



This *Alert* deals with a topic that is often forgotten, but so important, particularly in the current judicial climate where the “optics” of the termination are being scrutinized and serve as the foundation of damage awards that are “exceptional” in the sense that they are outside the traditional wrongful dismissal damages.

While it is not possible to completely foreclose a terminated employee from suing the employer, planning and preparation will serve to avoid many of these exceptional claims. I have set out in this *Alert* some random thoughts and tips that will, I hope, serve to make the termination process more manageable and to get you thinking about some of the often overlooked issues that, hopefully, minimize the risks of litigation that is often occasioned by ill-feelings and avoidable acrimony created by the manner in which the employer deals with the employee at the time of termination. Here as everywhere in employment law, there are no one size fits all solutions (it’s a fools errand to think otherwise), but there are some common themes that we can at least consider.

As always, I hope you enjoy this *Alert*.

Mike

In this Edition

1. Terminations - Planning and Compassion are Critical When Managing Risk
2. Articles of Interest and Random Thoughts

Terminations - Planning and Compassion are Critical When Managing Risk

Does anyone really look forward to carrying out a termination? Is there a HR practitioner anywhere who wakes in the morning, excited to get to work because he or she knows that ending someones employment is on the agenda? I know (or at least I hope) the answer is “no”. Instead, we feel a host of emotions from dread, anger, regret, failure, and fear. Let’s not forget fear. But joy and pleasure have no part in it and they shouldn’t.

I was working on a termination years ago with a “seasoned” HR professional with over 30 years of experience. In the course of discussing the termination with the soon-to-be former employee’s manager, we got to speaking about the logistics of the termination meeting (the manager was nervous having never terminated someones employment before and wanted some guidance). The HR guy laughed. He told me that he has carried out hundreds of terminations over his long career, that he was very “good at it” and that it was “old hat” to him and that he didn’t even have to think about it. He told the manager not to worry about it, and to just sit in the termination meeting and take notes. He bragged that he was so proficient at terminating people that “you can set your watch by how long it will take from the time the employee entered the room to the time she left the building”.

When I hear people talk this way (fortunately it doesn’t happen often), I get this feeling of, I don’t know, concern would be the polite way of saying it. A more honest word is pity.

I worry that anyone who looks forward to something that should not be fun, is going to make mistakes because they simply can’t help themselves - they are going in looking at it from the wrong point of view - as a task on their to-do list, rather than a moment that will change someones life and that of their families. This applies irrespective of the reason for termination.

I’ve received some really great advice over the course of my 26 years of legal practice. One of the best pieces of advice came from my former partner, the late Justice Randal Scott Echlin when he said “terminate the person as if you were terminating your best friend or someone in your own family and you’ll avoid problems”. Above all, be compassionate and respectful of the situation and the person.

This advice was imparted on me at the beginning of my career, and although the world has changed greatly in 26 years, this advice remains as relevant today as it did all those years ago, probably more relevant.

Courts since about 1997 and the Supreme Court of Canada’s decision in **Wallace v. United Grain Growers Ltd.**, [1997] 3 SCR 701 will examine the “manner of termination” and, where they feel that the employer acted in bad faith, disrespectfully, or in a high-handed manner, and will award damages to the terminated employee where circumstances warrant. The law is a bit more complicated than that, but the Court will examine how the employee was treated at the point of termination (and sometimes in the time leading to the termination) and where they are sufficiently offended or where the employee suffers damages as a result of the treatment, will find a way to compensate the employee.

I have written and presented many times about “exceptional damages” in employment law such as aggravated, moral and punitive damages and the circumstances in which these will be awarded to a terminated employee. Optics are important in the courts analysis of these claims and the circumstances in

which to award these sorts of damages. For example, see my recent article [How You Treat an Employee During Employment and On the Way Out Matters](#) in the January 2018 *Alert*.

What are some things that you can do to minimize the risks? Here are a few random thoughts:

