



## Hiring and Firing of Employees

By Michael Watt and Lawrence Robinson

### INTRODUCTION

Businesses regularly recognize employees as their greatest asset. Similarly, the Courts in Canada have recognized employment as central to a person's life in our society. As a result the decision to hire or terminate the employment relationship is an important one with serious consequences.

The hiring of employees is a positive, exciting opportunity. Many hirings are witnessed merely by an oral agreement. Others are documented by a simple letter while still others have the terms set out in a full agreement signed by both parties. The important aspects of hiring will include ensuring all terms are set out in writing and agreed to prior the commencement of employment. Further, it is important to ensure that any key terms are included in the contract and not left to be found later hidden in an employee manual. Finally, terms respecting the scope of duties and location of the work will be important to be agreed upon to ensure the employer has flexibility down the road and that changes are not viewed as constructive dismissal.

The need to terminate employment may arise from poor performance or just cause. In other cases, termination may arise from downsizing or the decision to close an office or business unit. In each case an employer, often through the human resources department, is called upon to plan the termination. This will require consideration of the effect of the termination of employment on the business and other employees, as well as the cost. Further, how the termination will be carried out, in particular whether termination pay is provided or working notice are important decisions. Finally as the business is ongoing, it will be prudent for the employer to ensure follow-up communications with the employee to confirm the termination of the relationship is completed in a business like manner.

### KEYS WHEN MAKING THE CONTRACT OF EMPLOYMENT

#### (a) General Considerations

It will be important that the terms of employment be set out in writing and agreed to by the parties. This may be in the form of a letter agreement or a more formal contract. Further, it will be important that the agreement include all key terms or, where the terms are set out in another document such as an employee handbook, reference the document in the agreement. Further, it will be important that the letter of agreement or contract be signed prior to the employee starting work. The agreement should also be the first offer of employment made to the employee.

The decisions of the Courts of Appeal in Ontario and British Columbia have made it clear that a contract signed following commencement of employment will not be enforceable against the employee due to lack of consideration. In the two decisions, one involving a contract signed five years before termination but during employment and the other signed on the first day of employment, the termination provisions were found to be unenforceable and the employees were found to be entitled to reasonable notice. These amounts totalled, in one case, twelve months pay and in the other, eighteen months pay.

There may be an ability to change contracts during employment in exchange for valid consideration. The case law has not provided guidance in this respect. However, an employer will want to ensure that some consideration is documented in exchange for the change to the employment contract in particular where a restrictive term is added to the agreement, such as a termination provision or a covenant restricting solicitation of clients. The case law is clear that ongoing employment will not be consideration supporting the new terms of employment.

Employee manuals or company policies often contain key employment terms. It will be important to have the employee review and acknowledge their agreement with the policies where they are intended to form part of the employment contract. This must occur prior to the employee commencing employment and at the time that the employment agreement is entered into by the parties. Many employers provide key written policies, including such documents as the Code of Ethics, to employees annually requiring their review and signed acknowledgement of understanding for their employee file to ensure no misunderstanding regarding the guidelines applicable to their employment.

Terms which may give rise to disputes in the employment relationship include those setting out the duties of the position or the place of employment. The duties of the position should be clearly set out in the agreement or in a separate job description. The importance of setting out the duties of employment are to ensure that there is no misunderstanding as to the position agreed upon. In the event of a reorganization of an employer's business, the job description will be relied upon by the employee to assert that the new position offered to them is a demotion or a constructive dismissal. It will be important in setting out the duties of the position to allow flexibility. It may be that any significant change from the duties agreed upon will be a constructive dismissal entitling the employee to seek damages for termination of employment.

Finally, the place or location of employment has arisen as an issue for employees disputing changes to their position. These changes may include a relocation or increased travel required by the position. The Courts have found that based upon the type of position held by the employee and the circumstances of their duties, relocation to another city or office requiring significant travel may be a fundamental change to the employment contract. Accordingly, an employer wishing to have the ability to transfer the employee to another office should include such a right in the employment contract.

