Top 5 Mistakes Employers Make When Dismissing Employees



Dismissing an employee is never an easy exercise for an employer and all too often employers dismiss employees without fully appreciating the obligations and liabilities associated with their decision. We look at the top five mistakes employers make when terminating an employee's employment.

1. Only Paying Statutory Minimums

Employers are often surprised when they receive a demand letter or claim from a former non-union employee after providing notice or paying termination pay in accordance with provincial or federal employment standards legislation. One of the most common misperceptions employers have is that statutory entitlements are the extent of their obligations owed to a dismissed employee. The reality is that unless the employee signed an employment agreement when they started employment that clearly limited their entitlement at the point of termination to the statutory minimums, employees are entitled to common law reasonable notice. This is a court-determined notice period that considers the employee's length of service, age, position held and prospects of re-employment. While there are no "hard rules" with respect to how much an employee may be entitled to as each dismissal is fact specific, in all cases the common law will be significantly more than the statutory entitlements. CCP normally recommends to their clients to budget a month's compensation for each year of service with adjustments up and down based on age, position held and the ability to obtain comparable employment.

2. Not Continuing Benefits and Other "Fringe Benefits" During the Notice Period

With few exceptions, the common law reasonable notice period will include continuation of group benefits, pension contributions, car allowances, bonuses and profit sharing. These obligations can significantly increase the costs of the dismissal and are often overlooked by employers when assessing the pros and cons of letting someone go. As well, the failure to continue group benefits can lead to significant liability if the employee dies or is permanently disabled during the notice period. Employers who fail to continue group benefits essentially step into the role of insurer if entitlement to benefits is triggered during the notice period. Again, a properly worded employment agreement and clear, unambiguous bonus/profit sharing plans can reduce or eliminate these obligations as long as the

contracts comply with applicable employment standards legislation.

3. Taking the Position that Cause Exists for the Dismissal

While many employers believe that they have “cause” to dismiss an employee – be it poor performance, an inability to get along with co-workers or repeated absences, legal “cause” is considered to be the exception rather than the norm by courts and tribunals. Taking a cause position has significant consequences for employees – typically they will be denied EI benefits, will have a much more difficult time getting a new job and can face dire financial challenges because the employee did not receive a severance package. For these reasons, courts will often come down hard on employers who take a cause position that cannot be defended at trial or before an adjudicator. Damages for mental distress and punitive damages will often be awarded to employees and the courts tend to be more generous with the notice period assessment where employees cannot make their cause case. All this, plus the costs of the litigation itself, means that employers should carefully consider the risks associated with taking a cause position at the time of dismissal.

4. Dismissing an Employee Who is on a Protected Leave

Dismissing an employee when they are on a protected leave (pregnancy/parental, compassionate leave, emergency leave) or when they are off work because of a disability or WSIB injury can be a costly mistake for an employer. Courts and tribunals will scrutinize these dismissals to ensure that no part of the decision to dismiss was based on the fact that the employee took the leave or availed themselves of their statutory rights. If the dismissal is found to violate the employee’s rights, a variety of remedies, including reinstatement with full back pay, are available to the adjudicator who hears the employee’s case. Employers must tread carefully when dealing with these kinds of dismissals and should consider alternatives that do not expose them to these additional financial risks.

5. Not Requiring an Employee to Sign a Release

An employer who pays out a severance package that exceeds an employee’s statutory entitlements should always get a full and final release from the employee. This will allow an employer to negotiate and pay out a severance package with the peace of mind of knowing that the employee cannot come back at a later time seeking additional salary or compensation for the loss of group insurance coverage, pension contributions or other fringe benefits. A comprehensive release can even protect an employer from allegations of discrimination and/or harassment being made at a later date.

The decision to dismiss can bring any number of additional liabilities if an employer is not aware of the full extent of the obligations and an employee’ entitlements. Once the dismissal has taken place it is often too late to fix the situation or take steps to minimize liability. The CCP team regularly provides guidance and advice to employers prior to dismissal to reduce the risks that can manifest themselves down the road.

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