

Mouzourakis & Company

Trial Lawyers

Employment Law FAQ

Have you just been fired from your job? Or are you about to fire an employee?

A. Employee or Independent Contractor?

Only employees are protected by the common law of wrongful dismissal. An employment relationship usually has the following four characteristics:

- (1) the employer exercises considerable control over the employee;
- (2) the employer owns the tools used by the employee to perform his work;
- (3) the employer has the chance to reap profits; and
- (4) the employer bears the risks of losses.

These four factors are only a guide. The entire relationship between the parties must be examined. Whether the parties call their arrangement employment or independent contracting is NOT conclusive.

B. Employee's Rights Upon Termination

i. Under the Common Law

An employer has the right to terminate an employee who is working under an indefinite term contract at any time. However, if the employer does not have legal justification (called "just cause") to dismiss the employee, the employer must either:

- (1) give the employee "reasonable notice" that his or her employment will be terminated at a future date; OR
- (2) pay the employee a sum of money in lieu of giving reasonable notice of termination.

There is no set formula for determining the length of notice that will be deemed to be reasonable for any particular employee. The purpose behind giving reasonable notice or pay in lieu thereof is to "tide the employee over" while he or she searches for new employment. The length of time required to obtain new employment is influenced by several factors, namely the nature of the employment, the length of the employee's service, the age of the employee and the availability of similar employment.

A court will take all of these factors into consideration when determining the notice period which the employee should have been given. The general rule of thumb is one month's notice per year of service, but this is only a starting point in a court's assessment.

ii. *Under B.C.'s Employment Standards Act*

Immediately upon termination, the employee has the right to receive:

- (1) all unpaid wages earned to the date of termination;
- (2) unpaid vacation pay earned to the date of termination;
- (3) the minimum statutory notice provided under the *Employment Standards Act*, which is:
 - three full months of employment: 1 week
 - after 12 months of employment: 2 weeks
 - for each subsequent full year: 1 additional week/yr, to a max. of 8 weeks
- (4) a record of employment

An employee can seek the assistance of the Employment Standards Branch if the employer fails to provide these four items shortly after termination.

Note that the minimum statutory notice is just that: the minimum notice that an employer is required to provide. It is something different than the common law notice awarded by the courts, and payment of the statutory notice does not prevent the employee from suing for common law notice (although the amount of statutory notice paid will be deducted from an award for common law notice).

C. Just Cause

It is not an easy task for the employer to prove just cause for dismissal. Misconduct must be very serious in nature to justify dismissal after one incident. Minor misconduct usually requires several occurrences. In all but the most serious cases, an employer has a duty to warn the employee that termination will occur if the conduct is repeated. Warnings should be in writing -- oral warnings are not always sufficient. Incompetence is an especially tricky matter -- an employee must be given clear expectations and assistance in improving performance. In cases involving less than egregious conduct, legal advice should be sought before dismissing for cause.

Condonation of an employee's misconduct will be a defence to an allegation of just cause for dismissal. Dismissal of an employee due to redundancy or economic conditions does not constitute just cause.

The following conduct can constitute just cause for dismissal, depending on the circumstances:

- insubordination
- insolence
- incompetence
- dishonesty
- criminal conduct
- absenteeism
- intoxication
- illness (justifies dismissal only in rare circumstances and carries the risk of a human rights complaint for discrimination on the basis of physical or mental disability)
- sexual harassment

D. Constructive Dismissal

An employee who is not fired outright by the employer may nonetheless consider himself to have been "constructively dismissed" if the employer unilaterally changes an important term governing the employment, e.g., number of hours, rate of pay, key job functions, level of responsibility. Not every change made by the employer will constitute a constructive dismissal -- the change must be to a *fundamental* term of the employment contract.

E. Common Questions

Q: What rights does a unionized employee have?

A: *Unionized employees are governed by their collective agreements, not wrongful dismissal law.*

Q: What if an employee is fired before the end of a fixed-term contract?

A: *An employee who is fired part-way through a contract for a set term is generally entitled to be paid for the remainder of the term at his usual salary instead of receiving reasonable notice.*

Q: Are part-time employees entitled to reasonable notice?

A: *Yes, but the amount of notice to which a part-time employee is entitled may be less.*

Q: What if a written employment contract contains a term dealing with reasonable notice?

A: *Generally, the employee will be limited to the reasonable notice specified in the contract.*

Q: Are damages for reasonable notice considered income for taxation purposes?

A: *Yes.*

Q: What other damages can be claimed in addition to reasonable notice?

A: *The loss of the value of health and other benefits is compensable for the duration of the notice period. Lost pension entitlement or stock options can also give rise to damages. Sometimes misconduct of the employer before, during and after the termination can justify additional damages or give rise to a separate cause of action, e.g., defamation.*

Q: Do I have to look for a new job during the notice period?

A: *Yes. An employee has a duty to mitigate his damages by diligently seeking new employment.*

Q: Is there a limitation period for commencing an action?

A: *Yes. An action must be commenced within 6 years of the termination of employment.*

Q: Where is an action commenced?

A: *If the damages claimed are less than \$10,000, the action is commenced in Small Claims Court. If damages exceed \$10,000, the action is started in Supreme Court. Some Supreme Court cases can be decided by Summary Trial, which is a much faster and less expensive process than a full trial.*

F. TO SUE OR NOT TO SUE? - That is the Question

With the help of a lawyer, you will quickly see if your claim is one that requires a lawyer or a lawsuit. All claims fall either within the jurisdiction of Small Claims Court or Supreme Court. Although there are several criteria that help determine which court will handle your claim, the key factor is whether your claim is worth \$10,000.00 or less (Small Claims Court) or if it is worth \$10,000.00 or more (Supreme Court). Once you add up your wage loss, lost benefits and estimate probable compensation it is not hard to find yourself over the Small Claims Court ceiling of \$10,000.00. A lawyer will be able to analyze all the factors that are important in making your decision to sue or not to sue and help you make the decision that is right for you. A lawyer can help you settle your claim without having to go to trial or show you how to help yourself if the probable benefits do not justify the costs of hiring a lawyer. All it takes is a free consultation to help you find the solution that works for you.

G. QUESTIONS?

Remember, unless you have hired a lawyer, you are on your own! If you have any specific questions in regard to these tips or any other concerns regarding your claim, please feel free to call or meet with us in person. **We will be happy to talk to you either in person or over the phone at no charge!**

H. FEES?

We structure our fees for legal services to be within the reach of the average person. Depending upon the situation, we will work for you either on an hourly rate, contingency (percentage) fee basis or value billing method. In some cases we will work on contingency and will pay for the disbursements (no up-front money from you) while representing you. Disbursements are deducted from your settlement or judgment at the close of your case. We get paid when you get paid. If we don't win or settle, you pay us nothing. It's that simple!

To Protect Your Rights - You Must Know Your Rights.