



# “Breaking Up Is Hard To Do” Employee Terminations - Legal Strategies for Difficult Decisions

Presented by

Cheryl Wiles Pooran  
Labour and Employment Practice  
PooranLaw Professional Corporation

120 Eglinton Avenue East, Suite 1000, Toronto, ON M4P 1E2  
phone: 416-322-2875 | fax: 416.981.3962 | [www.pooranlaw.com](http://www.pooranlaw.com)

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# Overview

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1. Legal Background
  - Employment Standards Legislation
  - Common Law
  - Contract
  - Collective Agreement
  - Human Rights Code
  - WSIB issues
2. Managing Various Types of Terminations
  - Just Cause
  - Without Cause
  - Resignations and Constructive Dismissal
3. Strategic Settlements
  - Assessing what is reasonable?
  - Releases
  - References
4. Case Studies and Questions

# PART I - Legal Background

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1. *Employment Standards Act, 2000 (ESA)*
2. *Common Law*
3. *Contract*
4. *Collective Agreement*
5. *Human Rights Code*
6. *Workplace Safety and Insurance Act (WSIA)*

# Employment Standards Act (ESA)

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## ESA Minimum Requirements

1. Notice of termination (or termination pay in lieu thereof) equivalent to:
  - 1 week after 3 months of service,
  - 2 weeks after 1 year of service,
  - Thereafter, 1 week of notice per year of service up to a maximum of 8 weeks.
  - Note: service includes periods of inactive employment

# Employment Standards Act (ESA)

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## ESA Minimum Requirements Cont'd

2. Continuation of benefits for statutory notice period
  - What will benefits provider allow?
  - What is the norm?
  - What is your liability for benefits?

# Employment Standards Act (ESA)

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## ESA Minimum Requirements Cont'd

### 3. Severance Pay

- After 5 years of employment, 1 week of severance pay per year of service to a maximum of 26 weeks (6 months)
- Only if (a) Employer payroll is \$2.5 million+ or (b) employee was terminated as part of a discontinuance of operations
- Calculated based on 1 weeks' wages X years of service + 1 week's prorated wages for final year of employment

# Employment Standards Act (ESA)

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For the purposes of ESA Notice, Termination and Severance Pay “Wages” includes:

- Base salary
- Commissions (but not tips)
- bonuses (does not include discretionary bonuses or stock options)
- Allowances for room and board

# Common Law Obligations

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- *Reasonable notice or pay in lieu*
- *No “rule of thumb”*
- *Considers:*
  - *Nature of position*
  - *Age at termination*
  - *Length of service*
  - *Availability of similar employment*
- *Beware the “Inducement” factor*



# Common Law Obligations

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*Quantum:*

- *24 month max barring aggravated or punitive damages*
- *Aggravated and Punitive damages*
  - *Results from the manner of dismissal, treatment of employee prior to and during dismissal and harm actually suffered by employee*

# Employment Contracts

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- *Termination risks should be considered at the time of hire*
- *Contracts must meet or exceed ESA*
- *Possible to limit to ESA minimums*
- *Key is careful drafting and avoiding impediments to enforceability.*

# Employment Contracts (Cont'd)

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Carefully drafted termination clause:

- Must explicitly limit employee entitlements at termination and should address pay in lieu of notice, benefits and bonuses if any;
- Must meet or exceed ESA minimums;
- Ambiguity will be decided in favour of employee;
- Consider *Roden* decision.

# Employment Contracts (Cont'd)

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## Impediments to Enforceability:

- Employee must be aware of the termination clause before starting work (at least a few days if not a week);
- Employee must have time to consider contract and opportunity to understand the consequences (i.e. independent legal advice) in advance of signing;
- If clause is introduced after employee has started work, require additional consideration;
- Passage of time can be an impediment.

# Collective Agreements

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- Collective Agreement is the entire agreement
- ESA minimums apply unless otherwise agreed
- No “without cause” dismissal except in accordance with layoff and seniority provisions
- Beware the human rights considerations in applying layoff provisions
- Terminations in the union context are largely focused on “Just Cause” dismissals

# Human Rights Issues

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1. Underlying human rights concerns
2. Accommodation issues
3. Reasonable perception
4. Terminating employees on leave

# WSIB Issues

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Duty to re-employ an injured worker  
where:

- Unable to work as a result of work related injury;
- Continuously employed for 1 year before date of injury;
- Employer regularly employs 20 or more workers

# WSIB Issues Cont'd

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Duty remains in effect until the earliest of:

- the second anniversary of the date of the work-related injury or illness;
- One year after the worker is declared fit to perform the essential duties of his or her pre-injury job or other suitable work; or
- When the worker reaches age 65.



