Five Of The Most Common Misconceptions In Employment Law

About 90% of us are employees or employers – generally, even those who call themselves independent contractors and even many partners are employees.

And it seems just about everyone has an opinion on employment law – the number of self-designated experts roaming Canadians offices can be staggering. Which is why anyone who is fired invariably receives multiple opinions as to their "rights," although most of them are wrong.

Let me dispel some of the more common errors:

1. Companies need not be fair

They can promote the weakest, terminate the strongest and treat employees badly for no apparent reason. At the extreme, harsh treatment can become a constructive dismissal. But sheer unfairness provides an employee no rights at all. Recently, on my CFRB show, there was widespread disbelief at my statement that employers could hire receptionists based on looks. Even in the job market, studies have shown that better looking people and taller people fare better. It isn't fair, but it's not illegal.

2. Employees can be fired for no reason at all

A company does not have to have cause of any kind. "Cause" in employment law refers to misconduct that is so serious it gives an employer the right to fire without severance. But, other than firing employees on human rights grounds, employers can be as arbitrary as they like in selecting someone for dismissal.

3. You can fire people who are disabled

You can also fire people on sick leave or maternity leave. The law only prohibits firing employees *because* of any of these situations. These are generally protected categories insofar as employers' conduct will be scrutinized if such an employee is dismissed.

However, if there is a good reason for the dismissal, such as an overall reorganization which requires laying off everyone in their department, the employee will have no protection.

Disabled employees might be even worse off. If their disability has lasted long enough and the medical prognosis for their return is poor, the employee will have less rights than other employees. In such circumstances, they can be fired for "frustration," limited to only their rights to severance and termination pay under the Employment Standards Act, generally a fraction of what the Court would award for wrongful dismissal.

4. Not all "harassment" is illegal

The law prohibits discrimination based on prohibited grounds under the Human Rights Code such as race, sexual orientation, family status, disability, etc. Harassment (or mistreatment) on other grounds is entirely legal unless it is so extreme that no reasonable person should have to put up with it. In that event, it is a constructive dismissal.

In some provinces, such as Ontario, workplace "harassment" can be violations of the Provincial Health and Safety Act. However, harassment is not in the eye of the beholder. An employee may feel "harassed" (and often does) when an employer is providing them warnings leading up to dismissal for cause.

A Court or administrative tribunal would likely take a different view unless these warnings are provided in bad faith without any honest belief in their truth for the purpose of forcing the employee to resign. Even then, they may still not be a constructive dismissal if the abuse is not serious enough.

5. Length of service does not determine severance

In *The Law of Dismissal in Canada*, I refer to more than 100 factors the Courts may consider in determining wrongful dismissal damages. Length of service is only one of them.

There are cases where employees who worked for only two weeks receive 12 months severance and others where employees working more than 20 years received less than 12 months. Length of service is generally the only factor under employment standards legislation for calculating minimum termination and severance pay. However, for the much greater amounts awarded by a court, age, position and remuneration are generally just as important and re-employability, the most important of all.

This article originally appeared in the Financial Post.

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