

Bulletin Article

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Termination of Employment: A Primer for Christian Charities

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Terminating an employee's employment is one of the most difficult things that a Christian charity ever does. The cost and legal risk to the organization are always of concern. But Christian charities aren't just a "business"; they are communities of staff, donors and volunteers who care about the mission of the organization and often care for each other. When terminating an employee's employment, charities need to consider the impact on the employee, as well as on donors, members and other staff members - and on the organization's reputation. This article sets out some basic considerations for Christian charities when terminating a non-union employee's employment.

Can the Organization Even Terminate?

Some employers wonder if they are legally entitled to terminate an employee's employment at all, without a good reason. The answer to that question, in almost all cases, is "yes". In general, Canadian employers are legally entitled to terminate non-union employees' employment at any time and for almost any reason; the legal question is how much it will cost the employer to do so (see below). The impact will not only be legal or financial, though. As mentioned above, Christian charities will be concerned for the employee's wellbeing as well as for the wellbeing of the remaining staff, members and donors.

Which Employment Laws Apply?

Before terminating - or for that matter, hiring - an employee, one of the first things a charity needs to consider is: which employment laws apply to this employee? The vast majority of Canadian employees are subject to provincial employment laws in the province in which the person works. As such, a charity with employees in British Columbia, Alberta and Ontario will need to know and apply B.C. laws to its B.C. employees, Alberta employment laws to its Alberta employees, and Ontario employment laws to its Ontario employees. As a general rule, federal employment laws, such as the Canada Labour Code, do not apply to employees of Christian charities, with very limited exceptions such as Christian radio stations (as telecommunications undertakings are under federal jurisdiction). I have learned, when giving seminars on terminations, that many employers think that the Canada Labour Code applies to them when it does not.

Is the Person an Employee or Not?

The answer to this question may seem obvious, but it is not always so. For instance, if the person is an ordained member of the clergy, the law in some provinces may not treat him or her as an "employee" meaning that the person may not be entitled to termination notice or severance. Whether a particular minister is an "employee" must be determined on a case-by-case basis. On the other hand, ministers, unlike most employees, are often entitled to have a certain mandated process followed before their relationship with a congregation or denomination is terminated. Also, a person may be an independent contractor, in which case he or she may be entitled to limited or no notice of termination.

Is the Employee Unionized or Not?

This is also a basic consideration. Unionized employees have entitlements under the collective agreement, and are usually entitled to be reinstated if dismissed without just cause. Termination of unionized employees is a topic for another article. In any event, relatively few Christian charities are unionized, and this article focuses only on termination of employment of non-union employees.

Is there Just Cause to Terminate the Employee's Employment?

In general, employers who have just cause to terminate an employee's employment will not owe the employee any termination payments, apart from the employee's final wages and any accrued vacation pay owing to the employee. However, just cause is very difficult to establish. Generally, only very serious misconduct such as theft, fraud, assault or sexual harassment will be considered just cause. Poor performance - even incompetence - is rarely just cause. In borderline cases, the employer must consider whether it is worth claiming just cause, given that many just cause terminations end up in litigation.

Has the Employee Resigned or Was he or she Constructively Dismissed?

In general, employees who voluntarily resign are not entitled to termination payments except their final wages and vacation pay. Sometimes it is not clear whether the employee resigned voluntarily or was "pushed out", or whether the employee was constructively dismissed because of, for instance, a demotion or pay cut. Legal advice is recommended in resignation or constructive dismissal situations.

What are the Employee's Employment / Labour Standards Entitlements?

The next thing to do is review the basic employment standards law in the province in which the employee is working. These laws are usually referred to as the "Employment Standards Act" or "Labour Standards Act", with some provinces using the word "Code" instead of "Act". What does that law say about the employer's obligations on termination? All provinces' employment standards laws require that employers provide advance notice of termination, or pay instead of notice. The amount of notice under employment standards legislation is on a sliding scale depending on the employee's service, in most cases between 0 and 8 weeks. However, that is only the minimum legal obligation; employees will also be entitled to "common law" notice, which is much greater, unless they signed a written employment contract that waives their common law entitlement (see below). Ontario is the only province that has a severance pay obligation under its employment standards law, but in general that obligation applies only to employers with an annual employee payroll in Ontario of at least \$2.5 million and only to employees with 5 or more years of service. Employment standards obligations are the minimum legal obligations and cannot be waived by the employee.

If There is a Valid Employment Contract, What does it Provide on Termination?

The next question is whether the employee has a written employment contract that deals with termination. If so, four main questions need to be asked before confirming that the employer can rely on the termination clause: (1) does the termination clause provide at least the employee's minimum entitlement under employment standards laws (if not, the clause is void?); (2) is the meaning of the termination clause clear?; (3) did the employee receive "consideration" (such as the initial offer of a job, or an offer of a promotion) for signing the employment contract?; and (4) did the employee sign the employment contract before starting his or her job or new position (if not, the contract may not be valid)? The analysis of these four questions often requires legal advice from an experienced employment lawyer. If the answer to all of these four questions is "yes", the employee's entitlement will generally be limited to what the termination clause in the employment contract requires. For example, a termination clause may require that the employer provide three weeks' notice per year of service, or pay in lieu of such notice. I strongly advise that employers - particularly charities - consider implementing a written employment contract with a termination clause, because such contracts can manage and limit employer's termination obligations and provide relative certainty as to the employee's entitlements on termination, thereby substantially reducing the risk of litigation.

