TERMINATING AN EMPLOYEE

By Sean Sinclair

So, on a fairly frequent basis, I’m contacted by an employer looking to fire an employee; perhaps the employee continues to show up late, is disruptive or just generally does not give a damn.

The vast majority of the time the employee is being fired “without cause”. Establishing just cause in Saskatchewan is a difficult test and generally requires that various written warnings first be given to an employee. Without this paper trail, it is going to be the rare case where you can fire an employee for cause (theft, criminal activity, severe insubordination are some examples of cases where you might be able to justify an immediate dismissal). Even with warnings, courts are reluctant to order that a dismissal is for cause.

So, long story short, if you are going to fire someone, you have to expect to pay the piper. The question is what you have to pay to get rid of the employee.

The Labour Standards Act

Although most of our clients expect to pay a dismissed employee something for firing him, they often misjudge the amount that they have to pay. One of the biggest misperceptions is that The Labour Standards Act stipulates what the employer has to pay.

The Labour Standards Act is the absolute minimum that an employer has to pay to a dismissed employee without just cause. However, a judge is likely going to give far more than the amount set out in the Act.

The Act has very little relation to the amount that will have to be paid. In fact, the Act normally speaks in terms of the number of weeks that have to be paid to an employee (with a maximum of 8 weeks). The courts talk about the number of months (with a flexible 18 month maximum) that has to be paid to the employee.

So, if you are looking at firing an employee, know that you will likely have to pay more than what is set out in the Act.

Reasonable Notice

When an employee is dismissed without cause, the law is “reasonable notice” or pay in lieu of reasonable notice.

“Reasonable notice” means that the employee has to be given notice that he is being let go on a certain date. That date has to be a reasonable period of time in the future. This gives the employee a reasonable period of time to find new employment and move on with his life. The amount of notice that has to be given
varies depending on a number of factors: length of service, age of the employee, seniority of the position (managers are normally paid more), availability of suitable alternative employment, enticement from a previous job, etc.

Instead of giving reasonable notice, the employer can pay an employee an amount in lieu of notice. Basically, the employer is paying out the notice period.

Most of the time, employers do not want an employee hanging around work making everyone else miserable, barely working and being a negative influence after he is let go. Also, the longer the employee is around the workplace, the greater likelihood that he will find some type of human rights or occupational health and safety complaint that he can lodge against the employer.

So, employers often want to buy out the notice and get rid of the employee right away. This triggers the question of what needs to be paid.

Calculating Notice

It is impossible to give a catch-all rule for what an employer has to pay to a dismissed employee for "severance" (which is what we call pay in lieu of notice). It is dependent on a number of factors. What lawyers generally do in determining an appropriate amount of severance is find similar cases (cases with similarly aged employees, similar jobs and/or similar periods of service) that went through trial and determine how many months of severance were given in those cases.

A very rough rule of thumb that some people use is one month of severance for every year of service. However, that can be quite inaccurate and should be checked against previous cases. Courts have recently spoken out against the one month for every year of service calculation.

Employee's Duty on Dismissal

A dismissed employee has a duty to try to find another job within a reasonable time frame after he is fired. If the employee finds a job, the wages that he earns at the new job are deducted from the amount of wages owing by his old employer.

Getting Rid of the Employee

So, if you are looking at getting rid of the problem employee, first speak to your lawyer. He or she will be able to give some advice about how to approach the employee with the news, what not to say (because you can get in a lot of trouble with human rights complaints) and how to structure a severance offer to the employee.
Real World Example

A recent case dealing with reasonable notice is Coppola v. Capital Pontiac Buick Cadillac GMC Ltd., 2011 SKQB 318. There, the worker was employed with the employer for around 2 years. He started off as the fleet manager for a dealership and was promoted within a short period of time to be the finance manager. He was 36 years old when he started with the employer and seemed to have a bright future.

The employer then dismissed the employee without warning after 2 years. The judge found that two factors likely played into the decision to terminate: high wages for the employee and a refusal of a transfer to a different dealership.

The employer, thinking that his obligation was what was set out in The Labour Standards Act, paid 2 weeks notice to the employee. The employee sued and was given 6 months notice (which amounted to $77,263). After deducting the wages earned by the employee during the notice period and the two weeks already paid, the employer had to pay the employee $66,384.

Also, the judge found that the employer suggested to others that the employee had been guilty of fraudulent or dishonest conduct. The employer attempted to defend the lawsuit at the outset on the basis that it had just cause for dismissing the employee because of fraudulent or dishonest behaviour (which was later retracted by the employer). As a result of the employer's unfounded allegations, the employee was given an extra $20,000 as aggravated damages against the employer.

How Can You Avoid Dealing with this Problem?

By now, you are probably looking at all of the dollar signs here: pay the severance, pay the lawyer, etc. So, can you avoid some of this?

Well, a couple of options you might consider are:

1. Having employment contracts with your employees which specify what a dismissed employee gets in the event of dismissal;
2. Having independent contractors do your work instead of employees.

Employment Contracts

You can specify the amount of notice that is to be given to an employee in the event of dismissal in an employment contract. However, you have to be very careful in the drafting of employment contracts.

In one Saskatchewan case (Duguay v. Mudjatik Thyssen Mining Joint Venture, 2010 SKPC 183), the judge was clear that terms in an employment contract that change the common law period of notice have to be set out in the clearest of terms so that the employee understands what he is giving up. Because the drafting of the
employment agreement was unclear in this case, the judge refused to limit the amount of notice to the amount set out in *The Labour Standards Act* as specified in the employment agreement.

In another case (*Hrischuk v. Lobstick Golf Club Inc.*, 2011 SKQB 151), Justice Smith of the Saskatchewan Court of Queen’s Bench emphasized the wisdom of making sure that a contract is well drafted by a lawyer:

7 A lawyer did not prepare the Agreement. The defendant had a template contract that it used for various management positions such as the plaintiff’s, general manager, food and beverage manager, and the like. No doubt a lawyer had prepared the original contract years before but the defendant had developed the habit of simply making adjustments to the original contract template as and when a new management employee was brought on. I leave it to the defendant to assess if that proved to be a false economy.

In short, you should make sure that your employment agreements are the best possible agreements if you are going to rely on them to fire a worker.

**Independent Contractors**

Another thing that we often see is employers terminating relationships with an “independent contractor”. The employer generally assumes that terminating this relationship will not result in any severance.

This is correct to a point: severance is not payable to a truly independent contractor. However, the issue is whether there is a truly independent contractor relationship or whether it could be construed as an employee-employer relationship.

A whole paper could easily be written on what constitutes an independent contractor relationship versus an employment relationship. However, it is important to realize that courts do not particularly care whether you characterize it as an “independent contractor” relationship or whether the employee pays taxes as an independent contractor. There is a lot more that goes into it than that.

Some of the things that courts look at are:

1. The level of control the employer has over the worker’s activities;
2. Whether the worker provides his or her own equipment;
3. Whether the worker hires his or her own helpers;
4. The degree of financial risk taken by the worker;
5. The degree of responsibility for investment and management held by the worker; and
6. The worker’s opportunity for profit in the performance of his or her tasks.
Thus, if you are using independent contractors, make sure that they are truly “independent” so that you can avoid a potential employment severance situation.

**Conclusion**

Firing workers in Saskatchewan is financially hazardous and has to be approached with caution. Make sure that you get good advice if you are looking at getting rid of an employee and expect that you will likely have to pay some form of severance to get rid of the problem.