#### **(b) Termination Terms**

The contract of employment will define the liability of the employer on termination. For example, if the employment contract is for a fixed term, then the severance claim will be for the remainder of the contract. As an example an employee terminated in year three of a five-year contract may claim damages based on the remaining two years. This was the case in Roger Neilson's claim against the Vancouver Canucks.

The existence of a termination provision in a contract may limit the severance to which the employee is entitled. The employer will then be able to decide whether it gives more severance but it will not be required to do so. It is important to include an express termination provision in an employment contract to ensure that:

- the termination clause forms part of the offer of employment;
- the severance is not less than the statutory minimum;
- the termination provision is clear that it represents the complete entitlement.

As noted earlier, it is important to always put a termination provision clearly in the original offer letter. At a minimum the employer will know up front at the time of hiring if there is any concern by the employee.

Based on current case law it may also be important to renew an employment contract during the employee's employment. This will not be an opportunity to add in an express termination provision but rather will ensure that the terms of employment agreed to at the start remain relevant. An employer relying upon an employment contract signed ten or fifteen years prior to termination when the employee was in a wholly different job may have difficulty enforcing the provisions of the contract.

An example of a termination provision based on the statutory minimum would be as follows:

The company may, following the completion of the probationary period, at any time terminate your employment:

- (a) for just cause without notice or payment in lieu thereof;

- (b) in its sole discretion and for any reasons by giving you in writing one weeks' notice where you have completed a period of employment of at least three consecutive months and after the completion of a period of employment of one year, two weeks notice, and after the completion of a period of employment of three consecutive years, one additional week of notice for each subsequent completed year of employment up to a maximum of 8 weeks notice as an agreed on reasonable notice of the termination of your employment;
- (c) the company may pay your salary for these periods in lieu of notice which payment shall represent an agreed on reasonable payment in lieu of advance notice of the termination of your employment;
- (d) the payments made to you on the termination of your employment will represent your full entitlement to notice, or payment in lieu of notice, required to be paid to you on the termination of your employment

The termination provision must clearly set out that it represents the complete entitlement of the employee on termination.

### **THE USE OF PROGRESSIVE DISCIPLINE**

The use of progressive discipline to correct any performance problems is always a first resort. However, where progressive discipline does not work, then severance pay may be money well spent. To follow progressive discipline through to termination is extremely difficult based on the case law. The cases are not employer-friendly, and at best an employee who exhibits poor attitude and is in violation of minor policies may be entitled to significant warnings before the progressive discipline will amount to cause for termination. One case upheld termination where warnings had been given during a one-year period.

Progressive discipline that does not successfully change employee practices will cause considerable disruption in the workplace and take management time and energy to address. Further, the progressive discipline of one employee will affect others interacting with the employee and, for an employee not correcting their practises, may result in low morale and disrupted business.

In considering progressive discipline it is important to adhere to provisions of the policy manual in place. The policy manual may contain specific requirements or steps to be followed by the employer prior to termination. An employer will need to consider its contractual obligations to follow the procedure established in the manual prior to termination of employment. Where mandated progressive discipline procedures are not followed, an employer may be found to have acted "unfairly" towards an employee leading to a claim for increased damages in the event of termination of employment. Alternatively, the failure to follow progressive discipline procedures may lead employees to believe they have no protection in the workplace and to seek union representation.

However, progressive discipline may have the effect of signalling to an employee that improved performance or attitude will be necessary to maintain continued employment. As a result the employee may decide to seek other employment or resign their position. However, in other cases employees faced with progressive discipline with which they disagree may remain in their employment as a "thorn in the side" of the employer in expectation of receiving a severance payment. The planning process may lead an employer to commence with progressive discipline leading to termination of employment after the decision has been made that further discipline will have no tangible affect.

### **EFFECTIVE TERMINATION OPTIONS**

#### **(a) Identifying the Termination Costs**

The benefit of an express termination provision contained in a contract is to clearly quantify the severance costs. If no such provision exists, then the employee is entitled to claim reasonable notice. The best that can be done at that point is to assess reasonable notice within a range of weeks or months. An employee will always be able to argue for the higher end of the range leading to a demand letter and possible dispute.

