



## JUST CAUSE TERMINATIONS IN ALBERTA

### A. General termination principles

Employers in Alberta are free to structure their business as they wish, including whether and when they terminate each employee. However, the law inserts a couple of caveats into this discretion.

First, the *Employment Standards Code* (the **Code**)<sup>1</sup> requires employers to provide employees with either notice or pay in lieu of notice in the event of termination. Notice or pay in lieu under the Code is based on only an employee's years of service with the maximum being 8 weeks.

In addition to notice under the Code, employment agreements also include an implied term requiring employers to give employees common law reasonable notice of termination. While employers can replace this implied term with an express provision reducing or even eliminating an employee's common law notice, such provision must satisfy certain requirements to be enforceable, including limiting language that's clear and unambiguous.

Absent an enforceable and express provision, courts determine an employee's common law reasonable notice period based on various factors such as age, length of service, and character of employment. Common law notice is therefore almost always significantly greater than that under the Code—with the rough high end being around 24 months for long service employees.

However, in practice, most employers, for business reasons, choose to terminate employees effective immediately without providing them with notice at all. When this happens, the employer has breached the implied term of reasonable notice and is liable to the employee for the damage that results. This damage is typically everything the employee would have earned had appropriate notice been given. These damages are also called pay in lieu of reasonable notice or severance.<sup>2</sup>

While notice or pay in lieu of notice under both the Code and common law significantly help employees bridge the gap between their previous employment and a new opportunity, employees are disentitled from both of these things where the employer can prove that they had "just cause" to dismiss the employee. If proven, then the employer must only provide the employee with their earnings up until the date of dismissal.

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<sup>1</sup> RSA 2000, c E-9. **Note:** if you are employed in another province, or are employed in a federally regulated industry,

<sup>2</sup> **Note:** there is some Alberta authority suggesting that this interpretation is incorrect. However, this Alberta authority conflicts with (a) statements from the Supreme Court of Canada; (b) leading employment law textbooks; and (c) countless lower court decisions from multiple other provinces.



To establish just cause, an employer must not only prove that the employee engaged in some sort of misconduct, but also that a just cause termination was warranted based on the nature and extent of the misconduct as well as the surrounding circumstances. In other words, a just cause termination must be a “proportionate” response to the employee’s misconduct. As one Court stated:

Just cause is conduct on the part of the employee incompatible with his or her duties, conduct which goes to the root of the contract with the result that the employment relationship is too fractured to expect the employer to provide a second chance.<sup>3</sup>

## **B. Just cause examples**

Because courts determine whether just cause exists based on all of the facts of any given case, it is impossible to provide a list of the specific acts that will always amount to just cause. However, past case law helps us in two main ways:

- It tells us what courts look for in respect of each category of misconduct such as insubordination, violence, or poor performance (otherwise referred to as incompetence); and
- It helps us understand how courts apply the above general principles—namely the proportionality requirement.

In respect of physical violence, case law tells us that employers will often be successful in proving just cause where the employee engaged in any type of this conduct on the job. Though, the principle of proportionality means that this is not always the case.

For example, in *Shakur v Mitchell Plastics*<sup>4</sup>, Mr. Shakur was a 6 year machine operating employee who was terminated for just cause following a physical altercation with a co-worker, Mr. Kelley. The incident started with “verbal jousting” but progressed to the point where Mr. Shakur slapped Mr. Kelley in the face with an open hand.

Though Mr. Shakur had clearly engaged in misconduct by slapping his co-worker, the Court nonetheless found that the employer failed to satisfy the test for just cause based largely on the proportionality principle. Namely: “There was no evidence that Mr. Shakur had caused any previous disruption or trouble in the workplace, or was anything other than a conscientious worker....”<sup>5</sup>

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<sup>3</sup> *Leung v Doppler Industries Inc.* [1995] BCJ No 690 (BCSC).

<sup>4</sup> 2012 ONSC 1008.

<sup>5</sup> 2012 ONSC 1008 at para 15.



In contrast, unlike physical violence, a just cause dismissal for incompetence is much harder for an employer to prove. It requires warnings, training, and a reasonable period of time thereafter to allow the employee a chance to improve.

