

RESPONDING TO WRONGFUL DISMISSAL CLAIMS: A CONCISE GUIDE FOR ONTARIO EMPLOYERS



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This guide is not legal advice or a substitute. You are encouraged to seek legal advice to ensure proper appreciation and compliance with the law.

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I. INTRODUCTION

Volumes have been written about employment law and wrongful dismissal litigation. When faced with a wrongful dismissal claim few employers have time to read volumes.

The purpose of this concise guide is to help employers get up to speed quickly on relevant legislation and caselaw developments. Understanding this complex legal landscape may be the difference between winning and losing. This guide is intended to assist provincially regulated employers dealing with employees who are not unionized. Very different legal and procedural issues arise in the context of unionized employees, and different legislation governs employment with federally regulated employers.

This guide does not provide or replace legal advice. Nor does it address all possible issues and circumstances. Employers are encouraged to consult with legal counsel as early as possible when a claim is threatened or received to avoid any missteps or lost opportunities.

Our Firm has been in practice, representing employers with labour relations and employment problems, for over 50 years. We regularly advise and represent clients on a wide variety of matters, from day-to-day issues to corporate transactions and major pieces of litigation. Our Firm's practice covers a broad spectrum of labour, employment, and human resources law. We would welcome the opportunity to assist you.

II. LEGAL LANDSCAPE

INTRODUCTION

Employment law in Ontario is a complex web of rights and obligations created by legislation and precedent decisions. On termination of employment employers may face issues ranging from compliance with minimum employment standards, demands for “reasonable notice,” to health and safety, workers’ compensation and human rights allegations (to name a few). How you respond in each case will depend largely on what issues are engaged and how the employee decides to initiate the dispute.

EMPLOYMENT STANDARDS

The foundation of employment law in Ontario is the *Employment Standards Act, 2000* (the “ESA”). This core piece of legislation sets out the minimum employment standards applicable to the vast majority of employees in the province. The ESA covers terms and conditions during employment such as vacations, overtime, public holidays, leaves of absence, temporary layoffs, hours of work and the minimum wage. The ESA also sets out minimum

requirements on termination of employment including notice of termination, severance pay and minimum benefits continuation.

The ESA sets the minimum standard. Employers and employees are free to agree to more generous provisions, which are then enforceable, but any agreement that falls below a minimum ESA standard is void and unenforceable.

A. MINIMUM NOTICE AND SEVERANCE OBLIGATIONS*

*[*Caution – Don’t read this section without also reading further below about common law reasonable notice]*

ESA Notice

Under the ESA, you may terminate an employee’s employment without cause at any time, so long as you provide a minimum amount of written notice of termination (or lump sum “termination pay” in lieu). Under the ESA, employees are entitled to notice according to the following formula:

Notice or Pay in Lieu (Weeks)	Length of <u>Continuous</u> Service (whether or not active service)
1	>3 months but less than 1 year
2	1 year but less than 3 years
3	3 years but less than 4 years
4	4 years but less than 5 years
5	5 years but less than 6 years
6	6 years but less than 7 years
7	7 years but less than 8 years
8	8 years or more

The ESA sets out different notice obligations for “group terminations,” which are terminations of 50 or more employees within any 4-week period at the same “workplace”. A “workplace” includes all work locations in the same municipality.

The minimum length of notice required is also different for group terminations than individual terminations. Employers must provide at least eight weeks’ notice or pay in lieu for a group termination of 50-199 employees, at least 12 weeks’ notice or pay in lieu for a group termination of 200-499 employees, and at least 16 weeks’ notice or pay in lieu for a group termination of 500 or more employees. In group terminations, all employees are entitled to the same minimum amount of notice of termination, regardless of their individual lengths of service.

In a group termination, employers must provide written notice on a special form to the Director of Employment Standards and affected employees, and must post the form in the workplace. Failure to meet this notice and posting requirement may void any notice provided to employees for purposes of ESA entitlements. So if you give 501 employees a copy of the form when you provide 16 weeks’ notice of termination, but you inadvertently wait eight weeks to file it with the Director, you may still owe the employees a fresh 16 weeks’ notice or pay in lieu and you may not be able to set off the eight you already gave them – a very costly error.

Whether you are providing individual or group notice of termination, you can give employees working notice, a combination of working notice and termination pay, or just termination pay.

ESA Severance Pay

In addition to minimum ESA notice requirements, employers must pay an employee who has at least five years of service “severance pay,” equal to one week’s pay for each year of employment with the employer to a maximum of 26 weeks where:

- (a) the employer has a payroll of at least \$2.5 million; **OR**
- (b) 50 or more employees are terminated within a six-month period, which terminations are caused by the permanent discontinuance of all or part of the employer’s business at an establishment.
[Emphasis added]

Unlike with notice of termination, “service” for purposes of severance pay calculations includes all periods of employment with the employer, whether or not continuous or active, and includes the period of minimum notice under the ESA even if termination pay is provided instead of working notice. Because service need not be continuous or active for severance entitlement accrual, employees who have worked for an employer sporadically over weeks or

even years are entitled to have all service counted, including inactive periods of employment (*i.e.* periods on a leave of absence).

It is important to remember that although you can give employees working notice of termination to reduce or eliminate liability for termination pay in lieu of notice – **ESA severance pay can never be worked off**, no matter how much working notice you give. However, if you paid an employee severance pay in the past, those amounts can be set off against any subsequent severance pay obligations, so that you don't have to double-pay severance pay.

There are provisions in the ESA which permit two companies to be treated as one employer for purposes of the ESA, often termed “related employer” provisions. Employees have successfully utilized these provisions to include payroll amounts from several entities toward the ESA severance pay threshold. The courts have also recently confirmed that calculating an employer's payroll to determine whether the \$2.5 Million threshold is met should include the employer's payroll from all sources, including extra-provincial payroll.

B. ADDITIONAL STATUTORY OBLIGATIONS ON TERMINATION OF EMPLOYMENT

Employees must receive all accrued but unpaid wages and vacation pay, and any termination pay and severance pay to which they are entitled, within the latter of seven days after employment ends or what would have been the employees' next regular pay day. All benefits in place when notice of termination is given must be continued throughout the minimum notice period. If employees receive termination pay in lieu of notice, benefits must be continued during the notional notice period.

