



# Wrongful Dismissal

# Agenda

- (1) What is Wrongful Dismissal?
- (2) Minimizing Severance Payments
- (3) Ensuring Insurance Coverage for Wrongful Dismissal Claims
- (4) Avoiding Claims for Bad Faith and Other Damages
- (5) Questions

# Part 1: What is Wrongful Dismissal?

- An employer can legally dismiss an employee at any time and for almost any (non-discriminatory) reason as long as they provide reasonable advance notice
- The requirement to provide advance notice is an implied term of all employment contracts
- The employer does not need to provide advance notice if there is just cause to dismiss the employee
- Wrongful dismissal occurs when an employer dismisses an employee without just cause and without sufficient advance notice
- This is a breach of the employee's employment contract entitling the employee to damages, commonly known as severance pay

# This Presentation Does not Apply to:

- Unionized workplaces
  - The collective agreement will almost certainly govern dismissal without cause
- Fixed term employment agreements
  - The employment agreement itself will typically govern dismissal without cause
- What is or isn't just cause for dismissal
  - That's a whole presentation on its own

# What is Severance Pay?

- In a wrongful dismissal case, the employer has breached the employment contract by failing to provide advance notice of dismissal
- Damages for that breach (severance) are based on what the employee would have earned if they had received proper advance notice
- The amount of notice the employee should have received is called the “notice period”

# What is Severance Pay?

- Severance includes all forms of employment compensation the employee would have received during the notice period, including:
  - Wages/salary
  - Vacation pay
  - Employer benefit contributions
  - Bonuses

# How is the Notice Period Calculated?

- Some written employment contracts set out the length of the notice period
  - For example: “three weeks for every year of service”
- If there is no written employment contract, the notice period will be calculated based on:
  - The *Employment Standards Code*; and
  - The Common Law
- The rule of thumb is that the notice period is around one month per year of service with the employer
- The maximum notice period in Alberta is 24 months

# The *Employment Standards Code*

- The minimum notice period an employee is entitled to is set by the *Employment Standards Code*:
  - nothing if the employee has worked for less than 90 days;
  - 1 week if the employee has worked for more than 90 days but less than 2 years;
  - 2 weeks if the employee has worked for 2 years or more but less than 4 years;
  - 4 weeks if the employee has worked for 4 years or more but less than 6 years;
  - 5 weeks if the employee has worked for 6 years or more but less than 8 years;
  - 6 weeks if the employee has worked for 8 years or more but less than 10 years; or
  - 8 weeks if the employee has worked for 10 years or more.
- Employers can comply with the *Employment Standards Code* by either providing advance notice, pay *in lieu* of that notice, or a combination of the two



# The Common Law

- The *Employment Standards Code* sets out the minimum notice period
- The actual notice period is based on a court's conclusion as to how much time it would take the employee to find a comparable new job
- The court looks at a number of factors in making this determination. These are called the *Bardal* factors, after a case called *Bardal v Globe & Mail*

# The *Bardal* Factors

- The factors courts use to set the notice period include:
  - The employee's age – the older the employee the longer the notice period. This factor becomes more important starting around age 45-50
  - Length of service with the employer – the more time spent with the employer the longer the notice period
  - The nature of the employment – the more specialized or high-ranking, the longer the notice period
  - Anything other facts that impact how hard it will be for the employee to find a comparable job. This can include things like the state of the economy, whether comparable jobs exist where the employee lives, and any health conditions that make finding new work more difficult

# Mitigation

- Employees have a duty to make reasonable efforts to find new employment during the notice period
- This is called the duty to mitigate
- If the employee finds a new job, courts will deduct income received from that job from severance pay owed by the past employer
- If a court finds that an employee failed to make reasonable efforts to find a new job, severance can be reduced by up to 75%
- Does not apply to the minimum notice period in the *Employment Standards Code*

# Recap

- Wrongful dismissal occurs when an employee is dismissed without just cause and without advance notice
- The amount of advance notice the employee should have received is called the “notice period”. It is based on how much time a court thinks would be required to find a comparable new position
- The employer owes severance based on what the employee would have earned had they remained employed for the whole notice period, minus any earnings the employee receives from a new job

