LABOUR AND EMPLOYMENT

TERMINATION OF EMPLOYMENT IN ONTARIO
by W. Eric Kay and Andrew J. Skinner

Overview

The cost of terminating the employment of an employee in Ontario depends upon a mixture of contract provisions, common law and statute. The rules under the Employment Standards Act, 2000 about the termination of employment are minimum requirements which cannot be contracted out of. Some employees may have rights under the common law or other legislation that provide them greater rights than those regarding termination under the *Employment Standards Act, 2000*.

Common law obligations for reasonable notice of termination will always add an element of uncertainty to an employee's entitlements upon termination, as calculating payment in lieu of notice at common law requires an understanding of the impact of the termination on the affected employee. In particular, an employee's age, length of service, character of employment, and availability of suitable alternative employment may all affect their entitlements at common law. The only way employers can attempt to mitigate the cost of common law obligations are to use well-drafted termination provisions in their employment contracts.

What is Termination?

Under the *Employment Standards Act, 2000* ("ESA") a person's employment is terminated if the employer:

- dismisses or stops employing an employee, including where an employee is no longer employed due to the bankruptcy or insolvency of the employer;
- "constructively" dismisses an employee and the employee resigns, in response, within a reasonable time; or
- lays an employee off for a period that is longer than a "temporary layoff".

In most cases, when an employer ends the employment of an employee who has been continuously employed for three months, the employer must provide the employee with either written notice of termination, termination pay in lieu of notice or a combination (as long as the notice and the number of weeks of termination pay together equal the length of notice the employee is entitled to receive).

The ESA does not require an employer to give an employee a reason why his or her employment is being terminated. There are, however, some situations where an employer *cannot* terminate an employee even if the employer is prepared to give proper written notice or termination pay. For example, an employer cannot end someone's employment, or penalize them in any other way, if any part of the reason for the termination of employment is based on the employee asking questions about the *ESA* or exercising a right under the *ESA*, such as refusing to work in excess of the daily or weekly hours of work maximums, or taking a leave of absence, as specified in the *ESA*.

Constructive Dismissal

A constructive dismissal may occur when an employer makes a significant change to a fundamental term or condition of an employee's employment without the employee's actual or implied consent.

For example, an employee may be constructively dismissed if the employer makes changes to the employee's terms and conditions of employment that result in a significant reduction in salary or a significant negative change in such things as the employee's work location, hours of work, authority, or position. Constructive dismissal may also include situations where an employer harasses or abuses an employee, or an employer gives an employee an ultimatum to "quit or be fired" and the employee resigns in response.

In order for the employer's actions to be considered a termination of employment for purposes of the *ESA* the employee would have to resign in response to the change within a reasonable period of time.

Temporary Layoff

The right to temporarily lay off an employee must be negotiated as part of the contract of employment. However the mechanics of the layoff are governed by the *ESA*.

An employee is on temporary layoff when an employer cuts back or stops the employee's work without ending his or her employment (e.g., laying someone off at times when there is not enough work to do). The mere fact that the employer does not specify a recall date when laying the employee off does not necessarily mean that the lay-off is not temporary. Note, however, that a lay-off, even if intended to be temporary, may result in constructive dismissal if it is not allowed by the employment contract.

In order for an employer's actions to be considered a termination of employment for purposes of the *ESA* a "week of layoff" is a week in which the employee earned less than half of what he or she would ordinarily earn (or earns on average) in a week. A week of layoff does not include any week in which the employee did not work for one or more days because the employee was not able or available to work, was subject to disciplinary suspension, or was not provided with work because of a strike or lockout at his or her place of employment or elsewhere.

Employers are not required under the *ESA* provide employees with a written notice of a temporary layoff, nor do they have to provide a reason for the lay-off. They may, however, be required to do both under a collective agreement or an employment contract.