EXAMPLE:

An employer with a \$2.5 million payroll that gives written notice of termination, to be effective immediately (not working notice), to an employee who has 5.4 years of continuous service, must provide the employee all accrued but unpaid wages and vacation pay, five weeks termination pay with vacation pay on that amount, and 5.4 weeks' severance pay within the latter of seven days after his employment ends or his next regular pay day. His benefits must be continued for five weeks from the termination date.

C. ENFORCEMENT UNDER THE ESA

Employees can enforce their rights under the ESA by filing a complaint with the Ministry of Labour (an “ESA Complaint”), or by bringing a civil action. Civil actions are discussed below in the section dealing with the Common Law.

I. ESA COMPLAINTS – PROCEDURE

If an employee files an ESA complaint, an Employment Standards Officer (an “ESO”) will typically write to the employer requesting certain records, *i.e.* payroll records, timesheets, cheque stubs. In most cases the employer must fully cooperate with requests for information and documents. However, at a certain point the ESO cannot seek further information or documents without a warrant. We strongly recommend that employers seek legal advice to assist in determining precisely at what point a warrant is required before refusing an ESO’s direction. Failure to cooperate with an ESO may lead to obstruction charges.

The typical letter from the ESO will set out the types of amounts claimed (*i.e.* wages, vacation pay, holiday pay, overtime pay), and typically a global amount claimed. The letter will also indicate that the employer may simply pay the amount claimed and send a confirmation of payment to the ESO. The advantage of this approach is that it saves time and resources. The disadvantage is that you are admitting to a violation of the ESA, which remains on your record forever. So paying claimants with unmeritorious claims, even small value claims, may have unintended consequences. An employer who decides to pay (before an order to pay is issued) rather than litigate should indicate in the cover letter to the employee and ESO that, “without prejudice to the employer’s position that it has not violated the ESA, and with a view to settling the claim in a cost effective manner, the employer is paying the amount claimed.” That will not remove the record of the violation from your record, but at least you may use that reservation if your compliance history is relevant in subsequent enforcement proceedings.

Many employees who call the Ministry are strongly encouraged to raise the issue first with their employer before filing a complaint. This provides employers with an opportunity to settle a dispute before it becomes a formal complaint investigation. However, when employees raise issues about ESA compliance, employers must be cautious not to commit a reprisal against the employee for making those enquiries.

Previously it was common practice that the ESO would either release a decision or, often, schedule a meeting between the employer and the claimant at the Ministry of Labour. It is now more common for ESOs to issue decisions only on the basis of the documents submitted and information provided over the phone. As a result, now, more than ever, it is strongly recommended that employers submit a covering letter, setting out in detail their position on the various issues raised in the complaint, making reference to the documents submitted. Obviously, it is important to strike the right balance in the letter between disclosure, legal argument and compliance.

If there is a meeting, which is rare, employers may choose to be represented by counsel. At the conclusion of the meeting the ESO may advise the parties of her bottom line decision, or may reserve. In either case, the ESO will provide a written decision later by mail. Typically, written decisions take between two to six weeks to issue. Often ESO's are willing to help mediate a settlement during the meeting. That varies from ESO to ESO, and is completely at her discretion (and voluntary for the parties).

In a written decision, the ESO may issue an "order to pay" against the employer if contraventions were found, or may refuse to issue an order to pay if no contraventions were found. In rare cases the ESO may also levy fines against the employer for contravening the ESA. If the ESO becomes concerned about more widespread contraventions, she may recommend the Employment Standards Branch initiate a compliance audit.

After a decision is released, each party has the right to make an application within 30 days to the Ontario Labour Relations Board (the "OLRB"), requesting a review of the ESO's decision and of any orders that may have been issued or that the ESO refused to issue. Reviews at the OLRB are formal hearings before a Vice Chair and involve similar rules of evidence and procedures as are found in court. This 30 day deadline is strict.

The decision of the OLRB is final and not subject to appeal. However, in certain narrow circumstances decisions may be "judicially reviewed" at the Divisional Court. The courts are generally very deferential to the OLRB, which is considered to be an expert tribunal. This means that courts usually only overturn OLRB decisions on judicial review if the decision is "unreasonable." This is a very high standard to meet.

II. ESA COMPLAINTS – REMEDIES AND LIMITATIONS

Different remedies may be available to an employee who files an ESA Complaint depending on the nature of the complaint. The ESA places limits on an ESO's ability to issue orders, and on the time limits within which ESA Complaints must be filed. Effective February, 2015, new limitations provisions govern ESA complaints.

Pre-February 2015

The old provisions still govern where wages were earned prior to February 2015. Under those old provisions, an ESO may not make an order to pay wages if the wages became due more than six months before the complaint was filed, or issue an order for vacation pay if the vacation pay became due more than 12 months before the complaint was filed (except in very limited circumstances). Repeated contraventions by the employer involving more than one employee may extend these time limits. However, the ultimate limitation period in the ESA for filing complaints was two years. In respect of amounts earned prior to February 2015, an ESO may not issue an order to pay wages in excess of \$10,000 in respect of any single employee.

If an employee files an ESA Complaint for wages or termination and severance pay, he is barred from commencing a civil action in respect of the same termination (unless the ESA Complaint is withdrawn within two weeks of being filed or a court rules otherwise). This restriction applies even if the employee could not fully recover because of the recovery or time limits in the ESA. As a result, particularly under the old provisions, there may be circumstances in which an employee who files an ESA Complaint forfeits significant entitlements. However, some courts have held they retain a residual jurisdiction to permit a civil action to proceed depending on the stage at which the ESA Complaint was withdrawn and surrounding circumstances.

As of February 2015

Claims for amounts owing after February 2015 are no longer subject to the same caps. ESOs may order employers to pay the full amounts earned and unpaid (no more \$10,000 cap) and the wages may be accrued over the entire two-year ultimate limitation period.

In addition to any order to pay, employers must pay an administrative fee equal to the greater of \$100 or 10% of the order to pay. In some cases an ESO may be willing to permit the employer to *voluntarily* comply with the ESA before issuing an order to pay, in order to avoid the administrative fee. This is entirely at the ESO's discretion.