*Parent v Spielo Manufacturing Inc.*<sup>6</sup> is a good example. In this case, the employee held the position of quality assurance tester but became unable to meet the standard that applied to all employees in this position: that they complete a minimum of 20 test cases per day. While the Court held that the employer had just cause for dismissal, this conclusion was based largely on the fact that:

- she was given warnings that failure to meet the standard would result in her dismissal;
- the warnings consistently stated that it was a requirement to meet the minimum test case completion of 20 per day;
- strategies for improvement were set out without any improvement;
- she was provided with considerable time, over a one year period, to improve; and
- she was allowed a daily opportunity to present concerns to her supervisor if she was unable to meet the performance standard—an opportunity the employee never took advantage of.

### **C. Employee's defence: condonation**

Even if the employer can prove the employee's misconduct and that a just cause dismissal would have been a proportionate response, this does not leave the employee without a defence. Specifically, if the employee can prove that their employer "condoned" or "accepted" the employee's behaviour, then the employer's just cause allegation will fail. One Court explained this principle as follows:

When an employer becomes aware of misconduct on the part of... [an employee], sufficient to justify... [a just cause] dismissal, he may adopt either of two courses. He may dismiss, or he may overlook the fault...If he retains the... [employee] in his employment for a considerable time after discovering his fault, that is condonation, and he cannot afterwards dismiss for that fault without anything new.<sup>7</sup>

While the most obvious form of condonation is allowing an employee to remain on the job for a considerable time after the employer discovers that employee's alleged misconduct, it can also arise in other ways such as where the employer fails to discipline other employees who have engaged in similar conduct. For example, where employee A and B engage in misconduct of a similar nature, and the employer terminates employee A for just cause but allows employee B

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<sup>6</sup> 2013 NBQB 394.

<sup>7</sup> *McIntyre v Hockin* (1889), 16 OAR 498 (ONCA).



to remain employed, it is doubtful that the employer's just cause allegation against employee A will be successful.<sup>8</sup>

#### **D. What to do when you have been terminated**

If you have been terminated, whether with just cause or without, booking a consultation with one of our lawyers will help you determine whether your employer is treating you in accordance with the law.

If you are terminated without cause, a lawyer can help you understand whether what your employer is offering you by way of notice or pay in lieu of notice is fair taking into account all of your individual characteristics as well as any applicable termination clauses.

If you have been terminated with just cause, then seeking advice from a lawyer can be even more valuable. As discussed above, proving just cause is not clear cut and depends on the circumstances of each individual case. While your employer may initially assert just cause against you, it does not mean that they are actually justified in doing so and you may be entitled to a significant amount of severance.

#### **E. Our Process**

In every case, our firm's main objective is recover the most severance and other compensation possible in the shortest amount of time. To achieve this outcome, all of our employment lawyers use a well-tested process for getting these results:

Step 1. A thorough legal consultation where our lawyers will sit down with you or connect with you over the phone to review the facts of your case, explain the legal issues to you, and outline your options to recover fair compensation (any fee for the consultation is tax deductible);

Step 2. We prepare a Reasonable Notice Assessment to calculate how much compensation you may be owed, and research previous cases that are relevant to your case;

Step 3. We prepare a Legal Argument for you based on the specific facts of your case, and how the law applies to your case, and why you are entitled to compensation or some other remedy;

Step 4. We incorporate the Legal Argument into a Legal Demand which is delivered to your former or current employer which proposes a Settlement. This Legal Demand will have a deadline by which the employer must respond failing which a lawsuit may be commenced.

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<sup>8</sup> See for example: *Varsity Plymouth Chrysler (1994) Ltd. v. Pomerlau*, 2002 ABQB 512.



Step 5. All of our lawyers are trained and experienced in employment law negotiations, and we will bring all of these skills to bear in order to achieve the most competitive settlement possible.

\*Our lawyers are very successful in generating settlements using the above process, however, if a settlement cannot be reached, our lawyers will aggressively advocate on your behalf using the courts, the Alberta Human Rights Commission, Employment Standards, or Arbitration.

### **Contact Us Today**

If you have been terminated for just cause, there is a very good chance that you are entitled to severance and other compensation. Please contact us to discuss your case in more detail, and find out how much compensation you may be entitled to:

**Toll-Free at 1 (844) 224-0222**

Disclaimer: please be advised that the above information is not a substitute for legal advice, and therefore it is important that you arrange for a consultation with an employment lawyer, to determine how the law applies to your unique circumstances.