Under the *ESA*, a "temporary layoff" can last:

a. not more than 13 weeks of layoff in any period of 20 consecutive weeks; or

b. more than 13 weeks in any period of 20 consecutive weeks, but less than 35 weeks of layoff in any period of 52 consecutive weeks, where:

- the employee continues to receive substantial payments from the employer; or
- the employer continues to make payments for the benefit of the employee under a group or employee insurance plan (such as a medical or drug insurance plan) or a retirement or pension plan; or
- the employee receives supplementary unemployment benefits; or
- the employee would be entitled to receive supplementary unemployment benefits but is not receiving them because he or she is employed elsewhere; or
- the employer recalls the employee to work within the time frame approved by the Ministry of Labour Director of Employment Standards; or
- the employer recalls the employee within the time frame set out in an agreement with an employee who is not represented by a trade union; or

c. a layoff longer than a layoff described in "b" where the employer recalls an employee who is represented by a trade union within the time set out in an agreement between the union and the employer.

If an employee is laid off for a period longer than a temporary layoff as set out above, the employer is considered to have terminated the employee's employment. Generally, the employee will then be entitled to termination pay.

Qualifying for Termination Notice or Pay in Lieu of Notice

The concept of "at will" employment does not exist in Ontario. Therefore, any "at will" employment clause in an employment contract will be void, and absent cause for dismissal (which is generally a very high threshold to meet), an employer is obliged to provide an employee with reasonable advance notice of termination of employment or a payment in lieu of advance notice.

Certain employees are not entitled to notice of termination or termination pay under the *ESA*. Examples include construction employees, employees on a temporary layoff, employees who refuse an offer of reasonable alternative employment and employees who have been employed less than three months. There are a number of other exemptions to the termination of employment provisions of the *ESA*.

The termination of employment rules are entirely separate from any entitlements an employee may have to be paid severance pay under the *ESA*.

Written Notice of Termination and Termination Pay in Lieu of Notice

Pursuant to the *ESA* Ontario employees who have been employed for more than 3 months are entitled to either written notice of termination (working notice) or termination pay or a combination of both.

An employee who does not receive the written notice required under the *ESA* must be given termination pay in lieu of notice. Termination pay is a lump sum payment equal to the regular wages for a regular work week that an employee would otherwise have been entitled to during the written notice period. An employee earns vacation pay on his or her termination pay. Employers must also continue to make whatever contributions would be required to maintain the benefits the employee would have been entitled to had he or she continued to be employed through the notice period.

The amount of notice or payment in lieu of notice depends on the length of employment. In most cases, the termination pay will be one week of regular salary per year of service (if they have more than 5 years' service they may also be entitled to severance pay, as outlined below).

<u>Calculating Written Notice of Termination or Termination Pay in Lieu of Notice</u>

A person is considered "employed" not only while he or she is actively working, but also during any time in which he or she is not working but the employment relationship still exists (for example, time in which the employee is off sick or on leave or on lay-off).

The amount of notice to which an employee is entitled depends on his or her "period of employment". An employee's period of employment includes not only all time while the employee is actively working but also any time that he or she is not working but the employment relationship still exists, subject to some exceptions.

The following chart specifies the amount of notice required:

Period of Employment	Notice Required
Less than 1 year (but at least 3 months)	1 week
1 year but less than 3 years	2 weeks
3 years but less than 4 years	3 weeks
4 years but less than 5 years	4 weeks
5 years but less than 6 years	5 weeks
6 years but less than 7 years	6 weeks
7 years but less than 8 years	7 weeks
8 years or more	8 weeks

Note: Special rules determine the amount of notice required in the case of mass terminations - where the employment of 50 or more employees is terminated at an employer's establishment within a four-week period.

<u>Requirements During the Statutory Notice Period</u>

During the statutory notice period, an employer must:

- not reduce the employee's wage rate or alter any other term or condition of employment;

- continue to make whatever contributions would be required to maintain the employee's benefits plans; and
- pay the employee the wages he or she is entitled to, which cannot be less than the employee's regular wages for a regular work week each week.
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Regular Rate: This is an employee's rate of pay for each non-overtime hour of work in the employee's work week.

Regular Wages: These are wages other than overtime pay, vacation pay, public holiday pay, premium pay, termination pay and severance pay and certain contractual entitlements.

Regular Work Week: For an employee who usually works the same number of hours every week, a regular work week is a week of that many hours, not including overtime hours. Some employees do not have a regular work week. That is, they do not work the same number of hours every week or they are paid on a basis other than time. For these employees, the "regular wages" for a "regular work week" is the average amount of the regular wages earned by the employee in the weeks in which the employee worked during the period of 12 weeks immediately preceding the date the notice was given.