Reprisals and Jurisdiction

If the employee alleges that the employer is liable for a "reprisal," the ESO's jurisdiction to issue orders is greatly expanded both in terms of time limitations, remedies and damages even under the old provisions. A "reprisal" means, generally speaking, that the employer intimidated, dismissed or otherwise penalized an employee, or threatened to do so, because the employee exercised, attempted to exercise, or inquired about rights or obligations under the ESA. Remedies for reprisals can include orders for reinstatement and compensation for all losses arising out of the reprisal. Employers faced with an ESA Complaint alleging reprisal are strongly encouraged to seek legal advice and representation.

An employer cannot file an application at the OLRB to review an ESO's decision unless the lesser of the entire amount of any order to pay or \$10,000 is first paid in trust to the Director of Employment Standards, along with the administrative fee of the greater of \$100 and 10% of the order to pay. The Board has held that employers must not deduct income tax, CPP or EI from the amounts being paid to the Director or their applications for review will not be processed. The OLRB has ruled that employers may not take tax, CPP and EI deductions from amounts paid in trust.

Employees are exempted from entitlement to ESA notice or severance pay in certain limited circumstances. For our purposes, the most relevant exemptions apply when an employee voluntarily resigns, fails to accept a reasonable offer of alternate employment from the employer, or when the employee is guilty of "willful misconduct" or "willful neglect of duty." The

regulations under the ESA set out certain other exceptions to employees' entitlements to notice, termination pay and severance pay. It is recommended that employers seek legal advice to determine whether an exception applies.

Voluntary Resignation

As the phrase implies, only if the resignation was "voluntary" will the employee forfeit entitlement to ESA notice and severance pay. The voluntariness of the resignation is determined by looking at whether the employee 1. had the subjective intention to quit, 2. acted, objectively speaking, in a manner that demonstrated that intention, and 3. was not coerced into resigning under duress.

If, in a moment of frustration, the employee declared, "I quit!", and then stormed off, but then returned hours or even days later and sought to retract the hastily uttered resignation, he may not be held to have voluntarily resigned. If an employer tells an employee to resign or he'll be fired, that is unlikely to be considered voluntary, even if he resigns in writing.

Any time an employer wishes to rely on an employee's resignation, it is important to obtain confirmation of the resignation in writing, and to let cooler heads prevail if the resignation was made in the heat of the moment.

Reasonable Offer of Alternate Employment with the Employer

Unlike the duty to mitigate at common law (which is discussed below under "Reasonable Damage Awards and Mitigation"), there is no obligation for an employee to mitigate ESA notice and severance. These are statutory rights. However, the regulations provide that if an employer makes a reasonable offer of alternate employment, the employee who rejects that offer may forfeit entitlement to ESA notice and severance pay.

The offer will only be "reasonable" if the employee is capable of performing the duties of the new position, the remuneration and benefits are comparable, and the new position would not be considered a significant demotion or humiliating to the employee. The test applied to determine whether the offer is "reasonable" is objective: *would a reasonable person in the circumstances of the employee find the offer reasonable?* However, the onus is on the employer to establish that it was reasonable – any tie goes to the employee.

Unlike mitigation under the common law, the offer must be an offer with the same employer. So an employee may refuse work with another organization, *i.e.* through a referral or an asset sale of a business, without giving up ESA notice and severance pay.

"Wilful Misconduct" and "Wilful Neglect of Duty"

"Wilful misconduct" and "wilful neglect of duty" are typically treated as very high standards. The key is that the conduct must be serious and it must be willful. In other words, failing to meet production standards will not usually be sufficient to disentitle an employee from

statutory notice and severance pay, unless the employee was failing intentionally. Examples of wilful misconduct that may be sufficient include: theft, fraud, serious dishonesty and assault. Examples of wilful neglect of duty that may be sufficient include: refusal to perform a task falling clearly within the scope of the employee's duties, and absence without leave or reasonable explanation. A refusal to execute a bilateral agreement, such as a non-competition agreement, or refusal to perform an illegal act, would not meet the test.

COMMON LAW

The “common law” is the term used to define the sum total of all prior decisions made by adjudicators like courts, boards, tribunals etc. in a given jurisdiction. Adjudicators must follow decisions made by adjudicators at higher levels in their jurisdiction (*i.e.* boards and tribunals in Ontario must follow decisions from lower courts in Ontario, which must follow decisions from the Ontario Court of Appeal, which must follow decisions from the Supreme Court of Canada). All Canadian jurisdictions (except Québec) are termed “common law jurisdictions” because they operate under this legal model.

A. “REASONABLE NOTICE”

Over several hundred years, the common law has developed certain principles adjudicators apply when interpreting and enforcing employment contracts. The common law has developed a legal presumption that all employment contracts, whether or not the contract is in writing, contain an implied term that an employer may terminate the contract without cause at any time by giving “reasonable notice” to the employee or pay in lieu of notice. This is often termed, “common law notice,” or “reasonable notice at common law.”

What amount of notice is “reasonable” is based, at least theoretically, on the amount of time it would likely take a particular employee to find similar, alternate employment. To determine the appropriate amount of reasonable notice, courts consider factors like (this list is not exhaustive):

- Age
- Position
- Length of service
- Earnings
- Education
- Level within the hierarchy (*i.e.* supervisory or management authority)
- Local economic conditions
- Whether the employee was induced to leave stable employment when hired

Reasonable notice generally ranges from a few weeks to 24 months. Although some may refer to a “rule of thumb” of one month for each year of service for convenience, statistical

reviews of court decisions do not support the existence of any such across-the-board rule. Moreover, the Ontario Court of Appeal has ruled that it would be an error of law for a judge to apply such a rule of thumb.

It is recommended that employers seek legal advice to assist them in determining the applicable reasonable notice period. A short call to legal counsel in advance of a termination is generally significantly less expensive and time consuming than litigation. Unless certain exceptions apply, employers who fail to give an employee reasonable notice of termination (or pay in lieu), including inadequate notice of termination, may be held liable for breach of contract, which is termed “wrongful dismissal.”