# Part II – Managing Various Terminations

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1. Terminations for just cause
2. Terminations without just cause
3. Resignations
4. Constructive Dismissal

# Part II

## Managing Various Terminations

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**Terminations**

**for**

**Just Cause**

*inclusive results*

# Just Cause Terminations

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Factors Considered in Assessing whether to terminate for Just Cause

1. Consider cost of terminating without just cause
2. Consider whether misconduct can be proven
3. Consider whether nature and degree of misconduct is sufficient to justify “capital punishment” of employment relationship.

# Just Cause Terminations

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## Proving Misconduct:

1. Burden of proof is on employer
2. Investigate thoroughly
3. Assess seriousness and evidence
4. Final decision

# Just Cause - Investigation

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Step 1 – Respond promptly

Step 2 – Prepare to investigate

- Depending on nature of misconduct in question suspension with pay may be appropriate while investigation under way
- Refer to policies and procedures before commencing investigation
- Consider potential conflict of interest investigators may have

# Just Cause – Investigation (Cont'd)

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## Step 3 - Interview all witnesses and gather evidence

- Communicate with witnesses about process, their role and what they can expect
- Don't promise confidentiality
- Ask witnesses to tell their story without asking yes or no questions
- Give employee in question opportunity to tell his/her story (employee may have union present if applicable)

# Just Cause – Investigation (Cont'd)

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## Step 4 – Interview alleged perpetrator

- Give employee in question opportunity to tell his/her story (employee may have union present if applicable)
- Provide employee with opportunity to respond to evidence
- Investigate employee's account and re-interview if necessary

# Just Cause – Assessing Seriousness

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## Seriousness of Misconduct

1. Types of misconduct:
  - dishonesty (fraud and theft being examples)
  - insolence and insubordination;
  - breach of trust and/or the duty of fidelity;
  - conflict of interest;
  - chronic absenteeism or lateness;
  - sexual harassment;
  - serious incompetence;
  - intoxication at the workplace; and
  - fraudulent misrepresentation as to qualifications/credentials



# Just Cause Terminations

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## Seriousness of Misconduct

### 2. Willfulness and Progressive Discipline

- Rules clearly communicated
- Consequences of misconduct clearly communicated
- Rules must be reasonable
- Rules must be consistently applied
- Clear warning issued where appropriate
- Absence of condonation
- Opportunity to improve

# PART II

## Managing Various Terminations

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### Without Cause Terminations

# Without Cause Terminations

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When contemplating without cause termination consider:

1. Legal entitlements – ESA, common law, contract
2. Factual circumstances that could lead to increased damages
3. Reasonable range of settlement taking into account
  - Mitigation
  - Income taxes
  - Legal fees
  - Good will and employee relations
4. Settlement structures (working notice, lump sum, salary continuance etc.)

# Termination Meetings

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## Procedure for communicating termination:

(Non-working notice termination)

1. Two employer reps present
2. Unionized staff permitted to have union present
3. Explain termination and state whether with or without cause
4. Provide letter confirming discussion and severance offer if any
5. Escort staff to work station
6. Permit opportunity to obtain belongings (supervised if appropriate)
7. Escort out of building

# **PART II**

## **Managing Various Terminations**

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### **RESIGNATIONS**

# Resignations

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- Voluntary termination by the employee
- Conduct an exit interview to ensure to be clear about the reasons for the departure
- Require a resignation letter
- If notice provided consider whether vacation may be permitted to be taken during notice period
- When to waive notice

# PART II

## Managing Various Terminations

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### CONSTRUCTIVE DISMISSAL

*inclusive results*

# Constructive Dismissals

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- Forced resignation
- Occurs when employer unilaterally alters a fundamental term of the employment contract such as a decrease in compensation or a reduction of status or responsibility.
- Burden on employee to prove
- If found, wrongful dismissal damages apply
- Duty to mitigate applies



# **PART III – Strategic Settlements**

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# Strategic Settlements

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## Non-union Settlements:

Variables to consider in negotiating a settlement in a wrongful dismissal case:

- Lump sum vs. salary continuance
- Mitigation claw back
- Retiring allowance (possible RRSP tax deferral)
- Allocation of punitive damages (not income)
- Attribution to legal costs (not taxable)
- EI recovery

# Strategic Settlements (cont'd)

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## Non-union Settlements:

### Releases

- Must be freely given
- Ensure inclusive of all claims

### References

- Liability for failure to give references
- Liability to employee for providing inaccurate reference
- Liability in negligence for misrepresentation to new employer
- Best practice, provide reasonable reference stating only the truth

# Strategic Settlements (Cont'd)

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## Union Settlements:

### Unjust discharge cases:

- Consider risk of order to re-employ
- Use grievance procedure to your advantage
- Last chance agreements

### Structuring layoffs:

- Options depend on collective agreement
- Most DS Sector employers don't do temporary layoffs
- Employees may have choice as to whether to take up front severance/termination pay or to wait out recall period and then receive termination pay/severance
- Beware benefit continuance obligations
- Consider implications of re-employment within specified time periods

# Case Studies and Questions

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*inclusive results*