

The Law of Dismissal

Prepared for: Legal Education Society of Alberta
Employment Law Fundamentals

Prepared by:

Damon Bailey QC, Chris Lane QC, and Manav Deol

McLennan Ross LLP

For presentation in:

Edmonton, Alberta – October 5, 2016

Calgary, Alberta – October 13, 2016

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INTRODUCTION

It is important for employers to know their legal entitlements with respect to under what circumstances employees can be terminated and what obligations arise out of such terminations. There are essentially five ways for an employee's employment to be lawfully terminated.

The first scenario is when an employer has just cause. Secondly, a lawful termination will arise whenever an employee is hired for a fixed term contract and that term comes to an end. Third, an employee can be lawfully terminated if the employer provides the employees with the amount of advance notice or severance pay which was *agreed upon* by the parties. Fourth, employment can be lawfully terminated by giving a reasonable amount of advance notice or the compensation and benefits lost if the employee had been given reasonable notice. The final scenario is where the contract of employment has become frustrated as a result of, for example, chronic absenteeism.

The purpose of this paper is to address the scenarios of with cause and without cause terminations and to address the circumstances under which employers are said to have unlawfully terminated an employment through a constructive dismissal.

TERMINATION WITH CAUSE

An employer may immediately terminate an employee without severance where there is "just cause." Just cause exists where the employee has done or failed to do something which is so serious on its own or coupled with a poor history that it results in an irreparable breakdown in the employment relationship and justifies immediate termination.¹

Just cause is all or nothing. Employers should be aware that there is no middle ground or "near cause."² If the employer cannot prove just cause on a balance of probabilities, it will be responsible for paying full monetary damages arising from what it is deemed to be a wrongful dismissal. Damages for wrongful dismissal are discussed later in this paper.

A single, isolated act or omission on the part of the employee can constitute just cause for immediate dismissal without severance pay only in exceptional circumstances. Usually, such an act or omission must be so serious that it destroys the trust that the employer has in the employee. Such things as dishonesty, fraud, theft or a serious and fundamental mistake (especially where the

¹*McKinley v BC Tel*, 2001 SCC 38 ["McKinley"]; *Foerderer v Nova Chemicals Corp.*, 2007 ABQB 349; *Steel v Coast Capital Savings Credit Union*, 2015 BCCA 127

² *Nelson v Champion Feed Services Inc.*, 2010 ABQB 409 at para 73

mistake results in, or could have resulted in, loss of life or injury) are examples of conduct which could constitute just cause, even where they only happen once.³ However, employers should keep in mind that there is no steadfast legal rule which states that these types of serious employee infractions will *automatically* warrant immediate termination. Rather, the Court will look at whether termination is proportional to the degree of harm caused by the employee's conduct in a contextual assessment.⁴

Aside from the few aforementioned examples, misconduct must generally be repeated in order for just cause to arise. Misconduct ordinarily falling into this category includes: absenteeism and lateness; moderate insubordination; breach of company rules; and incompetence.⁵ With these types of lower level employment infractions, the employee has to be warned that they have engaged in misconduct, that it is not acceptable, and that it must not happen again.⁶

The situation is somewhat different when an employer is dealing with poor performance issues. In these cases, absent substantial misconduct or incompetence, the employee has to be told what the issues are with their performance, told what they need to do to improve their performance, given a reasonable period of time within which their performance will be monitored for improvement, and warned that their employment is in jeopardy if their performance does not improve to the required standard within the stated period of time.⁷ Reasonable assistance to meet the stated goals must also be provided.

With many of the lower level employment infractions, employers are required to proceed with a number of progressively more serious disciplinary steps before termination is warranted.⁸ This is known as "progressive discipline." Progressive discipline essentially provides employees the opportunity to learn from their mistakes prior to termination.⁹

³ *McKinley*, *supra*, footnote 1; *Scaffold Connection Corp., Re*, 2001 ABQB 1127 at para 33; *Amos v Alberta*, 1995 CarswellAlta 67 at para 54; *Grant Forest Products Inc. and CEP, Local 99 (Guy)*, *Re*, 2006 CarswellOnt 10467, 84 C.L.A.S. 11 at para 119

⁴ *McKinley*, *supra*, footnote 1

⁵ *Rocky Credit Union Ltd. v Higginson*, 1995 CarswellAlta 90; *Lowery v Calgary (City)*, 2000 ABQB 859 at paras 24-27;

⁶ *Whitford v Agrium Inc.*, 2006 ABQB 726

⁷ *Lowery v Calgary (City)*, 2002 ABCA 237; *Henson v Champion Feed Services Ltd.*, 2005 ABQB 215 at paras 51-53; *Gillespie v 1200333 Alberta Ltd.*, 2011 ABPC 167 ["Gillespie"]

⁸ *Rogers v Midland food Prodcuts Inc.*, 2014 CarswellOnt 10367, 243 A.C.W.S. (3d) 630 at para 56

⁹ *Gillespie*, *supra*, footnote 7