B. DAMAGES FOR WRONGFUL DISMISSAL

I. REASONABLE NOTICE AWARDS AND MITIGATION

The most basic form of damages courts award employees in wrongful dismissal actions are reasonable notice awards. A reasonable notice award is equal to the value of the amount of notice of termination the court determines should have been provided to the employee, less any notice already given or amounts already paid (but cannot be less than applicable employment standards).

There is a significant amount of caselaw dealing with what is counted in that valuation. In some circumstances only base wages, any earned commissions and the value of benefit premiums are included. In other cases courts have included bonuses, pension contributions, stock options and other fringe benefits. Often the key to determining whether such additional benefits should be included is: whether they are discretionary, who paid for the benefits, and/or whether the employee has a vested right to the benefit.

ESA notice (or pay in lieu) and severance pay already given are deducted from a reasonable notice award. However, as discussed above, ESA severance pay can never be worked off, even through a lengthy working notice period.

If an employer breaches an employment contract by failing to provide reasonable notice, the employee is still obliged to take reasonable steps to avoid or lessen his losses. This is termed the “duty to mitigate.” Reasonable notice awards are often reduced in one of the following three ways because of the duty to mitigate:

1. the employee finds a new job within the reasonable notice period and so his reasonable notice award is reduced by his earnings from that new employment during the notice period;
2. the employee fails to take reasonable steps to find alternate employment and so his reasonable notice award is reduced to account for that failure; or

3. the employee fails to accept an offer of alternate employment with the terminating employer and so his reasonable notice award is reduced by the earnings he would have received had he accepted.

There has been a significant amount of litigation concerning whether or not an employee should be obliged to mitigate by accepting alternate employment with the same employer. In a decision by the Supreme Court of Canada, *Evans v. Teamsters Local Union No. 31*(2008), the court held that for an employee to be required to accept such an offer, the relationship must not be one of hostility or significant animosity, the conditions and offer of employment must not be degrading or humiliating, and the conditions of employment and compensation must be relatively similar. This is an objective standard, based on whether a reasonable person, in the circumstances of the employee, ought to accept the offer.

II. WRITTEN TERMINATION AGREEMENTS

Although courts will presume that all employment contracts contain an implied term entitling employees to reasonable notice of termination, the parties may agree instead on a specific formula for determining the amount of notice or pay in lieu to which an employee would be entitled in the event his employment were terminated, so long as that formula meets or exceeds ESA minimums. Although not technically required, it is strongly recommended that such agreements be in writing.

As discussed above, any agreement to provide an employee less than the ESA minimums is void and unenforceable. Also, regardless what length of notice is agreed to, if the employee is entitled to ESA severance pay, that cannot be worked off, so agreements must be structured to ensure those rules are observed. Recently, courts have struck down termination provisions that *could* be interpreted as providing no benefits continuation during the ESA notice period.

Courts have also refused to enforce termination provisions that are compliant today but may have been non-compliant in the future – for example, even if an employee is not entitled to ESA severance pay at the time of termination (whether because of length of service or the size of the employer’s payroll) a termination provision that fails to provide for the possibility of ESA severance pay may be void. This issue, the possibility of non-compliance in the future, has produced a patchwork of inconsistent court decisions. Time will tell which side of this debate is law going forward.

If a written termination agreement were enforceable, an employee would be limited to the terms of the agreement. If a court were to find the agreement unenforceable, the employee would be entitled to reasonable notice at common law.

When faced with a wrongful dismissal action from an employee whose contract has a specific termination provision, it may be appropriate to bring a motion for summary judgment to ask a court to enforce the provision and dismiss the action on that basis. If successful, the employer would likely be entitled to a portion of its legal costs.

It is strongly recommended that employers seek legal advice before drafting or implementing contracts with specific termination provisions. Mistakes in drafting or implementation could lead to a finding that the provisions are unenforceable and thereby expose the employer to significant, unexpected liability for common law reasonable notice.

III. AGGRAVATED, PUNITIVE AND “BAD FAITH” DAMAGES

In wrongful dismissal actions, aggravated and punitive damages are only available where the employer is found liable for a “separate actionable wrong,” such as the tort of intentional infliction of mental suffering. In other words, simply failing to give an employee sufficient notice of termination would not entitle the employee to aggravated or punitive damages.

“Aggravated damages” are payable to an employee to compensate her for such separate actionable wrongs.

As the name implies, the purpose of “punitive damages” is not to compensate the employee but to punish the employer for conduct that the court finds harsh, malicious, offensive and reprehensible. In the well-publicized case of *Honda v. Keays* (2008), the Supreme Court of Canada quashed a \$100,000 punitive damages award, which the Ontario Court of Appeal had already reduced from \$500,000 awarded at trial, because Honda’s conduct did not meet that exceptional standard.

In another well-publicized case, *Wallace v. United Grain Growers* (1997), the Supreme Court of Canada developed a new type of damages in wrongful dismissal actions – “bad faith damages.” These bad faith, or “Wallace Damages” were to be awarded only in circumstances where the employer acted in bad faith in the manner of dismissal. In such cases, the courts could award an extension to the notice period, which extension typically ranged from one to six months in subsequent cases.

The Supreme Court significantly modified its position on Wallace Damages in *Honda v. Keays*. The court found that Wallace Damages were applied inconsistently in the lower courts over the 10+ years since being introduced, and that they were often being awarded in inappropriate circumstances. As a result, the court determined that Wallace Damages would now only be available in circumstances where the employee could prove actual harm was caused by the employer’s bad faith conduct in the manner of dismissal, and that certain other contract interpretation principles were satisfied. In other words, Wallace Damages are now to be compensatory, based directly upon that proven harm, and not simply through an arbitrary extension of the reasonable notice period.

Only time will tell how the courts will deal with this new formulation. However, in *Brien v. Niagara Motors Limited* (2009), the Ontario Court of Appeal overturned an award of Wallace Damages because the employee failed to prove actual harm, and in *Strizzi v. Curzons Management Associates Inc.* (2011) the Ontario Superior Court rejected a claim for an extension

because the plaintiff failed to provide the type of compensable harm described in *Honda v. Keays*.

IV. BENEFITS

In addition to the minimum ESA obligation to continue employment benefits during the ESA notice period, a growing number of common law cases deal with benefit obligations during the common law reasonable notice period. As a minimum, it is settled law that employers must continue employment benefits during the reasonable notice period, or risk being ordered to pay the value of the premiums in lieu, and the ESA provides that employers must continue employment benefits throughout the ESA notice period (working or notional).

