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"It's Time to Go!"

At some point or another, every employer is faced with the decision on whether and how to dismiss an employee. Handle it wrong, and you could be paying an ex-employee for a long time for a job they aren't doing anymore. Handle it right, and you can re-energize your organization with minimal conflict and cost.

Dismissing for Cause

If an employer fires (dismisses, terminates, lays off) an employee because of just cause, there is no obligation to provide advance notice, or to provide pay-in-lieu of damages, or to give a severance payment.

However, proving just cause is a pretty tough thing to do.

First of all, there has to be a serious problem with employee's behaviour. One-time actions such as theft, fraud, violence, harassment and gross incompetence, may constitute grounds to fire for just cause. Lesser problems like unauthorized absences and minor incompetence can also qualify, if they are repeated and if the employer has disciplined the employee for the previous infractions. Sometimes actions outside of working hours or the office can be considered, if they undermine the employee-employer relationship.

Second the employer must have followed some kind of due process. The employee is entitled to be advised of the problem and present "their side", although the employer does not need the employee to agree on what has happened, or on what discipline should be applied. For repeated minor problems, a court will often want to see an employer follow "progressive discipline" - warnings and suspensions should generally precede a dismissal unless the behaviour is exceptionally bad.

Third, and just as important, the employer needs to maintain proper records, especially if the grounds for dismissal is for a number of relatively minor infractions. If the employer has not documented the problems at the time they occur (not just after the fact), it's almost as if there was no history of problems at all when you have to defend your decision in court.

Dismissing for cause has a huge impact on the employee. In addition to losing their job, dismissal for cause will disqualify an employee from receiving Employment Insurance benefits.

For this reason, employees who are fired for cause, especially if they are given no notice, are often in a situation where they have nothing to lose from challenging their dismissal.

Dismissing without cause – Statutory Minimums

Federal and provincial legislation provides that if an employee is dismissed without cause, the employee is entitled to notice, or pay-in-lieu of notice, and possibly severance pay.

For aboriginal organizations, there is some debate about whether the provincial *Employment Standards Act* or federal *Canada Labour Code* apply - a topic too long to get into here, but we'll simply say that most employees of Bands will be covered by federal legislation. Under the *Canada Labour Code*, an employee who is dismissed without cause is entitled to two weeks' notice, or pay-in-lieu of notice, and severance pay equal to 2 days per completed year of service, or 5 days pay (whichever is greater). The provincial *Employment Standards Act* requires notice, or pay-in-lieu of notice, equal to one week per year of service, to a maximum of 8 weeks.

Dismissing without cause – common law requirements

In addition to the statutory minimums, there may be additional notice requirements in your employee's written contract. But what if there is no written contract or the written contract says nothing about notice for termination? In this case the common law (court made law) may require additional notice.

As soon as an employer offers a job, and the employee starts working, there is an employment contract. Sometimes the employment contract is written out ahead of time, sometimes it is just a one page letter of offer, and sometimes it is just deemed to be created without anything in writing (an "oral contract").

Employment contracts get special treatment under the common law. If there is no contract term addressing notice, a court will often deem it a part of the employment contract that an employee is entitled to "reasonable" notice if they are dismissed without cause.

What is reasonable notice? In general, it is the amount of time reasonably required by the employee to get another job. That can mean over a year, if the employee is older, has specialized skills, is in a remote community, has worked for a long time in the position and is employable in an industry that has slim opportunities at the time of

dismissal. For a younger employee with broadly employable skills in an urban area, who has not been employed for long, it might mean less than a few months.

If an employer fails to give notice, and fires an employee without cause, the employee is generally entitled to pay in lieu of notice (ie. if they should have received six months' notice, they get six months' pay instead of notice).

Limiting an Employer's Potential Liability

There are a number of things an employer can do to limit their risk.

First, while it is impossible to contract out of the statutory minimums, it is possible to contract out of the common law notice periods discussed above. For example, an employee and an employer could negotiate a contract which limits the notice period in the event of dismissal without cause to the statutory minimum plus one month. This type of contract will hold up in court if it was actually negotiated - not a "take it or leave it" proposal from the employer - and the employee understood that they were waiving claims they might have under the common law. It may even possible to do this after an employee has started working. It is much easier to negotiate when dismissal is just a "what if" possibility, than when it is a real and immediate issue and tensions are high.