- ◆ Irrespective of the termination, and regardless of whether the employee is being terminated for just cause or without just cause, and whether he or she has been the biggest thorn in your side, or pain in the behind, or has taken up all of your time, never forget that the person you are terminating is a person like you and me. He or she has the same pressures that life puts before all of us and with which we must deal on a daily basis. How would you want to be treated? How would you want your best friend, your spouse, your kids to be treated? Act that way.
- ◆ Remember the 4 Ps - *Preparation Prevents Poor Performance*. Do not wing it - no matter how experienced you are. Do not get blasé, complacent or lazy. Above all, don't fall into the trap of believing that all terminations are the same, or that you can apply some formula or off the shelf solution to the issue. The fact is, that every termination, even if you've assisted with thousands of them as I have, is different. Sure there are many similarities, of course (we're not building rockets or going to Mars here), but the difference comes from the simple fact that each of us is different. We come with our own perspective, emotions, good and bad. Because of those unique features, each termination must be managed. I'm not suggesting you need to brainstorm or write out on a whiteboard every possible permutation of how things might go wrong. I am suggesting that you spend some time planning the termination and the logistics.
- ◆ I am not going to discuss the severance offer and the options that are available to you (though that might be something to cover in a future *Alert*). I suggest you consider the following logistical issues:
 - ◆ Pre-planning and carrying out the termination
 - ◆ What day will you terminate the employee?

Friday terminations are to be avoided. The reason is simply that if you terminate on Friday, the employee will not be able to speak with an employment lawyer until at least Monday. He or she will, however, speak with well meaning friends and family who will have an opinion (albeit one that may be completely unrealistic and perhaps fuelled by the emotion of the event). The employee will also have an internet connection and this is not a good thing for anyone. If you can, terminate on Monday, Tuesday or Wednesday.

Also, check the employee file to determine, if possible, whether the date you have selected to carry out the termination has any significance to the employee. For example, it's her birthday or a date that is otherwise meaningful to the employee.
 - ◆ Where and what time will the termination meeting take place?

The termination should take place at a time and in a location that minimizes the individual having to take the “long walk” past co-workers either out of the building or to his or her office to collect personal belongings.

Sometimes I am asked about terminating the employee by letter or over the phone is acceptable. In most cases these methods of termination are to be avoided. Exceptional situations might require an over the phone termination, but these occasions should be rare indeed. An “out of the blue” letter being delivered to the employee terminating his or her employment, while not unheard of, should be rarer still than the telephone termination.

◆ Who will attend?

Generally two (2) people should attend the meeting. More than that looks like the employer is “ganging up”. Avoid conducting the termination meeting alone since this creates an opportunity for misunderstanding and confusion over what transpired in the meeting. Someone should be designated as the note taker. *Usually*, the terminated employees’ immediate supervisor should attend along with someone from HR. That said, there are no hard and fast rules. Will someone’s absence from the meeting be seen by the employee as insulting, disrespectful, disingenuous or plain cowardly? Where the relationship between the terminated employee and his or her supervisor is acrimonious, perhaps someone else should attend.

Sometimes an employer does not have a second person to attend at the meeting. In those cases, the employer can engage an experienced relocation counsellor or HR consultant to participate in the meeting. Where this is done, it is critical to select the correct individual with the proper degree of actual experience and the right temperament.

◆ How will the employee be invited to the meeting and when?

Obviously, the employee has to come to the meeting (unless the termination is taking place in his or her office). Generally the meeting will not be scheduled in advance (for obvious reasons) and the employee would be called to the meeting at the last minute.

◆ Anticipate employee reactions and plan for them. This is one of those situations where you should “prepare for the worst and hope for the best.” But you know the employee. How do you think the employee will react to the news? You can never predict with certainty what will happen, but it’s never a bad thing to try to anticipate at least some reactions and prepare for those.

◆ Who will say what and when?

It is important to understand the purpose of the meeting. The meeting is not a debate about the “rightness” or “wrongness” of the employer’s decision. The sole purpose of the meeting is

to communicate a decision that has already been made (hopefully after proper and due consideration and internal discussion).

You should also decide who will say what and the order in which it will be communicated. This need not be complicated, but it is important that this not be a free-flowing discussion. It must be structured and directed. With that in mind, it needs to be planned carefully. Exceptional damages are awarded, in many cases, because the termination meeting takes on a life of its own, and gets out of control.

- ◆ The decision should be communicated within 10 seconds of the employee entering the room.

“We have some news to deliver, and we know this is not what you want to hear, but we have reached the difficult decision to end our employment relationship with you effective today”, or something like that .

- ◆ Provide the employee with the termination letter setting out the severance offer.

“We have prepared a severance offer for you which we’ve set out in detail in this letter. As with our decision, we have given a lot of thought to the terms of the offer and we hope, once you’ve had some time to review it, that you’ll agree to it.”

If the employee wants to sign and accept the offer and sign the release in the meeting, don’t let him or her. Instead, ask the employee to take the offer away, think about it and get whatever advice he or she thinks is appropriate. Signing the letter and release at the termination meeting might seem like a good idea, but it’s not in most cases and opens any settlement to challenge.