Far more contentious is the extent of an employer's liability for the actual benefits during the common law notice period. For example, some courts have held employers liable when employees became disabled during the reasonable notice period, for all medical and disability benefits that an employee would have received if the employer had not terminated their benefits early (*i.e.* before the end of the reasonable notice period). The caselaw is still evolving in this area, but employers must be cautious when terminating employee benefits, particularly those of elderly or infirm employees.

Employers should contact their benefits provider and strongly consider either extending benefits coverage beyond the ESA notice period or, at least, providing the employee with options to elect for personal coverage. It may also be prudent to provide expressly in policies and employment contracts that in the event of termination of employment, however caused or by whom, group employment benefits shall not be continued after termination of employment except to the extent required by applicable employment standards legislation.

In Ontario, loss of earnings ("LOE") benefits received from the WSIB are deductible from a reasonable notice award; however, despite the fact the such benefits are paid tax free to an employee, employers cannot set-off a grossed-up amount. Weekly indemnity payments made by a third party insurer to an employee under an employer-sponsored plan may also be deductible, but only in very specific circumstances (*i.e.* a weekly indemnity plan or supplemental unemployment benefits (SUB) plan – if the plan is **100%** employer funded).

C. "CONSTRUCTIVE DISMISSAL"

I. CONSTRUCTIVE DISMISSAL - DEFINED

"Constructive dismissal" is defined as: a unilateral, significant alteration by the employer of the fundamental terms and conditions of employment. If an employer makes such changes, the employee may choose to agree to the changes or may choose to treat the employment contract as terminated and claim "constructive dismissal". Employees who have been constructively dismissed are generally entitled to claim the same type of damages as in an ordinary wrongful dismissal claim.

The courts have held that employees claiming constructive dismissal have the same duty to mitigate as they would if the employer had terminated their employment rather than constructively dismissed them. As a result, even if an employer unilaterally and significantly were to alter an employee's terms and conditions of employment, the employee may be entitled to no damages if she refused the employer's reasonable offer of alternate employment (see "Reasonable Notice Awards and Mitigation" above for a review of the duty to mitigate).

II. FUNDAMENTAL CHANGE

Not all unilateral changes to an employment contract would cause a constructive dismissal. Only changes that, when viewed objectively, are so significant that they strike at the root of the employment contract are sufficient. Unfortunately, it is not always easy to determine which changes are fundamental.

The following are a few examples of changes that could constitute, individually or in combination, fundamental changes sufficient to cause constructive dismissal:

- Significant compensation reductions (usually greater than 10%, but as low as 4%)
- Significant reductions or changes to benefits (*i.e.* moving from defined benefit to defined contribution pension plans)
- Significant changes to job titles, responsibilities or reporting structure
- Relocation

Implementing even the above changes would not constitute constructive dismissal if the employment contract *specifically or implicitly* provided the employer with the right to do so, or if the employee were to agree or condone the changes.

III. CONSTRUCTIVE DISMISSAL AFTER WRONKO

Employees who do not quit or object within a reasonable period of time after a change is implemented will be deemed to have accepted the change. Whenever employers contemplate significant changes in the workplace, it is good practice to provide as much advance notice as possible. Until 2008, many operated under the belief that a claim of constructive dismissal could be avoided if the employer provided reasonable notice of a change. If this ever was the law in Ontario, it is no longer.

In a 2008 decision of the Ontario Court of Appeal, *Wronko v. Western Inventory Service Ltd.*, Mr. Wronko had an employment contract that contained an obligation to provide him with two years notice or pay in lieu on termination without cause. His employer gave him two years notice that the terms of his employment contract would change, reducing his guaranteed notice to a formula capped at 30 weeks. He objected several times during the two-year period. When the

two years were up the employer handed him a new employment contract and told him to sign or they had no position for him. He refused to sign it.

The Court of Appeal held that his termination was effective on the day the company handed him the new contract and demanded he sign it or he would lose his job. As a result, the two years notice of the change did not constitute notice of termination. As a result, Mr. Wronko was awarded two years pay in lieu of notice as per his original contract on top of the two years notice of change he already received.

In light of this decision, if an employee objects **after receiving advanced notice of a fundamental change, but before it is implemented**, the situation is more complicated. Employers basically have four options:

1. Try to secure the employee's agreement (in writing would be preferred) and provide consideration for the agreement;
2. Give the employee notice that his employment under current terms and conditions will terminate effective at the end of the applicable notice period (*i.e.* common law notice or ESA notice, as applicable), and offer the employee new employment thereafter under the new terms and conditions;
3. Implement the change and take the chance that either the employee will condone the change rather than risk unemployment, or that the employee would be obliged to continue working under the new conditions to mitigate her losses; or
4. Cancel the planned change or modify it so it is no longer a fundamental change.

Claiming constructive dismissal is very risky for employees. If an employee claims constructive dismissal in error, they have resigned their employment. Employees who resign employment are not even entitled to ESA notice and severance pay.

The downside for employers is that typically when constructive dismissal is proven, the employer will have had no opportunity to limit liability by providing working notice. The Court of Appeal held in *Wronko* that notice of an impending fundamental change is not equivalent to notice of termination. Notice of termination must be clear, unequivocal and explicit.

IV. "CAUSE"

Unless an employment contract stipulates otherwise, employers have an implied right to terminate an employee's employment without notice if the employer has "cause." Generally speaking, cause is defined as a condition or conduct so incompatible with the employment relationship that the employer cannot reasonably be expected to retain the employee. Cause may be established on the basis of a series of incidents or one single act of misconduct:

1. If by a series of incidents, the onus will typically fall upon the employer to have warned the employee that the conduct was unacceptable and could lead to further discipline up to and including dismissal. The purpose of the warnings is to provide the employee with an opportunity to correct her behaviour, refrain from future misconduct and to give clear notice of the potential consequence of failing to do so (not to help the employer build a case for dismissal).
2. If by a single incident, the conduct must be so serious that it utterly destroys the foundations of the employment relationship and justifies termination without warning. The following are a few examples of single incidents of misconduct that may constitute cause when committed in the employment context:
 - Theft
 - Sabotage
 - Fraud
 - Serious dishonesty (must not be trivial)
 - Assaults on co-workers or management
 - Serious threats of bodily harm
 - Competing against the employer

When a court determines whether or not an employer had cause for dismissal, the following factors are usually considered (this list is not exhaustive):

- the nature and severity of each incident;
- the employee's length of service;
- the nature of the employer's business;
- the nature of the employee's position;
- the amount of time that passes between incidents;
- whether the employer has policies that cover the type of misconduct;
- whether the employer has condoned similar misconduct in the past or has inconsistently applied discipline in similar circumstances;
- the effects of the misconduct on the employer's business, customers and employees; and
- whether the employee is contrite, or defensive and deceptive when confronted with the allegations.