An employer needs to consider other relevant factors in determining appropriate severance. These will include possible factors increasing the notice such as whether an employee was induced to join the company from a previous employer, whether the employee was promised long term employment or whether the employee's prior employment with a related company should be considered. In a worst case scenario, an employee induced to join the company from secure employment will be entitled to base their claim on the aggregate length of employment with both businesses.

The claim for damages arising out of termination of employment will include all amounts that the employee would have earned during the reasonable notice period. This will include amounts for:

- salary (including any increase);
- bonuses;
- commissions;
- share options;
- pension entitlement;
- car allowance;
- health and welfare benefits

These amounts may be significant increasing the chance of a dispute.

#### **(b) Planning the Package**

Planning the severance offer requires consideration of the claim of the employee with respect to each of the above amounts. It will be important to consider both the amount of the possible claim and methods to cover the amount of the claim such as salary continuance and the possible continuation of health and welfare benefits by the insurance provider. A comprehensive severance offer may entitle the employee to a share in any further bonus based on the performance of the company instead of offering no amount leading to a dispute. Similarly, assuring that pension loss is covered by continued contributions will increase the likelihood that an offer is reviewed and accepted by the employee, if that is the goal.

Termination plans will require consideration as to whether working notice is a possibility. As the contractual term will normally be satisfied by providing working notice, an employer may want to consider obtaining all or part of the value of the employee's services for the severance being paid. Another approach is to consider the willingness of the employee to take another position within the company with a set termination date. Such a step will normally only be possible where it is agreed to by the employee. A recent example was offering the manager of an office to be closed a twelve-month sales position in the territory. In that case the offer was accepted as the employee would be able to continue to service the business as an independent contractor.

#### **(c) Conducting the Termination**

Conducting the termination refers to the steps taken in notifying the employee of termination. Considerations include who will be present at the termination meeting, the form of the severance offer and written documentation to be delivered to the employee, and the reasons to be provided to the employee for the termination. The method of conducting the termination is important as notifying the employee will have contractual significance giving rise to liability for the employer. Further, how the termination is conducted will be scrutinized by the Courts in any damage claim and in one recent case, led to significant increased damages as a result of the method of termination.

##### **(i) Who**

Who conducts the termination is important. It is always important to have two individuals present, one as a witness. The individuals conducting the termination should both be individuals that deal with confidential information within the company. Receptionists and secretaries should not be used as a witness. To have the human resources department conduct the termination may provide some efficiency but if the employee's direct supervisor is not present at the termination, it will not allow for any of the employee's questions or concerns to be addressed. We recommend where possible that a representative from the human resources department along with the direct boss be in attendance at the termination.

(ii) Why

An employee will want to know the reason for termination. The reason for termination will have important meaning for the employer in regards to liability. For example, an employer relying upon cause for termination will be severely affecting the employee's ability to obtain alternative employment. Accordingly, a decision to terminate for cause should not be made lightly. The Courts have recognized that there is no near cause for termination. The decision to allege cause regarding a "non-performing" employee is a difficult decision for an employer. In certain cases, an employer may allege cause but offer a gratuitous severance payment to effect a settlement. The severance payment may satisfy the statutory obligation for termination pay but not match a claim for severance pursuant to the employment contract. In such cases, the employer is taking a significant risk by alleging cause and increases the likelihood of a dispute and the amount that the employee will seek in the litigation.

Similarly, the benefit of providing reasons for termination may be limited. Although simple reasons will identify the reason for termination, there is no room for debating specific concerns of the employer once the final decision has been made to terminate an employee. There may be a benefit to providing reasons for termination despite the fact that cause is not alleged, particularly where an employee may argue that the termination is in breach of the Human Rights Code. An employer providing no reasons is "behind the 8-ball" in defending a claim that the termination was a result of the employee's pregnancy or age. Having said that, an employer terminating "not for cause" is best served by having the employee obtain alternative employment as soon as possible. This is most likely to occur where the employee has a positive letter of reference from the employer with which to seek alternative employment.

(iii) What

What is offered at the time of the termination is important to the employee. An employee who receives working notice needs to retain a working relationship following notice of termination. It is equally important, at a minimum, to satisfy the statutory termination payment obligations.