Is the Employee Entitled to Common law Notice of Termination? If so, How Much?

If the employee has a valid employment contract with a valid termination clause, the termination clause applies and the employee is not entitled to "common law" notice. If the employee does not have a written employment contract that deals with termination, or if the employee does have such a contract but the termination clause is void (because, for instance, it provides for less than the employment standards termination entitlements, or because the contract was given to the employee after he or she had already started work), the employee will be entitled to common law notice of termination. Common law notice includes and is almost always greater than notice under employment standards legislation. Common law notice is an obligation imposed by a body of caselaw that has built up over the years. The common law obligation is to provide reasonable notice of termination. What is reasonable is based mainly on the employee's position (the more senior, the more notice), years of service (the more service, the more notice) and age (generally speaking, the older, the more notice). There is no "formula" for determining common law notice. Employment lawyers are able to estimate an employee's common law notice entitlement based on previous cases. The common law notice period ranges from 0 to 24 months. For example, an employee with twelve years of service may be entitled to nine months of common law notice, including his or her eight weeks of notice under employment standards legislation. Charities are not "exempt" from the obligation to provide appropriate notice of termination. If an employer terminates immediately, it must provide payment in lieu of notice. The common law and employment standards notice obligation sets Canada apart from the United States; in the U.S., most employees are "at-will" meaning that the employer may terminate their employment without any notice, ~~pay~~ in lieu of notice or severance - even after many years on the job.

Are There Any Potential Human Rights / Discrimination Issues?

Even if the employer gives the employee his or her employment standards entitlement, as well as the employee's entitlement under the employment contract or common law, human rights laws must be considered. In particular, an employee who has a mental or physical disability could allege that the employer terminated his or her employment because of the disability. Where the employer requires employees to sign a statement of faith and/or code of conduct, an employee might allege that he or she was dismissed because he or she is no longer a believing Christian or because of lifestyle issues. Employees dismissed for discriminatory reasons may be entitled to be reinstated into their job, although that happens relatively rarely. Terminations that raise human rights issues tend to be very sensitive and require a carefully-considered strategy and expert legal advice.

What "Papering" is Needed? The Termination Letter and Full and Final Release.

The termination letter should be carefully crafted to set out all of the employee's entitlements on termination. In most cases the employer will wish to have the employee sign a "Full and Final Release" - giving up the right to make any claims against the employer - in exchange for receiving the termination package offered by the employer; however, employers are not permitted to hold back employees' employment standards entitlements because the employee has not signed a Full and Final Release. If the employee signs a Full and Final Release and receives more than his or her minimum employment standards entitlements, in general the employee will not be permitted to advance any claims against the employer.

Are There Any Potential Reputational or Morale Issues?

In my experience, charities sometimes do not fully consider the reputation consequences of terminations. Termination of employment of employees who are loved and appreciated by staff - and possibly members - can lead to serious staff morale issues as well as member-relations issues. Employees of Christian charities often work together as part of a "family", each employee supporting the other not only professionally but also often spiritually and emotionally. This is particularly true in churches and other smaller, voluntary organizations. Sometimes donors get upset and stop supporting the organization. In rare cases, media pick up on the termination and the charity gets unwanted media exposure. Before terminating, the employer must fully think through how the termination will affect staff, member and donor morale and the organization's reputation generally.

How Should the Termination be Handled?

This could be the topic of another article, if not a book! Employees rarely commend employers for how they handled a termination. But employers should strive to handle the termination in a fair, discrete and compassionate manner. Terminations not handled in that manner present a much greater risk of litigation - and can sometimes involve additional damages for "bad faith" in the termination process.

Is the Organization Prepared for the Lawyer's Letter? The organization should be prepared to receive a - sometimes strongly-worded - lawyer's letter alleging that the termination was unfair and that the employee is entitled to much more pay in lieu of notice / severance. In my experience, these letters often rankle organizations and cause much anxiety. They ought not to, if the termination was carefully planned and carried out. The vast majority of "wrongful dismissal" lawsuits - in which an employee claims that he or she did not receive enough pay in lieu of notice - settle without litigation, and even those that end up in litigation rarely go all the way to trial, with the vast majority settling.

Summary

The best advice for employers is to know the applicable employment standards laws and have a carefully-developed and implemented employment contract that brings relative certainty to the employee's entitlement on termination, reducing the risk of legal disputes. Legal advice should be sought in all but the most routine termination cases as discrimination or other issues can arise. The termination letter and Full and Final Release should be carefully drafted to ensure that if the employee accepts the employer's termination offer, the resulting settlement is clear and is final. By offering a fair termination package in exchange for the employee signing a Full and Final Release of claims, the employer can usually avoid legal disputes. Staff, member and donor morale, and general reputational issues, must also be considered.

This article is not intended to be exhaustive and does not constitute legal advice. There are many other issues that can arise in employee terminations, and it is not possible to deal with them all in this article.

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