Human Resources policies sometimes - but rarely - can limit the notice period. Unfortunately, HR Policies are often only used against an employer (e.g. an employer better do at least what the policy says) because they are rarely negotiated with employees - most HR Policies are simply imposed upon the employees. Sometimes a court will enforce an HR Policy that limits the dismissal notice period, particularly for new employees, if the employer clearly made the HR Policy part of the employment contract. But don't count on it: if you want to rely on a contract-based period for dismissal, then put this in the written contract.

Second, while it may be tempting to scream "You're Fired – Get Out Now " like a TV personality, an employer can minimize their risk by giving notice of the dismissal and setting the last day several weeks, if not months, in the future. If you think an employee is entitled to six months' notice, give them that notice. Plus, give the dismissed employee reasonable opportunities to look for other work (e.g. time off to attend interviews or training sessions, provide reference letters, etc.). You're likely going to pay for that employee, you might as well get some work for your money. If you give advance notice, and the employee finds another job before the notice period ends, let them leave - you have just eliminated your risk of damages!

Even giving some notice to a long-term employee who is being dismissed can take away most of the "sting" and lessen your chances of getting sued. Conversely, unjustly treating somebody poorly can encourage them to make a claim they might not otherwise make.

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The practical exception to giving notice is if the employer is concerned there will be theft, fraud, violence, or possibly a "toxic work environment" if the employee is kept in the office - so be careful and honest with the employee and yourself in assessing whether proceeding by notice is appropriate or not.

Third, if you do not have an employment contract that limits the notice period, negotiate the notice period before you confirm the dismissal, and have the employee sign a short agreement confirming they accept the notice period and waive their claims to any other or further notice or damages. Admittedly, this is an awkward and difficult conversation, but if done right, you can save your organization tens of thousands of dollars.

Fourth, even if you have good grounds for dismissing with cause, consider negotiating notice and/or a severance payment anyhow. Get legal advice before doing this, and get a waiver signed before you commit to anything. Given the choice between paying your lawyer to defend a claim, or paying a modest amount of severance, we often advise clients to pay the employee – it could be cheaper in the long-run.

Finally, always advise employees of your decision in a calm, civil and courteous way. This is a difficult time for both parties and the courts have awarded additional damages where the employer behaves in a discourteous, abusive or highhanded way during the termination process.

When to Call your Lawyer

Call your lawyer if you need help preparing the employment contracts that will limit notice in the event of dismissal without cause. A good lawyer should be able to help customize a contract and advise how best to implement it in a matter of hours.

Call your lawyer before you give the notice of dismissal to confirm whether there is a good case for dismissal for cause, and what kind of reasonable notice period might be appropriate.

Call your lawyer if the employee commences a claim. If you haven't talked to your lawyer by this point, get your file organized and give them a copy right away, so they can explore negotiations before the claim gets too far along.

Some employees may simply pursue a claim through processes set up under the *Employment Standards Act* or *Canada Labour Code* because they generally don't require the employee to hire a lawyer. In some cases, working through the statutory process can eliminate any further common law claims the employee may have (a consequence most unrepresented employees often don't understand), but sometimes it can result in the re-instatement of the employee (with back pay!) if the employer did not give proper notice.

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Finally, check your insurance policy. Many aboriginal organizations carry insurance which provides some coverage for wrongful dismissal claims - or at least the legal fees required to defend such a claim. There may be a consequence to your premiums if you make a claim, but it might be worth it.

For advice on employment law matters affecting aboriginal nations, please contact Chris Roine (chris_roine@aboriginal-law.com), Niki Sharma (niki_sharma@aboriginal-law.com), Merrill Shepard (merrill_shepard@aboriginal-law.com) or James Hickling (james_hickling@aboriginal-law.com).

Yours truly,

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Chris Roine

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Readers should not act on information in the BULLETIN without first seeking legal advice on the particular matters that are of concern to them.