There is no such thing as "near cause". If an employer cannot establish that it had cause, then the employer had no right to summarily dismiss the employee. A court will not reduce an employee's wrongful dismissal damages because the employer almost had cause, or believed in good faith that it had cause.

Employers are encouraged to consult with their legal advisors whenever they are contemplating terminating an employee for cause. A short call to your lawyer for advice on

whether cause is established or how to manage the investigation and termination process can save you thousands in litigation costs and plenty of headaches.

D. CIVIL ACTIONS FOR WRONGFUL DISMISSAL

I. COMMENCEMENT OF A WRONGFUL DISMISSAL ACTION

An action for wrongful dismissal typically begins when the employee or former employee (the “plaintiff”) has a statement of claim (“Claim”) issued by a court and then serves it on the employer. Under the *Rules of Civil Procedure* that govern actions in Ontario, defendant employers then typically have 20 days to serve and file a statement of defence (“Defence”). In Simplified Procedure and Ordinary Procedure actions (see below) this deadline is automatically extended a further 10 days if the employer serves and files a “notice of intent to defend” within the first 20 days. The plaintiff may then choose to serve and file a Reply to the Defence. The Claim, Defence and Reply are called the “Pleadings.”

It is very important not to miss the first deadline for filing a Defence. If an employer fails to serve and file a timely Defence, it may be “noted in default”. The consequences of being noted in default are that the employer loses any further rights to notice or participation in the action, and that the employer is deemed to have accepted as true all of the plaintiff’s allegations. Unless the employer brings a successful motion to lift the noting in default or the plaintiff consents to do so, the plaintiff can then move for default judgment for everything claimed.

Sometimes the defendant employer may serve a “Counterclaim” and/or a “Crossclaim” in addition to the Defence. A Counterclaim is a pleading claiming relief against the plaintiff (and possibly a third party as well). A Crossclaim is generally either a pleading claiming relief against a third party who was not named by the plaintiff, but who the defendant asserts is liable for at least part of the damages the plaintiff claimed, or a pleading claiming relief against a third party who was not named by the plaintiff for damages arising out of matters involved in the main action. Crossclaims and Counterclaims are usually tried with the main action.

A typical example of these claims in the context of a wrongful dismissal action would be for the employer to Counterclaim against the employee for repayment of an employment loan, and Crossclaim against an insurer for denial of benefits.

The next steps in an action will depend greatly on the court in which the Claim was filed. Actions for wrongful dismissal may be initiated in Small Claims Court (a division of the Superior Court of Justice) or at the Superior Court of Justice proper. Actions at the Superior Court of Justice fall into two categories: actions under the Simplified Procedure and under the Ordinary Procedure. Actions to recover up to \$25,000, up to \$100,000, and over \$100,000 (exclusive of interest and costs) must be filed, respectively, in Small Claims Court, under the Simplified Procedure and under the Ordinary Procedure.

II. SIMPLIFIED PROCEDURE AND ORDINARY PROCEDURE ACTIONS

The plaintiff must elect on the face of the Claim filed in Superior Court whether to proceed under the Simplified or Ordinary Procedure. As noted above, actions to recover between \$25,000 and \$100,000 must be brought under the Simplified Procedure. Typically plaintiffs will claim damages that could total more than this range, but then expressly waive the right to any overage.

The two main differences between wrongful dismissal actions under the Simplified Procedure and Ordinary Procedure are that steps in the action follow a more expedited and regimented timeline under the Simplified Procedure, and that the parties have a much broader right to discoveries under the Ordinary Procedure.

a. Mandatory Mediation or Pre-Trial Conference

If the action was commenced in Toronto, Ottawa or Essex, the parties must attend a mandatory mediation session within 120 days (or later on written consent filed with the mediation coordinator). Seven days before a mediation parties must exchange and deliver to the mediator a “Statement of Issues,” which is essentially a summary of the relevant facts and issues in dispute, as well as an overview of the parties’ positions.

If the action was commenced elsewhere in Ontario, the court will typically schedule a pre-trial conference within 90 days after the matter is set down for trial. Five days before a pre-trial conference the parties must exchange and file with the court a “pre-trial conference brief,” which is essentially the same as the Statement of Issues required for mediations.

If the parties fail to settle at either the mandatory mediation session or pre-trial conference the trial will be scheduled (or confirmed).

b. Discoveries

Within 60 days (or later if agreed) of the filing of the last reply (or deadline to do so) the parties must exchange a “Discovery Plan.” The parties must agree on:

- the intended scope of documentary discovery;
- dates for service of the Affidavits of Documents;
- information respecting timing, costs and manner of documentary production;
- the names of persons to be examined for discovery and timing and length of examinations; and
- any other relevant information.

Regardless whether the ordinary or simplified procedure applies, soon after all pleadings have been served and filed (or the period for doing so has ended) the parties must exchange “Affidavits of Documents.” An Affidavit of Documents is an affidavit sworn by the respective party, disclosing in separate schedules: Schedule A) a list of all arguably relevant documents the

party does not object to producing; Schedule B) a list of all arguably relevant documents that the party objects to producing because they are privileged; and Schedule C) a list of all arguably relevant documents no longer in the party's possession or control. In Simplified Procedure actions the parties must also disclose: Schedule D) a list of potential witnesses (all persons with potentially relevant knowledge), and must produce copies of all documents referred to in schedule "A". Any persons not listed at schedule "D" cannot be called as witnesses except on consent or by order of the court.

