
Dismissal With and Without Just Cause

Dismissal with Just Cause

If the employer has just cause to terminate employment, they are not required to provide reasonable notice.

Just cause is considered to be conduct that is inconsistent with the employee's express or implied obligations under the employment contract. Such conduct must be a serious violation that goes to the root of the employment contract and damages the employment relationship in such a way that the employer cannot be expected to continue employing the employee. Just cause requires serious conduct such as theft or dishonesty, or continued improper conduct for which the employee was adequately warned and given the chance to remedy. Conduct serious enough to indicate that the employee is abandoning any intention to remain part of the employment relationship will be serious enough to constitute just cause. As just cause is generally difficult to establish, it is advisable to seek legal guidance to determine if just cause exists before dismissing an employee for cause.

It is imperative, specifically in situations of continued improper conduct or poor performance, that employer's efforts to bring deficiencies to the attention of the employee, and to assist them in improving such deficiencies are properly documented. This is often effected through performance reviews where specific issues in performance are addressed and a plan for improvement is laid out. Any attempt by an employer to allege just cause without strong evidence of continued poor performance or misconduct and efforts to warn and assist employees to improve will almost certainly fail in court.

It is generally easier to limit liability for reasonable notice by including a termination provision in the employment contract rather than trying to prove just cause in court. If you think you have just cause to terminate an employee but are unsure if the conduct is serious enough, it is advisable to seek legal advice before terminating employment. Successfully proving just cause can be very difficult and could expose an employer to further liability in defamation should they make statements about an employee's conduct to third parties that are untrue or cannot be proved.

Examples of Just Cause

Context must be considered when deciding if just cause to terminate an employee exists. The onus is on the employer to prove just cause, namely that the conduct complained of occurred and that it was serious. Further, the courts are far more willing to find just cause where the conduct complained of was intentional (dishonesty), rather than unintentional (inability to perform duties due to aptitude or illness).

The following are examples of conduct that if serious enough, may constitute just cause:

- breach of an express term of the employment contract (however, most likely there will need to be excellent documentation of progressive discipline and bringing the breach to the employee's attention before such a breach will constitute just cause)
- willful disobedience
- serious misconduct
- theft or fraud involving employer's property
- absenteeism and lateness
- dishonesty
- intoxication and drug use
- insolence and insubordination
- sexual harassment and other workplace harassment
- incompetence
- conduct prejudicial to employer's business

Dismissal Without Just Cause

An employer may dismiss an employee without just cause by providing reasonable notice of dismissal. The form and amount of reasonable notice must be determined prior to dismissing an employee. An employee given a suitable amount of reasonable notice is less likely to sue an employer for wrongful dismissal.

In order to dismiss an employee without cause, an employer must provide a clear and unequivocal communication of the dismissal. Proper communication of dismissal will leave no reasonable doubt in the mind of the employee that their employment has come or will come to an end at a set date. Notice of dismissal cannot be ambiguous or uncertain, for example, saying that there may not be enough hours for the employee to work in the future, or that at some point in the future they may be terminated will not be sufficient as it leaves the employee uncertain as to whether they should begin looking for replacement employment. In other words, an employer may not start the clock on reasonable notice by making unclear statements that in the future employment may not continue.

Form of Reasonable Notice – Working Notice vs. Severance Pay

Reasonable notice may be in the form of working notice, where the employee remains employed during the notice period, or in the form of pay in lieu of reasonable notice (severance pay), where the employee is paid the amount they would have earned had they worked during the notice period.

Most often employers prefer to meet their reasonable notice obligations by paying severance. Allowing an employee to work during the notice period may pose a risk, as the employee may become disgruntled, affect the moral of other employees, steal from the employer, or even attempt to cause damage to the employer's reputation. However, in certain circumstances, such as where the decision to dismiss is motivated by purely economic considerations and the conduct of the employee is not in issue, there may be little to no risk of allowing the employee to work through the notice period.

There are potential downsides to choosing a severance payment as the form of reasonable notice over working notice as well. For example, if an employee becomes disabled during the notice period, the employer's disability insurance plan may not cover the employee because they are no longer actively employed. Had the employee worked during the notice period, they could have made a claim against the insurance plan.

An employer could become liable to make disability payments to an employee who becomes disabled during the notice period. There is special insurance coverage that may be obtained to cover the employee during the notice period if they are not working.

Amount of Reasonable Notice – Statutory and Common Law

Where the employment contract does not limit an employer's liability for reasonable notice strictly to the statutory entitlements, or the contract of employment is oral, an employee will be entitled to both statutory and common law reasonable notice.

The statutory and common law reasonable notice entitlements are concurrent, but not cumulative. For example, if an employee is entitled to 6 months' reasonable notice at common law and 8 weeks under the [Employment Standards Act](#) (ESA), the employee will only be able to receive 6 months less 8 weeks as common law reasonable notice.

As previously mentioned, statutory reasonable notice requirements are set out in the ESA. According to s.63 of the ESA, an employee is entitled to the following amounts of reasonable notice based on length of service:

- 1 weeks' notice after 3 consecutive months of employment;
- 2 weeks' notice after 12 consecutive months of employment;
- 3 weeks' notice after 3 consecutive years of employment; and
- 1 additional week of notice for each additional year of employment, up to a maximum of 8 weeks' notice.

An employer's obligation to provide reasonable notice based on length of service under the [ESA](#), may be satisfied by providing written notice (working notice), pay in lieu of written notice, or a combination of the two.

For more detail on situations where statutory reasonable notice is not required and the calculation of wages to determine the amount an employer is liable to pay for a week of notice, refer to the discussion on compensation upon termination of employment under the ESA.

Common law reasonable notice requirements are more difficult to calculate and there is no detailed formula to follow, as with statutory reasonable notice. Further, common law reasonable notice requirements are based on factors beyond length of service.

Dismissal With & Without Cause

The calculation of reasonable notice depends on a number of factors, the most important of which include:

- length of employment (the dominant factor);
- the age of the employee;
- the level of skill and responsibilities involved in the job; and
- the availability of similar employment at the time of termination.

Note that benefits are included in determining the amount of reasonable notice, not just wages or salary.

It is advisable to seek legal advice to determine appropriate common law reasonable notice before dismissing an employee. Case law suggests there are many more potential factors that may be applicable in determining reasonable notice at common law depending on the particular circumstances.