An employee who receives notice of termination will focus on the severance offer. Accordingly, the terms of the offer need to be clearly set out in writing. The terms that relate to benefits also need to be clearly set out in writing. An employer has an obligation to notify the employee of any entitlement to continue benefits as personal coverage. An employer also wants to consider whether or not to provide outplacement counselling as part of a severance offer. This additional cost, although legally unnecessary, works to ensure that the employee is taking steps to find other employment and ultimately reduce any damage claim. The decision needs to be made as to whether the outplacement counselling is provided upon signing a release or without a release.

The termination letter needs to be clear and unequivocal. The letter needs to expressly set out that the employment is terminated and clearly state the effective date of termination. A letter that refers to termination but also refers to other employment opportunities within the company which may continue employment, may not be effective. This is of particular importance where many employees are terminated at the same time as part of a downsizing strategy.

(iv) Where

A termination should take place at the workplace in person. Termination sent by letter to an employee or left for an employee will not allow the personal one-on-one discussion which allows questions and answers. A recent decision criticized the employer for terminating an employee in the main boardroom known as the "fish bowl" in the presence of the full Board of Directors. Other employees amassed outside the Boardroom after learning of the special events. In the circumstances, the method of termination and location were criticized by the Court. An additional concern may arise where an employer has to travel to the employee's work location to terminate the employment. Similarly, employees working out of alternative premises should be met in person to effect termination.

(v) When

It is generally agreed that terminating an employee on a Friday is not a good idea. The employee will not have access to professionals or other individuals over the weekend to discuss their natural concerns and questions. Most terminations occur in the afternoon or at the end of the day as it does not make sense to have an employee attend

at work only to have their employment terminated. However, where an employee may need to package up personal property, then termination before or after lunch may allow one or two hours for this purpose.

Employers may also proceed with employee terminations outside the busy period or following key events. Similarly, an employer needs to consider plans for replacement before effecting a termination.

In such cases, the termination may be delayed pending planning for a replacement. This would normally not be an issue except where the termination is for cause and the employer is found to have accepted the conduct where it waits a significant time period before acting.

#### **(d) Following Termination**

The termination process does not end with delivery of the notice of termination. Many considerations remain, including the effect of the termination on the employee, concerns regarding security at the workplace, and completion of the terms of any severance agreement.

##### **(i) Employee Assistance Programs**

More often employers are providing employees with access to employee assistance programs to lessen the effect of the termination on the employee. Employee assistance programs may include counselling that addresses the emotional impact of the termination. Termination specialists provide services which include attendance at the termination meeting and also provide immediate advice to the employee regarding any future steps. In addition, employee assistance programs may refer the employee to other services. These may include outplacement services, financial planning or legal advice.

The possibility of violence following a termination must be considered by an employer. Employers have an obligation to ensure a safe workplace which includes the identification of any possible concerns that may arise as a result of a termination of employment. This concern was in particular brought to the forefront in a situation involving a government employee returning to the workplace with violent intentions. In such cases, the employer needs to consider a plan to address concerns regarding possible violence and the potential need to seek outside assistance. Such a plan may include changing locks and access codes, hiring a security guard to be present at the premises during and following termination, and alerting staff and authorities to a possible threat.

The goal of employee assistance programs is to provide a soft landing for the employee. The benefit of outplacement counselling will ensure, as much as possible, that the employee looks for alternative employment as soon as possible. The outplacement counselling may also help the employee avoid depression or other negative effects of termination which delays reemployment and increases the possibility of a wrongful dismissal claim.

Although offered less frequently, financial and legal advice particularly assists a long-term employee or one who has a complicated compensation package. In particular when dealing with issues of pension entitlement and loss, expert financial advice is important. Further, where a release is sought by the employer then the employer may consider an offer of a pre-determined amount to an employee to obtain basic legal advice. The benefit of paying for legal advice is to show the employee that the package is objectively fair and to obtain an enforceable release in settlement of all claims.

##### **(ii) Severance Offers**

Severance offers will normally have a time limit for response. We recommend one to two weeks to allow the employee to consider the offer and obtain any necessary advice. An employer will normally continue the employee's salary and benefits, where possible, while the employee considers the severance offer. We recommend including a set acceptance date in order to obtain closure in respect of the offer.

