in good faith. If the employee can show that the real reason was its intent to cut him from the work force then the hearing will be allowed.

Also. there must be a real discontinuance. If an employee has a job function of project manager and the company decides to do away with this and create a position of senior project manager, then there will be an examination of the real life job functions of the two positions to see if there is a real difference if not, the remedy of the *Canada Labour Code* will be open.

C. *Termination Of Employment at Common Law*

The *Canada Labour Code* and the provincial employment standards legislation provides only minimum standards of termination pay and severance. The Canadian Courts have set higher levels which Bands must also adhere to.

For example, an employee of a Band governed by the *Canada Labour Code,* may choose to commence a civil claim for wrongful dismissal damages instead of applying for arbitration.

At common law, a Employer has the right to terminate the employment of an employee on two bases. an employee may be terminated for any reason, with reasonable notice or payment of notice in lieu thereof. Alternatively, an employee may be terminated for cause, summarily and without payment.

i) Termination With Notice

When an employer terminates the employment of an employee with notice, the length of reasonable notice will be dependant upon the facts of each case. The various factors commonly taken into account by the courts in assessing the period of reasonable notice include the following:

- age;
- length of service of the employee:
- level of responsibilities and duties of the employee:
- expenence;
- education;
- status within the organization;
- training and/or expertise;
- qualifications:
- chances of alternative employment in the job market at a reasonably equivalent level:
- health;
- level of compensation:
- whether the employee was enticed away from an otherwise secure job to join the employer;
- in some cases. misconduct not amounting to just cause, and
- in some cases, the economic circumstances of the employer.

When an employee is terminated on notice, the Employer will be obligated to make the employee "whole" for the period of notice or payment in lieu. In other words, the Employer will owe the employee salary, bonus and any other compensation to which the employee is entitled. Additionally, an employee is entitled during the notice period. to whatever benefits he or she was receiving during the employment. This would include such benefits as vacation pay, insurance, and health and dental care.

While disputes sometimes arise regarding notice, generally they are limited to what is the reasonable length of notice and what compensation *would* be included.

ii) Termination For Just Cause

An employee may also be terminated for just cause (i.e., theft). If terminated for cause, an Employer must pay the employee any amounts then owing, but does not need to give them notice. However, it is extremely difficult to establish. in the courts, cause for dismissal. The onus is on the employer and the standard of proof is very high.

The courts have determined that if there are elements of cause. the employee *should* be confronted (verbally and in writing) and given a chance to explain.

Whatever the reason for firing someone. it's important that you treat your employees even-handedly. If you regularly *let* some employees engage in prohibited conduct, you'll be on shaky *legal* ground if you fire others for the same conduct.

With respect to terminating an employee without notice, the Supreme COUl1 of Canada released its unanimous decision in *McKinley* r. *Be Tel,* [2001] 2 S.C.R. 161 and this has become the standard test for just cause.

In *Me Kinley,* the alleged employee misconduct was dishonesty. The issue before the Supreme Court was whether an employee's dishonest conduct was, in and of itself, just cause for summary dismissal, or whether the nature and context of such dishonesty are relevant when determining if the employer has established just cause to summarily dismiss.

The Supreme Court determined that a particular incident of employee misconduct, such as dishonesty, in and of itself does not justify dismissal. Rather, the nature and degree of the particular misconduct must be analyzed in the context of the overall employment relationship, before a factual conclusion can be made as to whether an employer had just cause to summarily dismiss an employee.

An employee's employment record is one of the relevant features of the overall employment relationship. That relationship should be analyzed on a principle of proportionality, a balance between the employee's misconduct and the employer's choice of sanction. This balancing is important because employment is fundamental aspect of an individual's sense of identity, self-worth and well being. with the manner in which employment can be terminated being equally important.

A Judge will determine if employer has just cause to dismiss an employee, by answering the following two questions: **In** the circumstances of this case, (l) does the evidence establish employee misconduct on a balance of probabilities: and (2) if so, does the nature and degree of the misconduct warrant dismissal "because it gave rise to a breakdown in the employment relationship"; for example. did the misconduct violate "an essential condition of the employment contract. breach the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer."

Not only must an Employer prove just cause, but may also be liable if the employee was terminated or treated in a manner that cause injury to the employee. *Wallace* v. *United Grain Growers Ltd.,* [199713 S.C.R. 701 is the leading decision which established this principle.

It has long been accepted that a dismissed employee is not entitled to compensation for injuries flowing from the fact of the dismissal itself. Thus, although the loss of a job is very often the cause of injured feelings and emotional the law does not recognize these as compensable losses. However, where an employee can establish that an employer engaged in bad faith conduct or unfair dealing in the course of dismissal. injuries such as humiliation, embarrassment and damage to one's sense of self-worth and self-esteem might all be worthy of compensation depending upon the circumstances of the case. In these situations, compensation does not flow from the fact of dismissal itself, but rather from the manner in which the dismissal was effected by the employer.

Often the intangible injuries caused by bad faith conduct or unfair dealing on dismissal will lead to difficulties in finding alternative employment. a tangible loss which is recognized as warranting an addition to the notice period. It is likely that the more unfair or in bad faith the

manner of dismissal is the more this will have an effect on the ability of the dismissed employee to find new employment.

iii) Constructive Dismissal

There can be many circumstances where the conduct of the employer may legally terminate the employment relationship, where there are no direct words of termination conveyed to the employee. In such a situation the employee may claim that the employer's actions may be constructed to be the same as termination. To succeed the conduct must "go to the root" of the expectations of the parties. Examples are a dramatic reduction in compensation. a substantial demotion in responsibilities, or conduct which is abusive. The employee takes a risk in alleging constructive dismissal. Once alleged, the employee must usually end the relationship, accept immediate unemployment in the hope of winning or successfully negotiating a severance payment.