

R | M | R | F

**Reynolds
Mirth
Richards
& Farmer LLP**

BARRISTERS SOLICITORS



EMPLOYMENT LAW REFRESHER - TIPS AND PITFALLS DURING TOUGH ECONOMIC TIMES

**Kelsey Becker Brookes
Daina Young**





Topics

- Nature of Employment Law
- Constructive Dismissal
- Discipline
- Termination
- Other Issues



Nature of Employment Law

- Mix of
 - “Common Law” rules
 - Made by judges
 - Change over time
 - Less certain, more generous.



Nature of Employment Law

- Legislation
 - *Employment Standards Code*, minimums
 - *Alberta Human Rights Act*
 - *Labour Relations Code*
 - *Occupational Health and Safety Act*
 - *Freedom of Information and Protection of Privacy Act*



Nature of Employment Law

- In essence, a contract.
 - But many implied or statutory terms
- Written agreements
 - Can replace implied terms with explicit terms
 - Highly recommended
 - Reduces chances of uncertainty
 - Sets out roles and responsibilities
 - Generally subject to mutual agreement



Constructive Dismissal

- Difficult principle of law
 - Deals with a termination by conduct
 - Usually results from a unilateral fundamental change
 - Examples
 - Employee's "election"
- Court to determine whether "fundamental"



Constructive Dismissal

- Condonation
 - Employee can condone the change
 - Removes ability to complain
 - “Reasonable time”, rough rule is 6 months.



Constructive Dismissal

- Tips
 - Before change imposed, consult with HR.
 - Receive opinion regarding issue
 - Reflect change in writing
 - Get signature where possible
 - Use agreements with explicit ability to change



Progressive Discipline

- Conduct warranting disciplinary action
 - May be on-site conduct
 - Insubordination
 - Violation of established rule
 - Inability to perform (risky)
 - Off-site activity (social media)



Progressive Discipline

- Investigation required
 - Even where no union, investigate.
 - Except where impossible, get a response.
 - Then decide on the issue



Progressive Discipline

- Deciding on discipline
 - Consult with HR, and policies.
 - A number of factors: seriousness, impact, previous discipline, future working relationship.



Progressive Discipline

- Imposing discipline
 - Except for very minor, should be in writing.
 - Document verbal warnings
 - Then paper file with progressive letters
 - Legal counsel will review and provide opinion



Termination

- Despite absence of written contract
 - A contract exists
 - Statutes and common law impose a great number of implied terms
 - Usually in relation to the termination of employment



Termination

- Employee Termination
 - Employees can terminate their employment by providing *notice* of termination
 - “I gave my two weeks”
 - *Employment Standards Code* sets out the statutory minimum notice period: one week for employment longer than 3 months and less than 2 years; two weeks for two years or more (section 58(1)).



Termination

- Employee Termination
 - Employees do have an obligation to give “reasonable notice”
 - Depends on a number of factors
 - Usually nowhere near the time period for employer termination
 - Exceptions set out in the *Employment Standards Code*, s. 58(2).
 - Remedy is damages



Termination

- Employer Termination
 - More common
 - Requirements in:
 - *Employment Standards Code* and
 - Common law
 - Implied term in the contract of employment



Termination

- Employer Termination
 - Employment relationship can be terminated in two ways:
 - Just cause
 - No just cause



Termination

- Just Cause:
 - Employees don't believe that it exists
 - Employers think that it exists often
 - Onus is on the employer to prove just cause
 - Must represent a fundamental breakdown in the employment relationship



Termination

- Just Cause:
 - Misconduct: theft, assault, dishonesty
 - Incompetence: usually repeated, uncorrected behaviour.
 - Impairment: drugs and alcohol
 - Case sensitive: depends on all the factors



Termination

- *Employment Standards Code*
 - Depends on length of employment
 - Multiple periods of employment are counted together if less than three months elapsed (s. 54)
 - Can get termination pay, or notice, or combination (s. 55)



Termination

- *Employment Standards Code, s. 56*
 - a) one week, if more than 3 months but less than 2 years,
 - b) 2 weeks, if 2 years or more but less than 4 years,
 - c) 4 weeks, if 4 years or more but less than 6 years,



Termination

- *Employment Standards Code, s. 56 (continued)*
 - d) 5 weeks, if 6 years or more but less than 8 years,
 - e) 6 weeks, if 8 years or more but less than 10 years,
 - f) 8 weeks, if 10 years or more.