The severance offer will often attach a release to be signed and returned by the employee. The release may attach a copy of the termination letter setting out the severance terms or refer to the amount of the severance payment as consideration. In certain cases, the release language may be shortened to one paragraph so as not to raise additional concerns by the employee. This may be appropriate where the potential claim is small.

The legislation requires payment of any termination pay immediately following termination. In the case of the provincial Employment Standards Act, the payment is required within two days. Employers awaiting acceptance of a severance offer are technically in breach of the Employment Standards Act and may consider paying a lump sum severance amount without a release to satisfy the statutory obligation. However, in most cases, continuation of the salary while the offer is pending avoids any statutory complaint.

Similarly, the Record of Employment must be delivered to an employee within five days of termination of employment. How the Record of Employment is completed will depend upon whether the severance offer has been accepted and the amount paid. Once again, where the employee continues to receive their salary and is considering a severance offer, the failure to deliver a Record of Employment will normally be overlooked. However, it may be prudent to deliver a Record of Employment and amend the record to reflect any severance payment at a later date.

How the Record of Employment is completed will depend upon the reason for termination. Unfortunately, the options provided in the Record of Employment are limited. The common reasons for termination provided in the Record of Employment include "shortage of work", "dismissal", "retirement" or "other". We recommend use of the "other" category in many cases where termination is not for cause. The words to be put in the box in such cases will be simply "termination without cause".

(iii) Negotiation Strategies

A severance offer is just that, an offer. Accordingly, an employer must expect in most cases that the employee will return with a counteroffer in an effort to negotiate a higher package. The strategy for negotiation will normally be based upon the terms of the offer. An offer which is seen by the employer as generous may result in a simple explanation to the employee of that fact, with confirmation that no further amount is owing. Even in such cases it may be useful to continue dialogue to explain the offer to the employee to allow them to understand and accept its terms. Similarly, in cases where a large number of employees are terminated at the same time, there will be good reason to ensure that the offers made initially are intended to be final. Otherwise an employer will see a low acceptance rate and expect to spend significant time negotiating with employees. In one case involving a national employer, the approach of providing the offer and then dragging out any further discussions or negotiations was an effective means of causing acceptance through frustration.

For some employees there may be reason to provide some room for negotiation. This may arise where there are particularly difficult issues such as claims to commissions or where the employee's skill set causes an expectation of lengthy unemployment. One example would be an employee joining the company after high school or college and having worked for no other employers. In such cases, choosing the low end of a reasonable notice period will allow for the matter to be settled after negotiation with the employee.

Finally, in some cases, an employee's expectations may simply be unreasonable. This often occurs when an employee believes that the employer has wronged them. Often, a demand letter will follow from a lawyer requesting significant amounts in excess of the top end of any reasonable notice range. In such cases it may be necessary to recognize that a dispute will arise, and the best that can be done is to make a fair offer to protect the employer against litigation. In these cases, the nature of a wrongful dismissal claim may be the answer to settlement. In particular, as the notice period runs, the employee's prospects for reemployment may crystallize resulting in a renewed interest in settling the claim. In cases that involve a claim for damages based on many months reasonable notice, the Court system allows a litigant to seek a final judgment through the summary trial process well in advance of the conclusion of the notice period. In these cases, the best strategy is to obtain evidence and argue the issue of mitigation or anticipated mitigation through reemployment.

An employee may want to structure any settlement in a tax effective manner. This may include payment of a portion of the severance directly to an RRSP where the employee has room or to an RRSP based on the employee's employment up to 1995 as a retiring allowance. There is no issue regarding the right to pay a severance amount in this manner. Employees may also want to have a portion of the severance amount paid directly to legal fees. This also is generally acceptable.

Finally, an employee may seek to have some portion of the settlement funds described in a manner which would avoid statutory withholdings or benefit repayment obligations. This may include classifying the payment as damages for pain and suffering or as overtime arising prior to termination. An employer will need to consider carefully its liabilities before entering into any such agreement. In particular, in order to classify amounts in this manner at a minimum, the claims must be included in the lawsuit or demand letter and there must be objective evidence to support the claims. In one case handled by us this included extensive medical reports from a psychiatrist and family doctor supporting the allegations of depression.