# Part 2: But I Don't Want to Pay Severance

- There are a few ways employers can minimize their exposure to severance payments, including:
  - Written employment contracts that limit an employee's notice period
  - Assisting dismissed employees with finding new work
  - Paying severance as a salary continuance, not a lump sum
  - Giving employees working notice of dismissal

# Written Employment Contracts

- Many written employment contracts contain clauses that expressly limit the notice period to which the employee is entitled
- The notice period stipulated by a contract cannot fall below the minimum set out in the *Employment Standards Code*
- Contracts limiting severance should always be written by a lawyer
- Courts hate contracts that limit severance, and will use even the smallest error or ambiguity to void them and award severance based on common law

# Help Dismissed Employees Find a New Job

- Offer career transition services at the time of dismissal
- If you feel comfortable, give the employee any leads or contacts that could be useful
- If you feel comfortable, give a good reference
- At the very least, DO NOT give a bad reference. If they weren't a good employee, just confirm the role they held and how long they worked for you
- Ideally, all of this will help the employee find a new job early in the notice period, significantly reducing severance
- If the employee doesn't take you up on offers to help find a new job, this can support an argument that they failed to mitigate

# Salary Continuance/Working Notice

- Structure severance pay as monthly payments that are stopped or reduced once the employee finds a new job
  - Can include reporting requirements to ensure the employee is diligently looking for a new job
- Give employees actual advance notice that they will be let go, instead of dismissing with immediate effect and pay *in lieu* of notice
  - Not common, since (often) not much work gets done during working notice period, and introduces risk of the employee taking retaliatory action
  - Can be effective with trusted employees. If they get a new job during the notice period, then no severance owed



# Part 3: Insurance Coverage

- MUNIX's Commercial General Liability Policy provides coverage for wrongful dismissal claims
- Deductible is one month of compensation per year of employee service, deducted from settlement or judgment
- Basically, the policy covers costs of defending a wrongful dismissal claim, which can be substantial, particularly with high-ranking, long tenured employees who have large severance claims worth taking to trial
- Fairly common approach in CGL Policies

# Conditions for Coverage

- The MUNIX CGL Policy has some conditions that Members need to meet to receive coverage (Section 12.1.4):
  - Before dismissing an employee, disclose all relevant information about the proposed dismissal to legal counsel specializing in employment law or chosen from MUNIX's approved counsel
  - Obtain written advice from counsel on how the dismissal should be carried out
  - Follow that advice
- Complying with these conditions will both ensure coverage for defence costs and (hopefully) reduce the ultimate severance payout and lead to early resolution of the claim

# Part 4: Minimizing Other Damages

- In addition to severance pay, dismissed employees can claim other types of damages relating to the termination of their employment, including
  - Damages for bad faith
  - Damages for intentional infliction of mental suffering
  - Aggravated damages
  - Punitive damages
- The legal tests are different for each of these damages, but in essence they all punish misconduct by the employer in the manner of dismissal

# Dos and Don'ts When Dismissing an Employee (Part 1)

- DO treat the employee with empathy and respect
- DO give the employee a reasonable amount of time to consider a severance offer and obtain legal advice
- DO pay the employee what they are owed under the *Employment Standards Code*
- DON'T falsely accuse the employee of theft, then spread that allegation in the community
- DON'T tell the employee they have to accept the offer right now or they will get nothing
- DON'T refuse to pay the employee anything and maintain blatantly false allegations of just cause for years only to abandon them at trial

# Dos and Don'ts When Dismissing an Employee (Part 2)

- DO make the decision to dismiss if necessary
- DO maintain an open mind to settling disputes with employees
- DO provide a positive (or at least neutral) reference
- DON'T dismiss an employee just to avoid their pension vesting or paying them a bonus
- DON'T bombard employees with threatening letters and phone calls
- DON'T tell other churches that the pastor you just fired didn't run his ministry according to biblical principles

# Part 5: Questions?