Examinations for Discovery may be held in actions under both the Simplified Procedure and the Ordinary Procedure. However, these oral examinations are limited to two hours per party under the Simplified Procedure, and seven hours per party under the Ordinary Procedure, except on consent or with leave from the court. The purpose of Examinations for Discovery is to allow the parties to discern each other's cases, obtain admissions that can be used at trial, and obtain information or documents (or undertakings to produce information or documents) relevant to the issues in dispute. Examinations for Discovery also provide an opportunity to test the credibility and likely demeanour of a witness on the stand.

c. Costs and Settlement Offers

Successful parties in lawsuits are generally entitled to a portion of their litigation costs. How much they get depends on a number of factors, including whether the costs they claim are reasonable, whether offers to settle were made prior to judgment and whether judgment is obtained that betters a party's offer.

There are incentives to making reasonable offers to settle before trial built into the *Rules*. For example, if a defendant makes an offer to settle a case for \$25,000, the plaintiff refuses, and the plaintiff only obtains judgment for \$20,000, the plaintiff would ordinarily be entitled to no costs from the date of the defendant's offer, and the plaintiff may even be required to pay a portion of the defendant's costs from that date.

Alternatively, if the plaintiff makes an offer to settle for \$20,000, the defendant refuses, and the plaintiff obtains judgment for \$25,000, the defendant would ordinarily be required to pay a portion of the plaintiff's costs to the date the offer was made, and a substantial portion of the plaintiff's costs (termed "substantial indemnity") thereafter.

Costs are ordinarily awarded on the "partial indemnity" basis, meaning a much lower proportion of actual costs than "substantial indemnity." The purpose of these rules is to encourage parties to settle.

d. Trial

Wrongful dismissal trials are held before a judge. The plaintiff may also elect a jury trial, but that is rare. A trial may take anywhere from one half-day to weeks or months of trial time. Courts try to set consecutive dates, but hearing dates can be spread out as well.

The trial usually begins with opening statements. Typically the plaintiff has the initial onus of proof and so must present his case first. Next the defendant presents its case. Finally, the plaintiff has the right to call reply evidence (though this right is limited). The parties can agree on a book of documents to file with the court, or absent agreement they may have to prove certain documents through witnesses before they will be marked as exhibits.

The party who calls a witness is entitled to ask him questions first through an “Examination in Chief.” Generally speaking such party can only ask open-ended questions that do not suggest an answer to the witness. The opposing party then has the right to cross-examine the witness. Unlike in an Examination in Chief, on cross-examination the party may ask leading questions, and pose statements to the witness for agreement or disagreement. After the witness is cross-examined the first party has the right ask questions on Redirect. Like reply evidence the scope of proper questions on Redirect is quite limited.

After all the evidence and witnesses are presented, the parties typically make closing submissions. In most cases the judge will reserve her decision and provide a written decision a few weeks or months later. In some cases the judge will provide the parties with a bottom line decision at the end of the hearing and then follow that with written reasons later.

III. SMALL CLAIMS COURT ACTIONS

Small Claims Court is intended to provide a less formal, less expensive, and more expeditious process for resolving disputes. Unlike in Simplified and Ordinary Procedure actions, in Small Claims Actions documentary discovery is extremely limited, there is no requirement to exchange Affidavits of Documents, and there is no right to Examinations for Discovery.

In Small Claims Actions the parties are always directed to attend a pre-trial settlement conference before a judge. If the parties reach a settlement, they sign a settlement agreement in front of the judge who then marks the matter as settled. If either party defaults on its obligations the injured party may apply to have the settlement enforced (*i.e.* through garnishment or a writ of seizure and sale against property). If the parties are unable to settle at the pre-trial settlement conference either party may have the matter listed for trial.

Hearings in Small Claims Court, though before a judge, are less formal. Judges will often assist unrepresented litigants in the presentation of their cases. With the increased damages now available through small claims actions (up to \$25,000) more employees will be able to afford representation. This was a positive development from the perspective of efficiency and access to justice, but defendant employers now face more formidable opponents and increased litigation.

Unlike the case with actions under the Simplified and Ordinary Procedures, the parties are not automatically required to disclose and produce volumes of documents. Instead, the plaintiff must attach to the Claim copies of any documents or records upon which the claim is based. The parties are required to produce and file with the court no later than 14 days before the

Settlement Conference any documents or records they intend to rely on at trial along with a list of proposed witnesses and of other persons with knowledge of the matters in dispute.

If either party believes the other has documents relevant to and necessary for the adjudication of the matters in dispute, that party may bring a motion for production. However, given the intention that the small claims process be efficient and streamlined, judges are reticent to order production unless it is truly necessary and not merely a fishing expedition.

Parties may choose whether to have witnesses testify or enter their evidence by serving and filing signed witness statements. A party served with a signed witness statement has the right to summon the witness at trial to cross-examine her on the statement. Unless the court orders otherwise, no party may rely upon a document or record (including a witness statement) at trial that was not produced at least 30 days before trial.

Very similar costs rules apply to settlement offers in Small Claims Court actions as those in Simplified and Ordinary Procedure. So parties should consider making an offer to settle and should think carefully before rejecting one.

HUMAN RIGHTS

The Ontario *Human Rights Code* (the “Code”) provides that courts have the jurisdiction to determine whether an employer has infringed an employee’s rights under the Code, and to award remedies for that infringement. This jurisdiction only arises where the employee claims such an infringement in tandem with other claims.

For example, if an employer were to terminate a disabled employee, the employee may initiate a civil action claiming damages for wrongful dismissal, and may also seek damages for violations of the Code on the basis that the employer failed to accommodate her disability to the point of undue hardship. However, an employee cannot initiate a civil action alleging only an infringement of her rights under the Code.

A. HARASSMENT AND DISCRIMINATION

The Code provides that all employees have the right to equal treatment with respect to employment without discrimination because of their: 1. race, ancestry, place of origin, colour, ethnic origin, citizenship or creed; 2. sex, sexual orientation; 3. age; 4. record of offences; 5. marital status or family status; and/or 6. disability (often collectively referred to as the “prohibited grounds of discrimination”). Employees also have the right to be free from harassment on those same grounds.

