

Rely on **TDS**

Termination Dos, Don'ts and Dollars

Presentation to Association of Manitoba Municipalities



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Non-Union

- Application of contract law and common law principles when it comes to the termination of non-unionized employees

Union

- Application of the collective agreement and labour law when it comes to the termination of unionized employees

Hiring – The Big 3

1) Human Rights

- Employers are prohibited under *The Human Rights Code* from refusing to hire an applicant on the basis of a “prohibited ground”
 - ancestry; nationality; ethnicity; religion; age; sex (including pregnancy or the possibility of pregnancy); gender identity; sexual orientation; marital or family status; source of income; political belief or association; or any physical or mental disability; social disadvantage

Hiring

- Exception: Bona Fide Occupational Requirement (“BFOR”)
- But is the requirement really a BFOR??!!
 - E.g. firefighters case

Hiring

- Consider applications and interviews: it may be discriminatory to ask an applicant to reveal information about a prohibited ground
- Be aware of questions that may indirectly reveal such information – e.g. will questions about graduation date reveal the applicant's age?
- If an applicant is denied a job or discriminated against based on a prohibited ground, applicant may file a complaint with the Manitoba Human Rights Commission, which has the authority to award damages and possibly other remedies

Hiring

2) Representations made during the hiring process

- An employer must be careful not to make representations about the employment which are not true. A misrepresentation as to the character of employment may expose the employer to tort liability.
 - e.g. “There is enough work for you to work here forever”
- Where the applicant relies on the misrepresentation and accepts employment, he or she could later sue the employer in tort for any damages suffered as a result of the misrepresentation. This may be in addition to damages awarded for wrongful dismissal.
- Known as “wrongful hiring” cases

Hiring

- Therefore, employers must take great care to represent employment opportunities accurately.
- As a measure of protection, employers should include a clause in any employment contract stipulating that the written agreement (i.e. the employment contract) contains the entire terms of the employment and any other representations made do not form part of the agreement and are not to be relied on

Hiring

3) Inducing an applicant to leave his or her previous employment

- actively encouraging an employee to leave a previous secure employment may result in an increase in the reasonable notice period that the employee will be entitled to on a termination without cause
- Considerations: the length of the previous employment, the security of the previous employment, representations made by the employer to entice the employee to leave

Hiring

- **DOs**
 - Accurately represent the job being advertised
 - Avoid inducing an applicant to leave current, secure employment
 - Put employment contracts in writing
- **DON'Ts**
 - Ask the employee to provide information contrary to human rights law if not a BFOR

Addressing and Assessing Performance

- Performance (or lack thereof) often a key factor in the decision to terminate
- Performance reviews – a valuable tool!
- Areas to address:
 - skills and abilities
 - character and behavioural qualities (e.g. initiative, reliability, judgment)
 - Other relevant considerations specific to employment

Addressing and Assessing Performance

- Conduct performance reviews regularly
- Be honest!
- Review with the employee in person and have the employee acknowledge and sign

Addressing and Assessing Performance

- If performance is a problem:
 - Identify and describe the problem to the employee
 - Determine how long the problem has existed
 - Communicate performance expectations to the employee and ensure employee understands what is expected
 - Where possible, provide employee with instruction and training to enable employee to meet employment standards
 - Give the employee a timeline by which performance is expected to be met
 - Monitor performance and follow up with employee
 - Warn the employee that if performance remains unsatisfactory, termination could ensue

Addressing and Assessing Performance

- Consider whether the employee requires any special accommodation
 - Is the cause of the problem as result of a physical disability/condition (e.g. illness or pregnancy), mental disability (e.g. depression, addiction), family status (e.g. child care needs)?
 - If so, the employer has a duty to accommodate the employee to the point of “undue hardship”
 - Suggests that the employer must endure some hardship, even if this means a greater expense to the employer

Addressing and Assessing Performance

- Has the employer met its duty to accommodate?
 - A presentation in and of itself!!!
 - Required measures will vary from case to case
 - E.g. Physical Disability – permitting leaves to take doctors appointments; modification of duties (e.g. increased clerical or other non-physical work), longer or more frequent breaks
 - E.g. Mental Disability – provision of counseling/EAP, permitting leaves to seek treatment
 - E.g. Family Status – permitting flex time, working from home