(iv) References

Most large employers have moved to a standardized approach of providing simple form references confirming employment through the human resources department. However, providing a positive letter of reference will often be an important aspect for the employee in seeking reemployment. An employer should not avoid providing the positive letter of reference unless there are concerns regarding performance or unsettled claims with the employee. In such cases, the letter of reference may be used by the employee to dispute the allegation of just cause if one is made. In one case we are handling, the employee is arguing that the failure to provide a letter of reference formed part of the discriminatory conduct towards the employee following termination of employment.

Accordingly, in all cases, the employer should be willing to provide a reference confirming employment. Further, where claims have been resolved and settled with the employee then a letter of reference reflecting the employment relationship where it is positive may be provided. Finally, in other cases where the only outstanding issue is the amount of severance sought by the employee, then the employer may be willing to provide a positive letter of reference which accurately reflects the employment relationship despite the fact that claims have not been settled. The use of the letter of reference by the employee to obtain alternative employment may serve to limit or defeat the severance claim.

(v) Re-employment

Although re-employment may be a positive end to a termination by limiting or ending any claims by the employee, in some cases re-employment may lead to claims by the employer for breach of restrictive covenants or at a minimum, concerns regarding use of confidential information. On termination of employment, an employer is obligated to pay the statutory minimum regardless of the fact that the employee obtains or has secured alternate employment. Similarly, any outstanding amounts owing to the employee for vacation or commissions or other amounts need to be paid. An employee is seeking payment of commissions owing in spite of the fact the employee moved to a competitor. Understandably, the employer is not interested in paying amounts which may not be owing to a former employee now in competition with the business.

Concerns over use of confidential information will arise in a variety of circumstances. It may include use of special formulas of the employer, use of confidential information regarding the names or requirements of certain customers, or the use of a customer list to directly solicit customers. An employer should ensure the return of all company property upon termination and further provide notice to the employee regarding his obligation not to use confidential information. This notice may be given not just to the former employee but also to the individual's new employer where appropriate. However, the effect of any warning may be limited and the employer needs to consider litigation options where the use of confidential information is of particular concern. An employer will not want to delay taking this step once it is aware of a breach of the obligation not to take company property or use confidential information following termination of employment.

The existence of express restrictive covenants restricting competition or solicitation of customers following termination entitles an employer to take action to enforce these restrictions where the employee and his new employer are in violation of the obligations. The first consideration is the enforceability of the restrictive covenants. It is generally recognized that limited restrictions are more enforceable than lengthy, poorly defined restrictions. In particular, a restrictive covenant limited to six months restriction on competition or solicitation of clients with whom the employee directly dealt with in their specific region is preferable to broader language which may be unenforceable. The second consideration is to obtain evidence or be aware of any violation. This may be difficult unless the information is received directly through customers. Obtaining copies of any written solicitations is helpful in considering any claim.

At the time of the termination of employment an employer may consider having the employee confirm the reasonableness and enforceability of the restrictive covenants as part of a severance offer. The effect of obtaining this updated confirmation will be to remind the employee of the limitations as well as to obtain a further basis for enforcement in the event of a breach.

(vi) Possible Complaints

The end of an employment relationship may lead to disputes. These may include statutory complaint processes or lawsuits brought through the court system. The termination process is intended to avoid any complaints. However, where disputes arise it is helpful to understand the possible complaint processes.

An employee is entitled to apply for employment insurance benefits. Where the termination is for cause the employee may be disentitled to benefits. The Employment Insurance Commission will determine whether alleged cause amounts to “wrongful conduct” within the language of the legislation. An employer is obligated to provide the Record of Employment and to respond to the Employment Insurance Commission. However, once a decision has been made by the Commission, then the employer is not required to take part in the appeal process as any decision is not determinative of the issue of just cause in a lawsuit. However, the Plaintiff may await the outcome of the Employment Insurance Umpire’s ruling prior to proceeding with their lawsuit.