By far the most litigated claims are those involving disability. If an employee were unable to perform her duties as required because of her disability, her employer would have an obligation to accommodate her disability to the point of “undue hardship”. In other words, her employer would be required to accommodate her disability even if it caused the employer some

measure of hardship – only not “undue” hardship. It is generally very difficult to determine what measure of hardship an employer is obliged to bear before such hardship would be considered undue.

Regardless what ground of discrimination or harassment an employee pleads, she has the initial onus of demonstrating the employer (or the employer’s representative or agent) is guilty of the discriminating or harassing actions or omissions, and that those actions or omissions are related to a prohibited ground. If the employee can prove such harassment or discrimination occurred, the onus shifts to the employer to defend its actions or omissions. There is no cap in the Code on the measure of monetary damages that a court (or the Tribunal) may award.

B. FORUM SHOPPING AND SETTLEMENTS

Thankfully the Code bars employees from commencing an application at the Tribunal while simultaneously claiming remedies for the same alleged infringements in a civil action. Where an employee has done so, the defendant employer may request that the application at the Tribunal be dismissed. The Tribunal typically suspends the human rights application pending any settlement between the parties or final determination by the court in the civil matter.

If the parties settle the civil claim and specifically provide in the settlement documents that the settlement either releases the company from liability under the Code or, if the company is admitting liability, is a full and final settlement of those claims, the Tribunal will usually enforce the settlement. It is important to carefully draft the settlement documents in the civil claim to ensure that the application before the Tribunal cannot be resurrected. If a human rights application has already been filed, it is important to ensure that when executing the settlement, the parties also execute and file Tribunal Form 25, which advises the Tribunal expressly that the matter is settled.

III. RESPONDING TO A DEMAND LETTER OR CLAIM

INITIAL RECEIPT AND REVIEW

The most important thing to do when faced with a demand letter or claim is to **read it twice**. Often employees or their counsel make the mistake of filling them with angry rhetoric. This has the predictable effect of causing employers to become defensive and to provoke an overly aggressive response. Knee-jerk reactions are never a good idea. Whether or not the employee’s claims have merit or are merely unjustified accusations, it is important to remain objective and not to take the allegations personally.

The first step is to review the letter or claim and determine what type of claim is threatened and what types of issues may be raised. Is this a straightforward claim to ESA or common law notice? Or are human rights or other collateral issues raised? If the letter or claim

is directly from the employee, consider the tone of the letter. Does it read like the employee had it reviewed or prepared by a lawyer or has already received legal advice?

Finally, carefully consider whether any factual assertions can be challenged, or whether you can raise additional facts to support a defence to the allegations. To accomplish this you will likely have to review the employee's file, speak with any relevant individuals, and review payroll records.

If you received a claim, verify what deadlines apply and **be sure not to miss them.**

ASSESSING THE STRENGTHS AND WEAKNESSES

The next step is to determine the best and worst case scenarios, objectively speaking. Often the employee may allege entitlement to unreasonable/excessive damages and other relief that a court or tribunal would be very unlikely to award, or that flies in the face of well-established legal principles. So the worst case scenario you consider may not be that the employee is successful at obtaining everything claimed. Instead it may be a more reasonable result at the high end of the range of what a court or tribunal would likely award. As well, the best case scenario to consider at this stage is not just complete victory for your side. You must also consider the costs and inputs required to obtain that positive result. In some cases there may be no way to escape the fact that the employee is entitled to something (*i.e.* he received only ESA notice and was likely entitled to additional notice at common law).

At this stage of the process a quick call to your legal counsel can be invaluable. Even if no claim has yet been received and you prefer to handle the matter directly and without legal representation, obtaining a review and summary of the legal and financial risks as well as strategic options will usually help you determine which claims are worth fighting to win, which claims are worth fighting until you have a strategic settlement advantage, and which claims are better settled early and efficiently. [Note that the *Rules of Civil Procedure* require a corporation to be represented by a lawyer in Simplified Procedure and Ordinary Procedure actions.]

PREPARING A RESPONSE TO A DEMAND LETTER

If all you have received is a letter and no claim has yet commenced, and if the letter is directly from the employee, you may want to draft a response and have it reviewed by your counsel, but still send it on your own behalf. Employees tend to retain legal counsel if your initial response comes from counsel.

If the letter is from the employee's counsel it is often valuable to have the response come from your counsel. Employee-counsel will often assume they can push an unrepresented employer harder than one who is represented by experienced counsel.

When preparing a response letter, consider your objectives:

- If your aim is to settle quickly, taking an unsupportable position at the beginning (even if you intend to ratchet up with future offers) may backfire badly if the employee feels you are not taking her situation and demands seriously.
- If you believe you can achieve a better settlement after a claim is served, perhaps at mandatory mediation after you have had an opportunity to respond with a defence or going through discoveries (taking the relevant costs into account), your first response can be more aggressive. Showing your strength, without being overly antagonistic, can give the employee a much needed reality check and demonstrate that you are unlikely to cave in easily. The employee is likely as adverse if not more adverse than you to the costs and risks of litigation.
- Finally, if you believe the fight must be taken to its conclusion, there is little to be gained by a thorough response. A brief, simple response advising the employee that you deny any alleged wrongdoing and deny that the employee is entitled to any remedies sought would likely be sufficient.

Note that regardless whether a party states otherwise in correspondence, no settlement offer made before a claim is filed in court can be relied upon to invoke the costs consequences of rule 49 of the *Rules of Civil Procedure* (for a discussion of those cost consequences, see “Costs and Settlement Offers,” above).

No matter what your objectives and how you choose to respond to a letter, it is absolutely critical to avoid making any admissions that could come back to haunt you. Regardless what you write, it is usually prudent to use the words, “WITHOUT PREJUDICE” at the top of the letter. By using that turn of phrase you can usually avoid having your correspondence used against you in subsequent litigation with the employee.

If you have received a claim and not just a demand letter, it is generally advisable to retain counsel immediately to ensure you meet all deadlines and miss no opportunities.

IV. CONCLUSION

We hope that this guide has armed you with valuable information about the law, and that you will be better prepared when faced with pending or threatened wrongful dismissal litigation.

We would be pleased to assist you should the need arise, and would welcome any comments or questions about our guide.

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