Addressing and Assessing Performance

- The extent of the accommodation will vary from case to case.
- Consider the following factors:
 - expense to the employer
 - disruption to the workforce
 - size of the employer and the workforce
 - affect of the accommodation on employee morale
 - safety considerations

Addressing and Assessing Performance

- The Bottom Line:
 - An employer must give an employee a reasonable opportunity to be made aware of and correct poor performance. Absent any behaviour that is significant and egregious (for example, theft or fraud), the employer should not be overly quick to terminate an employee but should rather address and attempt to rectify performance issues.
 - If performance issues are due to a disability, family status, or other prohibited ground, employer must accommodate to the point of “undue hardship” or risk a complaint to the Human Rights Commission

Addressing and Assessing Performance

- **DOs**
 - Conduct performance reviews on a frequent and consistent basis
 - Clearly address performance problems with the employee
 - Clearly communicate the standards they are expected to meet
 - Consider whether performance is due to some other problem (e.g. physical or mental disability, family status, etc.) which can be accommodated
- **DON'Ts**
 - forget to document performance reviews
 - condone poor performance

Wrongful Dismissal at Common Law (non-union)

- What is “just cause”?
 - Misconduct that goes to the root of the employment contract
 - e.g. neglect of duty, conduct prejudicial to the employer’s business, insubordination/disobedience
 - May be a single incident or a pattern/history of multiple incidents
 - Each case must be decided on its own facts
 - Heavy onus on the employer to prove just cause

Termination for Cause

- Employer should be able to clearly pinpoint the misconduct
- Warnings and opportunities for improvement should be given where possible
- The employer must not have condoned the behaviour (e.g. failure to respond to the behaviour)
- Any circumstances unique to the case (e.g. higher standard of conduct for municipal officers than others)

Termination for Cause

- Special consideration re municipal employees: lack of loyalty
- *Bishop v. Trochu (Town)*
 - The council had a meeting with the administrator to address poor performance issues: his poor grammar, spelling, public relations, accounting, communications and leadership skills.
 - After this meeting, the administrator sent a letter to the provincial government accusing the council of engaging in misappropriation of grant monies.
 - The administrator was dismissed, not for his poor performance as per the review, but for accusing the municipal council of unethical behaviour and because of the way he dealt with the grants (using grants for unauthorized purposes).

Termination for Cause

The court outlined some of the duties and responsibilities of a municipal employee:

- must not engage in activities that attack the municipal government policies or activities - this displays a lack of loyalty - inconsistent with his or her duties as a municipal government employee.
- employee is as free as a private citizen to criticize municipal government policies provided they are unrelated to his or her specific job or department.
- must exercise restraint in criticizing town policy or council – ensures that municipal service is perceived as impartial and effective in fulfilling its duties. The degree of restraint is relative to the position and visibility of the municipal administrator in the community.
- In *some* circumstances employee may publicly express opposition to the actions and policies of municipal government (e.g. municipality engaged in illegal acts or if policies jeopardize the health or safety of others).

Terminations without cause - Notice

- An employee is entitled to “notice” of termination where the termination is without cause
- What is notice?
 - Information that employment will end on a certain date
 - Can be “working notice” (where employment continues during the notice period)
 - Can provide pay in lieu of notice (often referred to as a “severance” package)

Notice

- **How much notice?**
 - Minimum notice under *The Employment Standards Code*

Length of Employment	Notice Period
Less than 1 year	1 week
At least 1 year and less than 3 years	2 weeks
At least 3 years and less than 5 years	4 weeks
At least 5 years and less than 10 years	6 weeks
At least 10 years	8 weeks

Exceptions: Where No Notice is Payable under the Code

- Employment is for less than 30 days
- Employment is for a fixed term and terminates at the end of the term
- Employment is less than 12 months, for a specific task and terminates when that task is complete
- Employee is employed in construction
- Employment is impossible to perform or has been frustrated (fortuitous or unforeseeable circumstance)
- Employee gives notice to quit or retire on a certain date
- Where employment is terminated for cause

Reasonable Notice

- Check the terms of the Employment Contract
 - Term or indefinite?
 - Addresses termination or not?
- If no contract or if contract is silent about termination, then “reasonable” notice is required
- What is “reasonable notice”?
 - The question of much litigation and the sticking point in many severance negotiations!

