

## **Termination with Just Cause – Don't Expect a Severance** **By Marcel Faggioni**

A client came to me one day wanting to put together a severance package for an employee, who they were planning to terminate in the immediate future. As we began the consultation, I quickly became aware of a number of issues involving the employee in question. First, the client indicated that this employee was quite problematic in terms of his conduct at work. He would frequently get into arguments with fellow-employees and supervisors, as well as with the client's suppliers. In fact, some of the arguments escalated to the point of physical altercations. The client also revealed that the arguments were generally initiated by the problem employee. Second, this employee often missed work and seldom arrived on time at the start of his prescheduled shifts. Third, the employee frequently took smoke breaks outside of his normal break times. In sum, this employee represented every employer's worst nightmare.

Upon hearing all of this evidence, I attempted to dissuade the client from approaching this termination on a "without cause" basis but rather on a "with cause" basis. However, after some discussion, I soon found out the reasons for the client's apprehension in treating this matter as a termination with just cause. The client revealed that the incidents of the employee's misconduct were not recorded. Moreover, the employee was not subject to any form of progressive discipline. Based strictly on the two latter points, the client was right; he really didn't have a leg to stand on in terms of pursuing a termination with just cause. Finally, the client also expressed some uneasiness in pursuing this matter on a "with cause" basis given his belief that employment law is tilted in favour of the employee no matter the evidence in support of the termination. In fact, it is interesting to note that most Canadian's share this same belief. As a result of this widespread belief, employers tend to offer severance packages to non-deserving employees. Despite this prevalent view, terminations with just cause are often successful provided that the employer has undergone a methodical and thoughtful process prior to executing the termination.

This article will focus on what an employer can do in order to maximize his/her chance in substantiating a termination with cause and minimizing any cost associated with providing a severance to an errant employee. It should be noted that terminations are generally one of the most difficult aspects in human resources management. Moreover, each case involving a potential termination requires a meticulous and careful assessment of the merits that have led you to take this course of action.

The following check list contains items worthy of consideration when contemplating a termination with just cause against any employee:

- Does the employer have a progressive discipline procedure? If yes, was the procedure followed?
- Was the misconduct of the employee so egregious that immediate termination was the only option?

- Were there any mitigating circumstances or elements that may lessen the penalty of termination?
- Was a comprehensive investigation performed in uncovering all the evidence necessary to support the termination?
- Are there any past disciplinary notations on the employee's file and supervisory notes that would support the use of progressive discipline?
- In the case of a termination for incompetence, is there evidence that demonstrates that the employer provided adequate support and training to the employee before the decision to terminate?
- Were performance appraisal completed that would indicate a pattern of poor performance and/or misconduct by the employee?

The following circumstances represent situations where terminations without just cause may succeed if proper attention has been paid to the above considerations:

- Theft and Fraud
- Providing false information on an employment application form
- Disobedience and insubordination
- Sexual/racial harassment and bullying
- Expense claim fraud
- Breach of duty of fidelity
- Conflict of interest
- Chronic punctuality issues
- Gross Incompetence
- Lying during an investigation
- Illegitimate and culpable absenteeism

As noted earlier, it is of paramount importance that the merits of each case be closely examined, scrutinized and assessed before taking that step towards a termination with just cause. In addition, an external consultation with an expert in the field should take place before any termination action is contemplated and executed.