

BEEN TERMINATED? ANSWERS TO 20 COMMONLY ASKED QUESTIONS

***DISCLAIMER:** This document provides general information only, and is not intended to provide legal advice in connection with a specific termination. This document presumes your employer is provincially regulated. Different laws apply to federally regulated employees such as employees employed by banks and the federal government. It is necessary to review the circumstances surrounding your case before providing you with an opinion on any particular legal issue arising out of your termination.*

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1. Did my employer have the right to terminate my employment?

Unless an employment contract or a valid Company policy which forms part of the employment contract says otherwise, your employer is normally entitled to terminate your employment at any time as follows:

- (a) If your employer had just cause, then you normally have no right to common law reasonable notice of termination
- (b) if your employer did not have just cause, then you are normally entitled to common law reasonable notice of termination.

Important: You must tell us if you signed an offer of employment, an employment contract, or are aware of any employer policies that cover employee terminations.

Similarly, you must tell us if you think one of the reasons you were terminated was because of any of the following reasons:

- your sex, colour, disability, age, sexual orientation, ancestry, place of origin, race, ethnic origin, citizenship, creed, record of offenses, marital status, or family status.
- you refused to work because of unsafe working conditions or otherwise complained about working conditions
- you took maternity and/or parental leave
- you filed a Workers' Compensation claim
- you complained about your employer's pay equity plan or failure to post a pay equity plan
- you were absent from work because of an illness
- any other non-performance concerns

Note: Certain employees who work for federally regulated employers have the right to contest an employee termination and get re-instated.

2. What compensation am I entitled to receive as a result of my termination?

Normally, if you have not been guilty of wilful misconduct or disobedience or wilful neglect of duty then you have the right to a minimum amount of notice of termination under the Employment Standards Act (the "ESA"). Subject to certain exceptions, you are entitled to up to 8 weeks notice of termination (or pay instead of this notice). In addition, if you have worked for at least 5 years and the employer's Ontario payroll is at least 2.5 M you may be entitled to statutory severance pay. If so, subject to certain exceptions, you have the right to another week pay for each year of service up to 26 weeks.

Important: Please let us know if your employer terminated several other people at the same time that your employment was terminated as there are mass termination provisions under the ESA.

As mentioned above, unless there is just cause for termination you are normally entitled to common law reasonable notice of termination. This notice is almost always longer than the statutory notice period set out in the ESA.

Unless you can reach a negotiated settlement with the employer, you usually must proceed to trial and have a judge order the employer to award you damages for wrongful dismissal before you receive any compensation from the employer for failure to provide common law notice. The court will deduct any termination pay provided to you under the ESA and any income you earn during the reasonable notice period from this damage award.

You may be entitled to additional compensation if you were terminated contrary to other statutes such as the Human Rights Code, the Occupational Health and Safety Act, the Workers Safety Insurance Act, the Pay Equity Act etc.

3. What is just cause?

It is necessary for me to review all of the circumstances surrounding your termination before I can make an accurate assessment of whether your employer had just cause to terminate your employment. Sometimes it is easy to make this assessment. For example, if you stole a large amount of money from your employer, or viciously attacked a coworker without provocation or any other valid excuse then the employer probably had just cause. Sometimes it is very difficult to make this assessment. It is generally difficult for an employer to prove it had just cause for termination.

4. What is reasonable notice?

What constitutes reasonable notice is normally the most important issue in wrongful dismissal cases. There is no mathematical equation that is used to determine this figure. Again it is necessary to look at all of the circumstances. The courts will look at several factors including: your age, length of service, salary, position, level of responsibility, whether you were lured away from secure employment, the number of comparable jobs currently available given your education and experience, and the economic circumstances of the employer. The purpose of this notice is to provide you a reasonable amount of time to find comparable employment. The court will not normally try to punish the employer for its actions or provide you with a financial windfall.

We consider the factors mentioned above when providing you with an estimate of the range of reasonable notice that you might expect to receive if your case went to court assuming you had completely fulfilled your duty to mitigate. This duty is discussed below.

5. What does the duty to mitigate mean?

You are required to make every reasonable effort to seek alternative comparable employment. You are not required to accept any job offer. We cannot overstate how important it is for you to document your mitigation efforts. Otherwise a court could find that you are entitled to a relatively long reasonable notice period but refuse to order the employer to provide you with compensation for part or all of this time period because you failed to mitigate. A failure to mitigate will normally occur if you do not try to find a job, or you refuse to accept a reasonably comparable job.

6. How should I document my mitigation efforts?

You should start a diary which sets out what you have done to try to find another job. This diary can include:

- your resume;
- a list of employees in your industry;
- a list of publications you have checked;
- a list of all job applications;
- when you registered with Canada Manpower, or with online sites like Monster and Workopolis;
- when you registered with private employment agencies;
- a copy of all ads you responded to, all letters you sent, and the responses you received;
- a description of any job relocation seminars you attend;
- receipts for all out of pocket expenses that you incur relating to your search for new employment

7. If my case goes to court and I win will a judge deduct the income I earn during the reasonable notice period from my damage award?

The vast majority of wrongful dismissal cases never get to court. More than 9 out of 10 cases are settled. But if your case does proceed to court, a judge will normally deduct the income that you earn during the reasonable notice period from the damage award. For example, if you earn \$ 80 000 a year and a court concludes that reasonable notice in the circumstances is 6 months then you would receive \$ 40 000 less any income earned during this 6 month period. If you earned \$10 000 in the 6 months after your termination then you would be awarded \$ 30 000 in damages.