- ◆ Offer the employee a taxi ride home or to wherever he or she would like to go. Do not offer to drive the employee personally nor should you offer to have a co-worker drive the employee.

Being terminated is, to put it charitably, a stressful event. Offer the employee transportation and don’t let the employee drive if you have concerns about his or her fitness to do so.

- ◆ Debate should be shut down immediately. Do not allow yourself to get drawn into it.

“We understand that you’re not happy with our decision, and that you think we’ve made a huge mistake. But it’s a decision that we have reached after a lot of discussion and it is a decision that will not change. We are here to communicate the decision to you, and we are not going to debate it with you.”

I heard of a termination meeting years ago that about 60 minutes and drew a crowd of curious spectators. Needless to say, this did not end well.

- ◆ End the meeting respectfully and thank the employee for his or her service.

Prior to the meeting you should, for example, have considered:

- ◆ how the meeting will end
- ◆ what and how the company will obtain its property from the employee (some property should be left with the employer before the employee leaves the room or building other property may have to be secured in some other way).
- ◆ how and when will the company obtain its passwords that are needed to access its systems (i.e. computer, phone etc...)
- ◆ how will the employee retrieve their personal belongings (will they return to their office or workstation to gather their personal property, will they be allowed to return at a later date to retrieve their property or will it be packed up and shipped to the employee).
- ◆ How will the termination be communicated, internally and externally (if required) and will the employee be given an opportunity to have input with respect to the message.
- ◆ How will contacts from third parties be dealt with (i.e. prospective employers and HRDC). A generally recommended approach is that all third party contacts be filtered to a specific individual to handle and respond to.

We can attach buzzwords and jargon to the task we have to perform. We use these for many reasons, including to lessen the blow or, perhaps, to make ourselves feel better. We use words like downsizing, rightsizing, restructure and reorganization but in the end, the outcome is the same - a person is without a job, is thrown into uncertainty, and has to explain this to their family and friends.

Even where the employee is being terminated for just cause, the above considerations will assist. It is critical that the meeting not be allowed to devolve into a finger pointing exercise. Assigning blame and fault will serve no purpose, save to throw fuel on the fire. In the end, where the termination is carefully planned, the risks associated with the decision will be minimized. Of course, nothing can prevent an employee from challenging the decision but getting the employee out of the business respectfully at a time where he or she is most vulnerable will serve both the employee and the employer in the end.

Articles of Interest and Random Thoughts

The Ministry of Labour has updated its online (and very useful) **Guide to the Employment Standards Act**. I highly recommend bookmarking the *Guide*.

The Ministry of Labour also published a revised **What You Need to Know** poster. The *Employment Standards Act, 2000* requires that:

- 🔊 Every employer post and keep posted in at least one conspicuous place in every workplace of the employer where it is likely to come to the attention of employees in that workplace a copy of the most recent poster published by the Minister under this section.
- 🔊 If the majority language of a workplace of an employer is a language other than English, the employer shall make enquiries as to whether the Minister has prepared a translation of the poster into that language, and if the Minister has done so, the employer shall post and keep posted a copy of the translation next to the copy of the poster.
- 🔊 Every employer shall provide each of his or her employees with a copy of the most recent poster published by the Minister under this section.
- 🔊 Every employer shall provide an employee with a copy of the poster within 30 days of the day the employee becomes an employee of the employer.

On January 15, 2018, Minister of Labour Kevin Flynn confirmed that 41 new employment standards officers graduated. He went on to say that “[T]hese new officers are part of the investments in enforcement in Bill 148. The *Fair Workplaces, Better Jobs Act* will hire up to 175 new enforcement officers to ensure all workplaces are fair and respectful in Ontario.” Employers stay tuned. Have a read of **Ontario Enhancing Enforcement to Ensure Worker Rights Are Protected**.

CONTACT

Fitzgibbon Workplace Law
Management Labour & Employment Law
2275 Upper Middle Rd East | Suite 101 | Oakville | ON | L6H 0C3
Direct Tel: 905-637-7927 | Fax: 905-637-0735
Email: michael@fitzgibbonworklaw.com

Copyright and Disclaimer

Copyright 2018 © Michael Fitzgibbon Professional Corporation o/a Fitzgibbon Workplace Law. All Rights Reserved.

This newsletter is published by Michael Fitzgibbon Professional Corporation o/a Fitzgibbon Workplace Law. The articles and other items in this newsletter provide general information only, and readers should not rely on them for legal advice or opinion. Readers who need advice or assistance with a matter, question or issue should contact a lawyer directly for specific advice.