The processes for pursuing claims through the Courts have changed significantly. At present, Provincial Court Small Claims has a limit of \$25,000. This amount is expected to increase to \$50,000 in the future. This is a significant amount for most employers. Accordingly, despite the fact that the claim is brought in Provincial Court under simplified rules, the employer needs to pay attention in defending the claim. Similarly, the Supreme Court process has been streamlined for claims of \$100,000 or less. The idea is to limit the steps required to be taken to pursue a claim and thereby limit the cost of obtaining “justice”. However, given the amount claimed it will be necessary to properly defend any claim. We expect that many wrongful dismissal claims will fall within either of these provisions resulting in easier access to those employees wishing to bring a claim.

The statutory Employment Standards complaint process also exists for employees seeking wages owing pursuant to the legislation. This provision is not available to seek general damages for breach of contract for the failure to provide reasonable notice. However, employment standards complaints are often brought by employees not seeking legal advice as there is no cost to the individual to pursue a complaint. As in one case we are defending, the finding of constructive dismissal within an employment standards process will affect the ability of the employer to argue resignation in any ensuing lawsuit and therefore must be defended.

A hot topic today is the fact that an employer may face several complaints arising out of one termination. This may arise where an employee brings a complaint pursuant to the *Human Rights Code* as well as seeking damages for wrongful dismissal in a lawsuit. Luckily, both the employment standards and human rights processes have a six-month time limit after which claims cannot be commenced. Although claims will normally be for money, the Federal unjust dismissal complaint process as well as the provincial statutory processes do allow in certain cases for an employee to seek reinstatement.

## **SPECIAL CONSIDERATIONS FOR THE DISABLED EMPLOYEE**

(a) Disabled Employees

The fact that an employee may suffer from a disability must be considered in planning termination of employment. This may include considering the effect of the disability on performance or simply ensuring that the disability has no part in the termination decision. The failure to consider the disability in the planning process may lead to a claim for increased severance, a claim for punitive or aggravated damages or a human rights complaint.

A disability arising during the progressive discipline or as a result of progressive discipline may cause the employer to question the truthfulness of the disability. An example is doctor’s notes recording employee absences following performance warnings issued by the employer. However, without objective medical evidence that the employee’s

disability is not supportable, an employer will not be in a position to challenge the disability of the employee. An employer will be required to put the progressive discipline on hold pending the return of the employee to active employment.

It is important that an employee termination is not related to an employee's disability. An employer needs to consider whether or not the disability is the root of, or in any way related to, the performance issues. This analysis must be performed to avoid increased costs and a dispute. For example, a car dealership was found to have discriminated against an employee with a hip problem based on enforcing the minimum sales requirements despite the absence of the employee.

An employer will be called upon to consider its duty to accommodate the disability to the point of undue hardship prior to termination. These circumstances will arise if the employee cannot perform certain tasks of their position and are therefore slated for termination. An employer needs to consider other options including varying the employee's duties or offering alternative positions within the business. For larger businesses, undue hardship is a difficult test to meet.

The termination of employees who suffer from a disability has resulted in the majority of large damage awards in wrongful dismissal cases. As an example, a company that was closing its business terminated an employee while on long-term disability so that it did not have to pay severance. This action resulted in a significant monetary damage award for the employee. Similarly, the termination of an employee who was off work and collecting Workers Compensation benefits resulted in a complaint to the Human Rights Tribunal.

Pregnant employees are protected by the *Human Rights Code*. The termination of an employee if found to be related to the pregnancy may result in a successful human rights complaint. Further, the damage claim will be for the full amount of damages with no chance of reduction by the employee's mitigation efforts. Similarly, employees returning from maturity or parental leave are entitled to return to a comparable position. The termination of an employee returning from maternity or parental leave may result in the employer facing not only a severance claim, but also exposing itself to statutory complaints under the *Human Rights Code* or the *Employment Standards Act*. Employers are better served by having discussions with an employee returning from leave to consider options before making decisions. It is necessary for the employer to return the employee to work unless there is a clear reorganization or agreement with the employee that would avoid a complaint.

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