

## 3 Traps to Avoid When Writing a Termination Letter



A bad termination letter can cost you tens and even hundreds of thousands in damages.

Employees who spend their entire working life at one company are an extremely rare breed. And when you lay off one of these lifers without cause, you better be extra careful or you could end up on the wrong end of a big damage award.

### **Laid Off Lifer Is a Trial Lawyer's Dream**

An Ontario home goods retailer recently learned this lesson the hard way. Like so many others affected by the pandemic, the company had to reorganize and lay off workers in July 2020. Among the victims was a 57-year-old warehouse worker who had spent all 36 of his working years with the company. The company didn't deny that termination was wrongful and that it owed the employee common-law notice, i.e., termination notice beyond that required by the *Employment Standards Act*. The question was how much and whether the employee was in line for other kinds of damages.

After hearing all the evidence, the Ontario court settled on 24 months, the maximum notice it could award absent "exceptional circumstances." It also awarded the employee "moral damages" for the mental stress he suffered as a result of the way the company carried out the termination.

### **The Termination Letter from Hell**

What really stuck in the judge's craw was the boilerplate form letter the company used to offer a termination settlement. For HR directors in charge of creating these kinds of letters, the case is an excellent illustration of what to do and not do.

#### **1. Don't Offer Less than Legally Required Minimum**

The severance package must offer employees at least the minimum notice and benefits to which they're entitled under your jurisdiction's employment standards laws. That's true of all the terms. Thus, while the company's overall offer was generally more generous than the statutory minimums, it also included terms below what the Ontario *Employment Standards Act* (ESA) requires. Specifically, it offered vacation pay accrued to the termination date, even though the ESA says that vacation pay continues to accrue over the notice period, which was 8 weeks in this case.

## **2. Tell Employees They Still Get Their ESA Entitlements If They Reject Severance Offer**

The next slip-up was the one that really ticked off the judge. The letter didn't advise the employee that he'd get his ESA entitlements immediately even if he rejected the severance offer. The court called this a "serious defect" to the extent it implies that employees will automatically know that rejecting the severance offer won't affect their right to demand their ESA entitlements immediately. "By failing to include this proviso in the termination letter, [the employer] was not being honest and forthright with [the employee]," according to the court.

Adding to the effect was that the company did extend almost all of the employee's benefits through the notice period, as the ESA required, but didn't tell him. It wasn't until the lawsuit began that the employee learned that his benefits had been extended.

The company's lack of honesty and fair dealing caused the employee to suffer mental stress. He was without income and, in his belief, without benefits for nearly 8 months. His wife had to go back to work and he had to use his life savings to make ends meet. "This is no way to treat any employee, much less a long-term loyal employee of over 36 years," the court concluded.

## **3. Don't Use a Template Termination Letter**

In addition to making the company look cold and insensitive, the use of a boilerplate exerted a multiplying effect on the seriousness of the letter's flaws. It suggested either 1 of 2 things: A. The company was unfair and dishonest with all of the employees to whom it had sent the form letter in the past; or, B. The form letter actually did offer ESA-compliant terms and advised employees of their right to immediate payment of ESA entitlements, but the company deliberately altered the template for this occasion. In either case, this factor, along with all of the others, supported the case for moral damage, the court reasoned.

*Russell v. The Brick Warehouse LP*, 2021 ONSC 4822

## **Strategic Pointer**

The other risk of boilerplate termination letters is that they may become out of date if employment standards laws change. Consequently, you need to continually review the letters to ensure they reflect current requirements. And that costs time and money. Writing an individual letter for each employee you terminate may be a much wiser way to invest those resources.