Reasonable Notice

- No “magic formula” - each case must be decided on a case-by-case basis
- Depends on a variety of factors:
 - the character of the employment
 - the employee’s position relative to the management structure of the employer
 - the length of service of the employee
 - the age of the employee
 - the availability of similar employment having regard to the expertise, training and qualifications of the employee

Reasonable Notice

- As a general guide, 1 month per year of service is reasonable – *but not a hard and fast rule*. The unique facts of each case must still be considered.
- Courts in Canada have set 24 months as the upper limit and are hesitant to award beyond this
- However, Courts in Manitoba have not awarded more than 18 months within the past 10 years

Calculating the Compensation

- Another question which keeps lawyers busy!
- Employee is entitled to the compensation that he or she would have earned during the notice period
- Can include such things as:
 - salary
 - increases in salary that employee would have been entitled to during the notice period
 - bonuses
 - pension benefits
 - fringe benefits
 - vacation pay

Working Notice or Pay in Lieu of Notice?

Working Notice

- Employee works up until the date of termination
 - Is employee willing to work out the notice period?
 - Has the relationship deteriorated?
 - Will the employee be productive?
 - Will the employee present a security risk?

Working Notice or Pay in Lieu of Notice?

Pay in lieu of notice

- Lump sum
- Salary continuance
- Release?

The Manner of Termination

Procedural Fairness

- Special consideration that applies to “municipal officers” that may not apply to other employers
- Who is a “municipal officer” is a grey area for some employees – e.g. supervisory or middle-management personnel

The Manner of Termination

- Council owes a municipal officer a duty to be fair in the manner of dismissal:
 - must provide general substance of the reasons for the dismissal
 - must provide an opportunity to respond to reasons (through discussion, by written submission or oral hearing)
- Failure to provide procedural fairness could result in judicial review
- Court could quash council's decision and reinstate the employee

The Manner of Termination

Punitive/Other Damages

- Take care to avoid harsh, vindictive or other extreme conduct in termination
- Consider:
 - Be sensitive to the timing of the termination date
 - Be sensitive to the time of day that the termination takes place and where it occurs
 - Balancing the need to maintain security with employee privacy/dignity

The Manner of Termination

- Provide a termination letter so that the message and terms are clearly communicated, especially if not for cause
 - e.g. any proposals regarding pay in lieu of notice
 - e.g. benefit considerations, including conversion privileges
 - provide time to seek legal advice prior to accepting
 - include a release

Employees Duties Upon Termination

Duty to Mitigate

- Employee must take reasonable steps to obtain equivalent employment and to accept such employment if available
- Onus on the employer to prove that the employee could have found alternative employment if he/she had taken reasonable steps to do so
- Effects of Mitigation
 - Failure to mitigate by the employee could reduce the “reasonable notice” period
 - Set-off with income earned during the notice period

Duty to Mitigate

- The duty to mitigate does require that the former employee spend money, time and ingenuity in finding a new job
- *This may mean the employee will be obliged to work out their notice period, if offered, or accept reasonable alternative employment offered by the same employer*

Other Considerations

- **Check insurance policy**
 - Check insurance policy – may cover losses incurred due to employment related practices, errors or omissions
 - Insurer may have duty to pay defence costs in a wrongful dismissal suit

Other Considerations

- **Tax Considerations**

- Lump sum severance payment = taxable as a *retiring allowance* and subject to withholding tax (remit directly to CRA)
- Salary continuance = subject to regular deductions (income tax, CPP, EI)
- Structuring the settlement in a manner favourable to the employee:
 - Direct payment or RRSP contribution
 - Allocation for legal fees

Terminations

- **DOs**
 - Be clear in communicating the termination
 - Provide terms of separation in writing
 - Be sensitive to the employee
 - Have a witness to the dismissal
- **DON'Ts**
 - Embarrass the employee
 - Make an unreasonable severance offer



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Questions



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