

Employment Practices & Wrongful Dismissal



The majority of employment practices claims made against an organization are wrongful dismissal and constructive dismissal claims. Both are considered unjust terminations. It is important to consult with professionals to protect your organization from an employment practices claim. Ecclesiastical Insurance has produced this white paper to guide you through the process and offers support to our customers with access to confidential human resources and legal services.

What is wrongful dismissal or termination?

Wrongful dismissal or termination occurs when an employee’s contract of employment has been terminated by the employer without just cause or without sufficient notice, pay in lieu of notice and/or severance. Employees and employers have the right to terminate employment for any lawful reason at any time. However, where the employer has made the decision to terminate employment, they are required by law to provide reasonable notice or pay in lieu of notice, and in some instances, severance

pay in addition to the pay in lieu of notice. Dismissal for “just cause” must be on the grounds that serious misconduct by the employee has occurred, either in a single incident or in a series of incidents. The employer is then not mandated to provide pay in lieu of notice or severance pay due to the seriousness of the misconduct. It is important to note that the Courts have established a high threshold for determining “just cause”, which may be difficult for the employer to prove. So, consult with legal counsel.

EXAMPLES OF NON-LAWFUL GROUNDS FOR DISMISSAL:

- *Discrimination on the basis of any of the prohibited grounds of discrimination as outlined in the Canadian Human Rights Act, e.g. gender, age, race, ethnicity, disability, religion, sexual orientation, gender identity or expression, or marital or family status.*
- *Disagreements over pay, benefits, overtime*
- *Toxic work environment (bullying, harassment, and sexual harassment)*
- *Protected leaves under the Employment Standards Act (medical or family related leaves)*
- *Response to an employee who is injured on the organization’s premises and is seeking benefits/coverage*
- *Reprisal for “whistleblowing”*

What is constructive dismissal?

Constructive dismissal occurs when an employee is not formally terminated but the terms of their employment are substantially changed unilaterally by the employer and the employee does not accept or consent to the changes. This may result in the employee resigning and making a claim that they were forced out of their position and are owed pay in lieu of notice and/or severance.

What you need to know to protect your organization

Legal action can be taken against an organization by terminated or ex-employees. Regardless of the legitimacy of the reasons for termination, the costs to defend the action can be significant, and the legal process can be lengthy. To prevent the organization from being susceptible to these losses there are steps management need to take when hiring a new employee, during the course of employment and at the termination of the employment relationship. Remember, everything you do can be scrutinized by the law.

Terminating an employee's contract the right way can save the organization from loss of reputation and legal expenses. The following are best practices to prevent wrongful dismissal losses.

What organizations need to consider when hiring

EMPLOYMENT CONTRACTS

A clearly written contract that has been vetted by legal counsel with knowledge of employment law in the applicable provincial jurisdiction may help to minimize future disputes if employment must be terminated. The employment contract will cover salary and other forms of compensation, benefits coverage, vacation entitlement, and should include an enforceable termination clause.

EMPLOYEE HANDBOOK

Develop an employee handbook with Human Resources staff or legal advisors who are knowledgeable in employment law. The document should contain organizational guidelines and policies. The handbook should include an anti-harassment policy as well as protocols on what should be done in the event of a harassment incident. The handbook should be provided to employees upon hiring, and the employee should sign off that they have received and read the policies. It is also recommended that the Employee Handbook be reviewed and updated annually, and signed off each time with a signed copy filed with Human Resources. In the event an employee is terminated for contravening a policy, the Human Resources files will have supporting evidence that the terminated employee signed off acknowledging that they received, read and understood the policies.

EMPLOYEE AND MANAGEMENT TRAINING

Provide frequent training courses on the organization's anti-harassment policy and how to effectively communicate, prevent, and resolve conflict. Ensure regular reminders are communicated throughout the organization to reinforce that the organization has zero tolerance for this behaviour and has a formal investigative process.

GUIDELINES FOR TERMINATING EMPLOYMENT

Develop guidelines for how employees are selected for termination in the event the organization restructures, downsizes and/or eliminates positions. This is recommended to show there is an established formal, unbiased procedure for termination. The organization should also develop guidelines for employee performance management and how performance issues are handled within the organization. These guidelines should be developed in conjunction with the Human Resources Department and updated as needed.

What to document in employee files

The following items can serve as evidence in the event of a wrongful dismissal claim and support the organization's decision for terminating an employee.

SET GOALS

Employees need to be aware of and agree to the roles, responsibilities and goals of their position and the expectations that their employer has for their performance. Regular feedback for the employee can help to guide them toward meeting positive performance expectations or correct negative actions early.

PERFORMANCE REVIEWS

Conduct performance reviews at least annually for all employees and volunteers. It is important to document their performance and that a discussion took place. Whether it is a good or a bad review, it lets employees know how they are performing in relation to the previously established goals and expectations. If the employee is not meeting expectations, the performance review should include a clearly written Performance Improvement Plan with specific expectations, targets, and support to help the employee succeed. Ensure both management and the employee sign off on the Performance Review and Improvement Plan, if applicable

DOCUMENT DISCIPLINARY ACTIONS

Where disciplinary actions are taken, it is essential to document all these items in the employee's Human Resources file. Documents should include management and Human Resources' communication related to disciplinary steps and actions taken.

