

Dismissing An Employee? Consider These Potential Pitfalls First

Dismissing an employee from employment is almost always a difficult thing to do. Aside from the emotional and personal issues that invariably arise, there are legal considerations that must always be taken into consideration, whether or not the dismissal is with or without cause. In cases where cause is alleged, it is a matter of analysing whether the employee's conduct motivating the dismissal absolves the employer from any further contractual obligations towards the employee. In cases where cause is not alleged, then the issue principally becomes one of calculating the employee's entitlement to notice of termination or pay in lieu thereof.

Before carrying out a termination of employment, employers should first consider whether the employee subject to dismissal has any rights to security of employment under the *Employment Standard Act, 2000* ("ESA"), the *Workplace Safety and Insurance Act* ("WSIA") or the *Occupational Health and Safety Act* ("OHSA"). Although the common law has long recognized that employers have an unfettered right to dismiss employees at any time with or without cause (as long as reasonable notice of termination or pay in lieu thereof is provided in the case of the latter), the common law is constrained by statute in certain specific circumstances. In short the ESA, WSIA and OHSA provide job protection to employees in certain circumstances. If not properly considered prior to a dismissal, these three provincial statutes could create costly pitfalls for the unwary employer.

Employment Standards Act, 2000: Pregnancy, Parental And Emergency Leave

Before implementing a dismissal, inquiry should be made as to whether the employee recently exercised his or her right to a statutory leave under the ESA. If the inquiry reveals that the employee exercised such a right, the employer should then satisfy itself that it could prove that the dismissal is in no way in retaliation for, or the result of, the employee exercising his or her rights under the ESA. If the employee challenges his or her dismissal before the Employment Standards Branch of the Ministry of Labour or before the courts, the onus will be on the employer to demonstrate that the dismissal had nothing to do with the fact that the employee exercised his or her statutory right to a prescribed leave.

Should the investigation into the employee's complaint reveal that the dismissal was not entirely free from improper motives, an Employment Standards Officer appointed under the ESA could reinstate the employee and award damages for lost wages. In addition, if it is revealed that the termination was tainted by the fact that the employee exercised his or her rights under the ESA, the employer may be prosecuted under the *Provincial Offences Act* for having violated the ESA. If convicted, the employer could be fined up to \$100,000.

Workplace Safety And Insurance Act: Obligation To Re-Employ

An employee who sustained a workplace injury and thus received workers' compensation benefits may also be protected by law. Once medically rehabilitated, the employer is obligated to reinstate the employee to the position he or she held on the date of his or her injury, subject to various time limits. Therefore, an employer contemplating dismissing an employee should determine whether the employee recently returned to work after receiving

benefits for a workplace injury under the WSIA. The inquiry should go back at least six months, as a termination within six months of an employee's return to work is deemed to be in violation of the employer's obligation to re-employ under the WSIA. If the investigation reveals that the employee subject to dismissal returned within the previous six months, then the employer should be prepared to demonstrate that the dismissal is in no way tainted by the fact that the employee was off work and on workers' compensation.

Should the employee challenge his or her dismissal before a Re-employment Officer at the Workplace Safety and Insurance Board, the onus will be on the employer to prove that the dismissal was in no way motivated by the injury. If the officer finds that the employer failed to comply with its obligations under the WSIA, the officer could:

- (a) levy a penalty against the employer not exceeding the amount of the employee's net average earnings for the year preceding the injury; and
- (b) make benefit payments to the employee for an additional maximum period of one year.

In addition, the employer could be prosecuted under the *Provincial Offences Act* and, if convicted, fined up to \$100,000.

Occupational Health And Safety Act: Right To Refuse Unsafe Work

Employers must provide a safe work environment for their employees. An employee with reason to believe that a piece of machinery or equipment or other condition of employment is likely to endanger his or her health or the health of another worker may refuse to work or perform a particular assignment, with pay. Employers are specifically prohibited from dismissing or threatening to dismiss an employee who has refused to work because of an alleged unsafe work environment.

In the event that an employee's dismissal is closely related in time to an employee's complaint of an unsafe work environment, employers should again be prepared to refute any allegation that the dismissal was a result of the employee exercising his or her right to refuse to work in an alleged unsafe work environment. In the event of dismissal, the employee could file a complaint with the Ontario Labour Relations Board ("Board") and seek reinstatement and damages for lost wages. Then, the employer would have the onus of proving that the termination was in no way tainted by the fact that the employee exercised his or her rights under the OHSA.

Should the Board find that the employee was dismissed contrary to the OHSA, the employer could be liable for all lost wages and potentially obligated to reinstate the employee to employment in his or her former position. In addition, if the violation is prosecuted under the OHSA, the employer, if convicted, could be fined up to \$500,000.

Conclusion

As noted earlier, dismissing an employee with or without cause is in itself a potentially explosive matter. But the dismissal could be much more problematic in those circumstances where the employee recently exercised a right under the ESA, WSIA or the OHSA. For the unwary employer, dismissing an employee in such circumstances could result in prolonged litigation and, potentially, significant liability. To avoid such liability, employers are urged to first consider the statutory protections afforded to employees, if any.

Should you have any questions or comments regarding the foregoing, please feel free to contact any member of our Labour and Employment Group.

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