Termination

- *Employment Standards Code*
 - Benefits to employees are enforced by the government
 - Employees can contact Employment Standards Branch and make a complaint



Termination

- *Employment Standards Code*
 - Lay-off and recall (ss. 62ff)
 - Vacation and vacation pay (ss. 34ff)
 - Holiday and holiday pay (ss. 25ff)
 - Overtime and overtime pay (ss. 21ff)
 - Timing of termination payments:
 - 3 days after termination without just cause
 - 10 days for termination for just cause (s. 9)



Termination

- *Employment Standards Code*
 - *Section 4:*
 - *An agreement that this Act or a provision of it does not apply, or that the remedies provided by it are not to be available for an employee, is against public policy and void.*



Termination

- *Employment Standards Code (continued)*
 - *Section 3:*
 - *Nothing in this Act affects an agreement that imposes on the employer an obligation or duty greater than that under this Act.*



Termination

- “Reasonable” notice
 - Idea is to bridge an employee from one job to the next
 - Based on factors applicable to the employee
 - Standing at the date of termination



Termination

- “Reasonable” notice
 - Almost always greater than the times set out in the *Employment Standards Code*
 - Factors (“can be no catalogue”):
 - Character of the employment
 - Length of service of the employee



Termination

- “Reasonable” notice (*continued*)
 - Age of the employee
 - Availability of similar employment, having regard to the experience, training and qualifications of the employee.



Termination

- “Reasonable” notice
 - General rule of thumb:
 - [Insert general rule of thumb here]
 - Moves up and down the scale depending on the circumstances



Termination

- “Reasonable” notice
 - What’s included?
 - Wages
 - Value of benefits
 - Any perquisites
 - Less statutory deductions



Termination

- Aggravated damages
 - Employees want them!
 - Courts say no
 - Being terminated is not evidence of bad faith



Termination

- Aggravated damages (*Wallace, Honda*)
 - “Reasonable” only means length, not manner.
 - Must be akin to malice or blatant disregard for the employee
 - Honest belief in just cause bars aggravated damages



Termination

- Aggravated damages
 - Very important and recent case of Court of Appeal
 - *Merrill Lynch Canada Inc. v. Soost*, 2010 ABCA 251
 - Justice Cote clarifies the law on aggravated damages



Other Issues

- Human Rights
 - Duty to accommodate
 - Relates to ground set out in the *Act*, and relates to employment practices
 - Can relate to hiring and terminations
 - Commission is set up to receive complaints from individuals



Other Issues

7(1) No employer shall

- (a) refuse to employ or refuse to continue to employ any person, or
- (b) discriminate against any person with regard to employment or any term or condition of employment, because of the race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or of any other person.



Other Issues

- 7(2) Subsection (1) as it relates to age and marital status does not affect the operation of any bona fide retirement or pension plan or the terms or conditions of any bona fide group or employee insurance plan.
- 7(3) Subsection (1) does not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.



Other Issues

11 A contravention of this *Act* shall be deemed not to have occurred if the person who is alleged to have contravened the *Act* shows that the alleged contravention was reasonable and justifiable in the circumstances.



Other Issues

- Privacy
 - Employees have right to protection of personal information
 - *FOIPPA*
 - Complaints can be made
 - Requests for access to employee's personal information can be made



Other Issues

- OH&S
 - Workers are required to report health and safety concerns (s. 35)
 - Workers are required to refrain from working if on reasonable and probable grounds, safety of a worker is at risk.



Other Issues

- OH&S
 - Disciplinary against workers who report in compliance with the *Act* is prohibited (s. 36)
 - Complaint can be filed with an officer (s. 37)

R | M | R | F

**Reynolds
Mirth
Richards
& Farmer LLP**

BARRISTERS SOLICITORS



Thank You For Your Attention Questions Are Welcome

Kelsey Becker Brookes

780.497.3304

Daina Young

780.497.3309

Toll Free: 1.800.661.7673 (RMRF)