8. When should I apply for employment insurance benefits?

You should apply immediately. Your employer should provide you with a Record of Employment within a few days after your termination. Employers, however, do not always send this document to a terminated employee as quickly as they should. You can provide your Record of Employment once you receive it from your employer.

9. What information should I bring to the initial consultation?

A list of the money you were owed when you were terminated. This could include:

- salary (including unpaid overtime)
- bonus
- vacation pay
- business expenses
- any other monies you are owed

Identify any obligations that you owe the employer that arise out of any terms of employment such as a confidentiality agreement, or a non-solicitation agreement. If any obligation of this kind exists, please let us know immediately.

A list of options that are available to you under the employer's pension plan, profit-sharing plan, or other similar plans.

10. What should I do about any Company property in my control or possession?

You should immediately return the property and obtain a receipt.

11. What should I do about my life insurance coverage?

If you are covered by a group life insurance plan, check to see if you have the right to convert your coverage to an individual policy. Usually, you must convert from a group policy to a individual policy within 30 days of termination.

12. Other than compensation, what other terms should be in the severance package?

In theory, a settlement can include almost any issue that you can imagine.

13. Will my employer provide me with a letter of reference?

Normally, an employer won't offer to provide you with a letter of reference. If you want one, you should ask for one.

14. Will my employer continue to cover me under its employee benefit plans?

Under the Employment Standards Act, your employer is suppose to continue coverage under the employee benefit plans for the minimum statutory notice period. If benefit continuation is important to you, let us know and we can discuss this issue further. Generally, benefit continuation is a negotiable issue, however, employers rarely extend long term disability coverage beyond the date of termination. Check to see whether you are covered under any other person's employee benefit plan such as your spouse.

15. Will my employer provide me with outplacement counseling?

Again this is a negotiable issue. Assess whether you would benefit from the services of an outplacement firm. If so, find out what kind of services you need. There is quite a range of services in the packages offered by these companies. Do you need a basic or a deluxe package?

16. What information should I obtain in order to make an informed decision concerning my employer's severance offer?

Normally, our goal is to negotiate a separation package on your behalf that provides income protection from the date of your termination to the date you start a comparable job. In some cases, we are able to negotiate a financial windfall that could not be obtained if the case proceeded to court. Accordingly, when advising you we need to know your best estimate of how long you think it will take you to secure comparable employment.

In order to arrive at this best guess, you normally must research the job market. You also must assess when you will be ready to enter the job market. When going through this process, ask yourself the following questions:

- Do I have an up-to-date resume?
- When is the last time I interviewed for a job? Do I need to take some time to learn how to interview properly? Am I ready medically and emotionally to participate in an interview?
- Are there comparable jobs currently available or am I going to have to obtain additional skills before I am marketable?
- Do I need to do some market research to find out where to look for a comparable job?
- How long does it take a prospective employer to make a hiring decision for someone in my position? Does the company first screen applications, then do first interviews, then second interviews, then negotiate terms of employment? If so, it can take several weeks after you make contact with the prospective employer before a hiring decision is made.

17. What is a release?

Normally, an employer will insist that you sign a release before providing you with any termination pay beyond your minimum entitlement under the ESA. Essentially, you agree not to sue the employer for wrongful dismissal or bring any other complaint against the employer related to the employment relationship. Normally, you will be required to agree that the severance monies you receive include any payments you are entitled to receive under the ESA, the Human Rights Code or any other applicable statutes.

Therefore it is imperative that you tell us if you think your termination was the result of your sex, racial origin, a disability or any other prohibited ground under the Human Rights Code. Similarly, it is critical that you tell us if you think a reason for your termination was because you exercised one of your statutory rights. (ie refusal to work because of unsafe working conditions, complaint about pay equity plan, decision to take maternity or parental leave etc.)

18. How are severance payments taxed?

We are not tax lawyer lawyers. If you would like to speak to a tax lawyer I would be pleased to provide you with the names of a good tax lawyer. Having said this, we can tell you that generally if a severance payment which is characterized as a retiring allowance is made directly to you, then the employer is required to deduct and remit income tax according to the following schedule:

Payment With holding tax
\$1 000 to \$5 000 10%
\$5 000 to \$15 000 20%
over \$15 000 30%

The total tax that you will ultimately be required to pay will depend on several factors including your total income for the year, and your marginal tax rate.

In order to avoid having your employer withhold tax on the severance payment, you may be able to direct your employer to deposit some or all of the payment into an R.R.S.P. on a tax free basis. In order to transfer the severance monies directly to an R.R.S.P. both you and the employer must sign a form.

19. If my employer has made a time-limited severance offer, do I have to accept the offer without any changes before the end of the specified time period or receive nothing and be forced to commence litigation?

If you received a written offer, there is always a chance the employer will withdraw the offer and force you to go to court to obtain any monies above your ESA entitlement. In practice, however, the offer is often a minimum offer that will not be removed from the negotiating table.

Similarly, there is always a possibility that an employer will withdraw the offer if you don't respond to the offer within the specified time period. In practice, however, once your lawyer gets involved in settlement negotiations this time limit is often forgotten.

20. How long will it take to negotiate a severance agreement?

If both parties want to negotiate a severance agreement and both parties can agree on terms it can take a couple of weeks to several months. We recommend that you assume it will take longer that you think it should, and concentrate your energies on securing alternative employment.

If you want to contact us to set up an initial consultation, [click here](#)