

# When all else fails: Dismissing difficult employees



By Lisa M. Bolton & Andrew Ebejer

In our January *Canadian Lodging News* article we discussed strategies for managing underperforming employees. However, not all employees are willing or able to improve. In that case, terminating the employment relationship may be an employer's next step.

## Reason for dismissal: Anything goes (almost)

Contrary to what many employers believe, in the absence of an employment agreement limiting the circumstances in which employment may be terminated, an employer may terminate employment at any time and for any reason, so long as the decision to end employment does not breach the employer's human rights obligations or constitute a reprisal under health and safety legislation. For example, it is not illegal to terminate employment because the employer "doesn't like" the employee. However, it is illegal to terminate employment if the reason (in whole or in part) the employee is disliked is because, for example, he or she is of a certain colour, or sexual orientation.

## Form of Dismissal: With or Without Notice?

Termination is either with or without notice. A dismissal without notice is permitted if the employer has "just cause", meaning the employee's conduct is so bad it has effectively destroyed the employment relationship. Absent just cause, an employee is entitled to notice of termination, which can take the form of working notice, or pay in lieu of notice. How much notice is required is addressed later in this article under the heading The (Potential) Costs of Terminating Without Cause.

## With just cause: A high threshold

It is often difficult for an employer to know

whether an employee's conduct or poor performance is sufficient to merit dismissal for just cause. Get it right and an unsatisfactory employee can be removed from the workplace without financial cost to the employer. Get it wrong and the risk to an employer could include liability for wrongful dismissal damages, not to mention negative publicity both inside and outside the workplace.

So, before making a decision to terminate employment for just cause, the employer should consider – objectively – the extent and quality of the misconduct; in particular, whether the employee's conduct has irreparably harmed the trust that underpins the employment relationship. Serious misconduct such as theft, workplace violence or insubordination are often sufficient to meet the just-cause threshold.

Just cause is more difficult to establish in the case of a chronic underperformer. Thorough documentation is required to demonstrate that the employee was aware of the performance requirements, was given sufficient time and assistance to improve, and failed to achieve the requirements. For these reasons, some employers decide, on a business basis, it is less onerous and expensive to simply give the employee notice, or pay in lieu of notice, than to allege cause and risk the additional cost and risk in responding to a wrongful lawsuit.

## The (potential) costs of terminating without cause

If there is a valid employment contract which sets out the amount of notice to be provided upon termination, that will be sufficient so long as the notice period in the agreement meets or exceeds the statutory notice requirements under the Employment Standards Act (ESA). Thankfully, the minimum statutory notice period is limited to between 1-8 weeks depending on the length of employment.

If the employment relationship is not governed by a valid employment agreement, the employee is entitled to "reasonable notice" determined in accordance with the common law – judge-made law developed by courts. In deciding how much notice is reasonable, a judge considers a number of factors such as the employee's age, length of service, position, etc. to try to determine how long it will reasonably take the employee to find suitable alternate employment. In cases involving older, long service employees in senior positions, common law reasonable notice can be as high as 24 months. This can amount to significant financial liability for an employer.

## A written employment contract: An employer's best insurance policy

A well-drafted employment contract can reduce the risk an employer will be exposed to liability for a long common-law notice period; in many cases limiting termination entitlements to the minimum amounts established by the ESA. A contract also reduces uncertainty for an employer, as the amount of reasonable notice is already determined.

The best time for an employer to introduce an employment contract is at the time of hiring, prior to the employee commencing work. In that case the offer of employment is the "consideration" (i.e. compensation) in exchange for which the employee accepts the terms of the employment contract.

However, all is not lost if an employment contract is not entered into prior to the employee starting work. There are opportunities during the employment relationship when an employment contract may be introduced in exchange for additional consideration (e.g. salary increase, promotion, improved benefit plan, etc.). Alternatively, an employer may offer an existing employee a "signing bonus" as consideration for

signing an employment contract.

Either way, it is important to appreciate that most employment contracts will be interpreted strictly against the employer and in favour of the employee. Thus, to obtain the maximum protection possible for an employer, any employment contract should be drafted or reviewed by experienced employment counsel. Employment contracts should also be reviewed periodically, to ensure the language used continues to be enforceable.

## The gold standard: Obtain a release

Employment-related disputes can be expensive. A properly drafted release gives an employer comfort that, once the matter is concluded, no other claims will be made by the employee arising out of the employment, including, for example, under human rights or employment-related legislation.

## Conclusion

When dismissing an underperforming employee, an ounce of prevention really is worth a pound of cure. There are many potential ramifications, legal and financial. Prior consultation with expert employment law counsel is very often the best medicine.

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## Winnipeg's Alt

WINNIPEG — An Alt Hotel is set to open this summer in the heart of Winnipeg's Sports, Hospitality and Entertainment District (SHED). According to Groupe Germain, Alt Hotel's parent company, the location "will play a key role in the revitalization of Winnipeg's downtown core."

The 160-room hotel will offer 120 single queen rooms and 40 double queens. An Italian-designed armchair and original works of art will also be in each space. Visitors will be able to use multi-plug connectivity to connect devices to flat screen televisions and the bathrooms feature glassed-in showers with 100 per cent terry cloth bath towels.

The smoke-free hotel will also feature several green initiatives: geothermal heating and cooling and domestic water heated by geothermal energy; heat recovery from ventilation exhaust to preheat cold air coming in from the exterior; energy efficient lighting; thermal windows with low emission rates to maximize natural light; an automatic regulation system for ventilation, air conditioning and heating; and a white roof to reduce heat islands.

The building will also house seven meeting rooms with projection screens and easy connectivity. Two restaurants — Milestones and Chi Na Libre — will be located adjacent to the lobby.