COMMUNICATE DISCIPLINARY ACTIONS

Where disciplinary actions such as suspensions, warnings, and final warnings with notice to terminate are made, they must be communicated to the employee both verbally and in writing. All written communications to the employee regarding disciplinary actions should be signed off by both management and the employee and retained in their Human Resources file.

When considering terminating

Here are a few things to consider before deciding to terminate:

NEVER TERMINATE ON THE SPOT

Terminating an employee is a big decision and should not be taken lightly, especially when emotions are involved. Take time to consult with senior management and professionals such as Human Resources and get legal advice where necessary. Remember, Human Resources may be aware of confidential information that could appear discriminatory if the employee were terminated. For example, the employee notified Human Resources of mental health problems or bullying.

EXPLORE ALL COURSES OF ACTION

Every situation varies when it comes to terminating employment. Have you done your due diligence such as investigating, taking disciplinary actions (where applicable), consulting with Human Resources and receiving legal advice?

BE CONSISTENT

To prevent allegations of wrongful dismissal, such as discrimination, use established guidelines for terminating employment. It is important to maintain consistency by terminating employees involved in similar situations, in the same manner.

KNOW THE LAW

Seek advice from legal counsel and Human Resources. Know what laws apply to your organization and situation such as: common law, civil law, provincial employment laws, Human Rights legislation and review the employee's employment contract.

EVIDENCE AND DOCUMENTATION

Do you have it? If an allegation of wrongful dismissal is brought against the organization, you will need evidence to show the termination was justified. Can you prove all the right steps were taken from the start of employment to the end of employment? Did you comply with the law?

SEVERANCE

Determine if pay in lieu of notice and/or a severance package will be offered. Consult with legal counsel or Human Resources to ensure the employee is receiving the amount required by law upon termination of the employment relationship.

The Termination

Important steps to take during the termination process:

BE PREPARED

Terminating employees can be uncomfortable. Saying the wrong thing can make the situation worse by confusing or upsetting the employee and may result in an allegation of wrongful dismissal or bad faith in the manner of dismissal. Consider practicing what to say and how to say it with Human Resources.

BEST PRACTICES

- *Have at least two people present from management, senior management, or Human Resources*
- *Communicate clearly and directly why the employee is being terminated and provide supporting reasons*
- *Be respectful*
- *Do not apologize*
- *Do not compliment them as a person or as a good employee*
- *Do not argue. If the individual becomes hostile or attempts to stop the termination discussion, stay focused and continue to clearly communicate why they are being terminated and provide reasons.*

OFFERING A SEPARATION PACKAGE

When pay in lieu of notice and/or severance is offered during termination, the employee must sign a Final Release Form to accept the terms and to collect the financial package. The release form should be drawn up by legal counsel. This is an important document as the organization is at risk of a claim exposure if the release form is not signed.

ADVANCE NOTICE OF TERMINATION

Where practical and where there is minimal risk to the organization, consider giving advance notice of termination of at least a few weeks and notify the employee if a separation package will be provided. This can give the employee time to decide what to do next, such as looking for other employment, and may offset the amount of pay in lieu of notice the organization has to provide. Please consult with legal counsel and ensure the Final Release Form is signed.

DOCUMENT THE MEETING

Record what both parties in the termination meeting said and did. In the event of a claim for wrongful dismissal, this information will be important.

MAINTAIN PAST EMPLOYEES' FILES

Do not destroy evidence! In the event a wrongful dismissal claim is brought against the organization, employment records will be important. Maintain files for 2 years from the date of termination or resignation.

Legal Action

If you receive verbal or written notification of a claim or potential legal action or believe legal action will be commenced by a terminated or ex-employee, do the following:

INVESTIGATE

Take all allegations seriously and investigate for existing and ex-employees.

CONSULT WITH PROFESSIONALS

Obtain professional assistance from Human Resources and legal counsel. Include legal counsel in the investigation process. Remember to document everything!

NOTIFY YOUR INSURANCE PROVIDER

Any allegation brought against the organization, big or small, should be taken seriously. Even if you think legal action by the ex-employee will not be pursued, your insurer needs to be notified as soon as possible. Ecclesiastical Insurance has claims specialists available to provide guidance on what or what not to do when a claim is made against the organization.

Claims can be reported through your broker or online at ecclesiastical.ca/reportclaim

If you need legal advice or Human Resources assistance, visit our website at ecclesiastical.ca for details on how to access these free services through our third party service provider **LegalConnex** and **HRAssist**.

LegalConnex

LegalConnex provides unlimited, free confidential telephone access to experienced lawyers who provide information and practical solutions that can help policyholders avoid high legal costs associated with issues such as: complying with the legal requirements of terminating an employee; the legal responsibility of an organization for its team of volunteers; recourse for damages to property caused by a building contractor while doing repair work. Call **1-866-263-0256** and have your policy number available to verify eligibility.

HRAssist

HRAssist provides unlimited, free, confidential telephone access to experienced Human Resources professionals and lawyers who provide advice and assistance on workplace issues such as: developing policies for permanent staff and/or volunteers; drafting employment contracts; dealing with allegations of harassment or bullying; performance management. Call **1-888-325-4633** and have your policy number available to verify eligibility.

References

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