

# Wrongfully Terminated, Now Coming Back to Work

written by Rory Lodge | January 31, 2014



## **Question:**

To avoid a protracted process, my company has decided to accept the premise that an employee may have been wrongfully terminated. We believe it is possible that someone made an error when dismissing this employee. The employee, who has worked for us for 15 years, wants to return to work in his previous job. This employee was liked by many of his colleagues but had a poor relationship with his supervisor. Should we allow him to resume his old job?

## **What Goes Wrong: Wrongful Termination**

What constitutes wrongful termination in Canada? Terminating an employee and failing to provide sufficient notice; termination for cause and without sufficient notice when it turns out there was not sufficient cause; making substantial unilateral changes to an employee's job without their consent, even when the employee quits as a result. Understanding which of these best describes the situation may help determine your actions.

## **Reinstatement Not the Norm**

It is very rare in Canada that a wrongfully terminated employee will win the right to return to work. In Ontario, for example, The Ontario Ministry of Labour orders reinstatement in very rare cases. When reinstatement occurs, it is generally a result of a finding the employee was fired for exercising, or attempting to exercise, his or her legal rights under the *ESA* (*Employment Standards Act*). This includes asking for one's rights to be considered, asking for maternity or parental leave, asking an employer to obey the law, or filing a claim about one's *ESA* rights.

A violation of union processes outlined in a collective agreement may be considered akin to wrongful termination and restitution may include reinstatement.



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Generally, however, most of the time employees who have been wrongfully terminated will be awarded financial compensation (and required to mitigate damages by finding another job).

### **Pain or Gain**

Given that it is rare for an employee to be returned to work after a wrongful termination, consider your reasons for choosing this option including:

1. To save money. Consider the short-term savings versus potential negativity or longer-term challenges.
2. To right a wrong. This is a valid option but may not be executed without challenge.
3. To avoid a protracted fight. It could save you time, resources and good will in the short term.
4. You agreed to follow the suggestion of a mediator, arbitrator or negotiated it as an option. Although a mediators suggestion may not be binding you should not enter this process if you are not prepared to follow-through.

### **How To Return a Wrongfully Terminated Employee Back To Work**

Returning an employee to work without making changes or addressing the root problems can lead to future problems. If you plan on returning an employee to work consider taking these steps:

1. Examine the reasons for the termination in the first place. Determine if these reasons really existed, were valid and/or have been successfully resolved.
2. Identify what changes can be made to the working conditions to help smooth out the situation to avoid a repeat. However, be careful that these changes do not substantially change the job and provide the employee with a case of constructive dismissal.
3. Consider if the parties involved are willing, motivated and capable of making the situation work. Discuss this and gain agreement from all parties.
4. If the situation involved disciplinary actions that were based in legitimate concerns, consider how progressive discipline will proceed upon reinstatement.
5. If performance issues were a concern consider how you will establish and monitor performance benchmarks and who will be responsible for this process, as it may not be the immediate supervisor.
6. Are there alternatives to returning your employee to the exact same work situation he or she was confronted with before? Contemplate offering him or her a job in a different department or team. In one cases I was involved with the employee was offered a year to re-train and return to the organization in a new role with a new department and supervisor.
7. Have a plan in place to head off or address new problems. Be prepared to

carefully monitor the situation. However, be careful you do not over monitor the employee such that there are any implications of harassment.

8. It may be worth bringing in an outside performance coach to assess the potential workplace dysfunctionality concerning the employee, the supervisor, or the team. This may help with the ongoing challenge of moving on.

### **The Bottom Line on Reinstatement**

It is difficult to un-ring the termination bell. Once a relationship is broken it can be difficult to repair. Sometimes it is easier to part ways, even if this will cost you significantly in the short term. If reinstatement is required or appropriate, however, ensure everyone has a clear understanding of expectations and are prepared to let the past negativity go and move forward.