

THE LEGAL EDGE

Current developments in the law which may affect you or your business

DAMAGES FOR TERMINATION OF EMPLOYMENT: WHAT YOU NEED TO KNOW

What is a non-unionized Ontario employee entitled to, when terminated? It depends.

An employee who quits or resigns, or who is terminated for “just cause”, is only entitled to accrued earnings, payable within seven days. What is “just cause”? If the employee does something so damaging that it essentially destroys the employment relationship, the employer can acknowledge the fundamental breach of contract and terminate the employee. It is a high test and an employer is well advised to speak with a lawyer before claiming “just cause”.

An employee who is terminated without “just cause” should be given sufficient advance notice in order to make suitable arrangements (i.e. find another similar job). In Ontario, the Employment Standards Act sets out certain minimum notice periods, but these are only minimums, and courts generally require employers to provide considerably more notice. How much is enough? It depends on a number of factors, such as: the employee’s age, work experience, years of service, specialization and economic circumstances.

If the employer fails to give sufficient notice, the employee is entitled to damages. The damages are calculated by multiplying the number of weeks of notice that should have been given by the gross earnings of the employee (including bonuses, pension contributions, etc.) less the damages that the employee could have “mitigated”. Employees must “mitigate” their loss by immediately seeking other similar work. This is because the law of contracts, including employment contracts, is based on the principle of compensation rather than punishment.

Employees must mitigate their damages even if terminated before the end of a fixed term contract - they cannot simply sue for the balance of the term. Furthermore, even if the employment contract specifies a guaranteed severance payment, courts generally interpret the severance payment as a “pre-estimate of damages”, still requiring the employee to mitigate the actual damage (thus reducing any payments from the severance plan) by seeking other similar work after being terminated.

In recent cases, however, Ontario courts have found an exception to the general duty to mitigate if the employment agreement either expressly or implicitly waives mitigation. Implied waivers were found where the severance packages were required to be paid, or where there was a practice to pay them, soon after termination (thus suggesting that the parties did not care to wait to see if mitigation was possible). Obviously, care should be taken when drafting or reviewing employment agreements, so that both sides will know their rights on termination.

Also, under Ontario’s Human Rights Code, an employee is entitled to damages and other remedies if he or she is fired, suffers adverse treatment, or harassment because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or handicap.

In some cases, directors and senior officers can be personally liable to wrongfully dismissed employees, if the corporation is unable to pay. This is the subject of another newsletter.

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