

Whitten & Lublin is a team of legal experts who provide practical advice and advocacy for workplace issues.

JUST CAUSE AT COMMON LAW MIGHT NOT BE ENOUGH

Canadian employees are entitled to reasonable notice (or pay instead of notice) if they are terminated without cause. For longer term and older employees, this obligation can be significant for employers. But there may be a way out. Employers can limit the notice and severance they must provide to an employee through an employment contract. Since every Canadian province has its own employment standards legislation that imposes minimum entitlements on termination of employment, an employer's contract can limit termination entitlements only to those statutory minimums, if it desires.

Many employers also believe that if they have just cause for termination, they don't have to pay any severance. This is not necessarily the case. The Courts have recently tried to limit this argument as well.

In *Oosterbosch v. FAG Aerospace Inc.*, the employee worked for a machine operator assembling parts for airplanes when a number of errors caught up with him, eventually leading to his termination. Given the importance of producing properly functioning parts and the errors that he caused, the employer figured that terminating him for just cause was clear cut.

Although the court agreed that the employee was not entitled to severance and notice as a result of his incompetence, the court still awarded him some pay. Why? Because the court accepted his claim that his conduct was not willful or deliberate. Rather, he was just incompetent. Therefore, it found that he was owed his termination and severance payments under the provisions of the Employment Standards Act, 2000.

This decision should give employers some pause when contemplating a termination for misconduct:

1. Are the employee's actions deliberate? Or was it a well-intentioned but foolish mistake?
2. Having and consistently applying a good system of progressive discipline may often be a pre-condition to successfully asserting cause, but it is not necessarily enough to justify a termination for cause; and
3. Proving just cause requires sufficient evidence to demonstrate an employee has repudiated the employment relationship. Without a very serious incident of misconduct or dishonesty, this will usually demand proof of repeated warnings and coaching sessions.

While employers may successfully assert just cause at common law, they may be surprised to learn that in some cases the employee will still be entitled to statutory minimum notice and severance pay. It is important to be familiar with provincial employment standards legislation and to know the difference between conduct warranting just cause and misconduct that rules out statutory termination pay.

OUR LAWYERS

DAVID WHITTEN

DANIEL LUBLIN

CÉDRIC LAMARCHE

ELLEN LOW

AARON ROUSSEAU

DANIEL CHODOS

IN THE MEDIA

Daniel Lublin, a Partner at Whitten & Lublin, was interviewed for CTV's Canada AM program "Ask the Lawyer" where he answered questions regarding legal issues in the workplace. Daniel's interview can be seen on [CTV's website](#)

* * * * *

Daniel Lublin was interviewed by CTV News regarding the massive class-action lawsuits filed on behalf of employees at two of Canada's largest banks; CIBC and Scotiabank. Daniel's interview can be watched on [CTV's website](#)

UPCOMING EVENTS**April 4th**

David Whitten will be part of a panel of experts at the Lancaster House Conference, "Pursuing and Responding to Human Rights Claims: Practical tips and strategic advice", where he will discuss advancing and responding to human rights complaints in the workplace.

May 2nd

David Whitten will be co-chairing at the OBA's Annual Employment Law Issues Conference which will include speakers discussing the most recent decisions dealing with workplace investigations, negotiating and structuring settlements, drafting and enforcing restrictive covenants, and the annual "just cause" update.

Daniel Chodos will be giving a presentation at the Ontario Bar Association's "11th Annual Employment Law Issues" seminar, on the subject of the enforceability of restrictive covenants.

May 7th & 8th

David Whitten has been invited by the Federated Press to participate as a Lecturer on Executive Employment Contracts. This program will take place over two days in Toronto. The topics featured in the course include:

1. Negotiating The Business Deal
2. Trends In Executive Compensation
3. Termination Issues: Trends In Constructive Dismissal
4. Protection Of Intellectual Property & Non-Disclosure/Confidentiality Agreements
5. Non-Compete And Non-Solicitation Agreements
6. Dispute Resolution And Arbitration Clauses
7. Change Of Control Provisions
8. Use Of Contractual Clawbacks In Canada
9. Negotiating And Drafting Settlement Agreements
10. Pitfalls In Common Executive Contract Clauses

This event is intended to brief Board Members, Senior HR Executives, In-House Counsel, Directors & Officers responsible for executive recruitment, employment and compensation; Executive Employment Consultants & Lawyers.

To register for the course, please refer to the Federated Press website.

For your 15% discount, use this code: EECT1304/PR

LAW BLOG

My ex-employer refused to pay my severance! Can he do that?

Fired while on maternity leave

Which rules apply if working from home?

Read more at
<http://blog.toronto-employmentlawyer.com/>

LATEST NEWS ON TWITTER

Can your ex-employer refuse to pay severance?-see in my @globeandmail column <http://bit.ly/ZRpxK3>

arguments for or against mandatory retirement? see fireman goes to Human Rights Tribunal after he forced retirement <http://natpo.st/ZYZaSi>

Can you be forced to retire? See Lawyer's fight over mandatory retirement heads to Supreme Court <http://soa.li/Ywe3bKZ>

Is it legal to lay off a worker on maternity leave? See my Globe & Mail column from today and find out. <http://soa.li/cQ3K7Ud>

See Richard Branson blasts Mayer's telework stand at Yahoo <http://soa.li/WtpedzK>

Unpaid internships: Is this even legal? Possibly not according to the ESA see http://www.thestar.com/news/gta/2013/03/05/unpaid_internships_the_most_pre_carious_work_of_all.html ... via @torontostar

Miners fired for 'Harlem Shake' video. Is this illegal or legal? Hard to tell. see: http://www.thestar.com/news/world/2013/03/04/miners_fired_for_harlem_shake_video_report.html ... via @torontostar

Work from home? Which rules apply see in my @globeandmail column from today <http://bit.ly/YGgj2P>

See my interview on #CTV #CanadaAM from this morning: Ask an #employment #lawyer <http://bit.ly/13o7foC>

FOLLOW US

@DanLublin

CONSULTATIONS

For a consultation
 please call us at

416-640-2667

or submit your
 online request at

www.canadaemploymentlawyer.com