How to Provide Written Notice

In most cases, written notice of termination of employment must be addressed to the employee. It can be provided in person or by mail, fax or e-mail, as long as delivery can be verified. There are special rules for providing notice of termination if an employee has a contract of employment or a collective agreement that provides seniority rights that allow an employee who is to be laid off or whose employment is to be terminated to displace ("bump") other employees and when there is a mass termination (50 or more employees).

Severance Pay (caps out at 26 weeks)

Under the ESA, when an employer has a global payroll of at least $2.5 million, employees who have been employed for five years or more are also entitled to severance pay. Severance pay is calculated by multiplying the employee's regular wages for a regular work week by the number of completed years of service and the number of completed months of service divided by 12 for years that are not completed. In sum, employees with 5 years or more of service are entitled to a week of severance pay per year of service, pro-rated for incomplete years, to a maximum of 26 weeks.

When to Pay Termination and Severance Pay

Termination and severance pay must be paid to an employee either seven days after the employee's employment is terminated or on the employee's next regular pay date, whichever is later. An employer may pay the severance pay portion in installments if the employee agrees to this in writing.

Benefit Continuation

Pursuant to the ESA, Ontario employers must continue to fund any employee benefits for the statutory termination period. This can create a conflict with the terms of disability insurance plans.

Common Law Notice

In the absence of a binding employment agreement that sets out the terms the parties have agreed upon in the event of the termination of employment without cause, an employee is entitled to reasonable notice of dismissal. This common law requirement typically amounts to notice or payment in lieu of notice in addition to Ontario's statutory minimum payments. Determining "reasonable notice" at common law is both an art and a science as there is no prescribed formula to determine common law notice.

The classic statement of what factors are taken into account in assessing common law damages are set out in *Bardal v. Globe & Mail Ltd.*, which states:

> There could be no catalogue laid down as to what was reasonable notice in particular cases. The reasonableness of the notice must be decided on with reference to each particular case having regard to:
>
> - the character of the employment,
> - length of service,
> - age of the employee, and
> - availability of similar employment in light of the employee's experience, training and qualifications.

Since common law obligations for reasonable notice of termination are affected by the impact of the termination on the dismissed employee, there is an element of uncertainty in determining an employee's entitlements upon termination.

The Treatment of Bonuses during the Notice Period

Employees in Ontario are generally entitled to post-termination bonus payments, including , deferred and incentive compensation and commissions, during the applicable notice period as though they had continued to work, unless there are clear contractual terms limiting the payment of the bonus. Whether a bonus or other benefit is payable during the notice period depends not only on the language of the relevant plan, but also whether the bonus is determined to have become an integral part of the employee's salary. Courts have produced conflicting decisions on whether the language of an employee's plan which limits an employee's entitlement to a bonus or other form of post-termination compensation should govern in instances where the payments have been determined to be an integral component of the employee's compensation. The court has also considered an employer's decision to terminate and deny an employee a post-termination grant in the context good faith, and found the employer's decision could not stand when exercised to deliberately deny an employee a bonus entitlement.

Although it is important to include clear language regarding the payment of bonus and other benefits during the period of notice, employers should be aware that the courts have demonstrated inconsistency and unpredictability on this issue.

Other Considerations for Employers Prior to Termination

Before terminating an employee, Ontario employers should be familiar with their obligations, and potential restrictions, under Ontario's Human Rights Code. In particular, employers should ensure that the reason for termination is not directly or indirectly connected to a protected ground of discrimination. There are also anti-reprisal or whistleblower protection rules under the ESA and Occupational Health and Safety Act that may affect an employer's ability to terminate an employee or be used as a basis for a claim by a dismissed employee.

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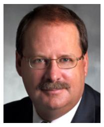

W. Eric Kay is a partner in Dickinson Wright's Toronto Office and can be reached at 416.777.4011 or ekay@dickinsonwright.com

Andrew J. Skinner is a partner in Dickinson Wright's Toronto Office and can be reached at 416.777.4033 or askinner@dickinsonwright.com