



SMHI LEGAL NOTES

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BARRISTERS & SOLICITORS • TRADEMARK AGENTS

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The Great Fence Debate

Spring has sprung – we hope – and with it thoughts of our yards, including fences. The issue of fences can be filled with tension. To help allviate some of the potential problems, we offer you this information about the law of fences.

First Things First

Before becoming too invested in the look and location of your fence, there are some logistical considerations that you must put your mind to.

The first is to find out if your municipality has a fence bylaw. (In Toronto you should refer to Chapter 447 on Fences in the Toronto Municipal Code.) Such a bylaw will set out standards for the height and location of the fence and possibly the construction materials that can be used.

If you live in a subdivision, you need to find out whether there are specific rules about fences. To preserve the aesthetics of the neighbourhood, developers will often register a series of restrictions respecting changes that can be made to the yards and houses. You can find out about such restrictions by looking at your deed.

Before you begin building your fence, you should also speak to the utility companies: water, hydro, sewers, gas lines, telephone and cable TV. It is important to get them involved so that you do not accidentally cut one of their lines. In addition to verifying the location of the utilities, they may be able to show you exactly where the property line is located, saving you the cost of a survey.

Location, Location, Location

The next consideration is whether you build your fence on

the boundary line between yours and your neighbour’s property or completely on your own property. If you want to retain maximum control over the fence, you are best to construct it entirely on your side of the property line. If you do choose to construct it on the boundary line, you may lose some control, but on the other hand, your neighbour may have to share in the cost of construction.

The Line Fences Act

The balance of this article will focus on fences built on the property line.

In Ontario, the issue of boundary fences is governed by *The Line Fences Act*. The general rule is that a land owner may construct and maintain a fence to mark the boundary between his property and those of the adjoining land owners. Having said that, if you and your neighbours really are right next door to each other, as in a city, putting up a fence along the property line might lead to some tensions, even if you both want the fence.

Tensions may also arise around the issue of the need for reconstruction of an existing fence, or the maintenance and upkeep of an existing fence that is built on the property line.

If tensions do arise, the obvious first solution is to try and come to an amicable and mutually beneficial agreement. If that is not possible, you may have to request that a fence viewer, appointed pursuant to the *Line Fences Act*, attend the properties¹. The fence viewer will arbitrate with respect to who should pay for the fence as well the type and style of fence.

Before going this route, you should be aware that the application fee can be expensive.

A Few Additional Points

The arbitration process does not apply to disputes about the

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The articles in SMHI Legal Notes are necessarily of a general nature and cannot be regarded as legal advice. Our firm will be pleased to provide additional details on request.

¹In Toronto, the Act is administered by the City of Toronto. If you live in another municipality, speak to the city clerk to determine whom you should contact.

Parting Ways With Your Employees: An Overview

“You’re Fired!” These are words that every employee hopes never to hear and every employer hopes never to have to utter. But what is an employer to do if it comes to this?

The General Rule

In Canada, we do not dismiss employees at will. Having said that, an employer is entitled to let an employee go, even if the employee has done nothing wrong. However, the employer is under an obligation, except in situations of just cause, to provide an employee with reasonable notice of the termination or payment in lieu. Failure to give reasonable notice, or payment in lieu, results in an employee being wrongfully dismissed.

Reasonable Notice - The Employment Standards Act

The starting point for determining reasonable notice is Ontario’s *Employment Standards Act*. The following chart specifies the periods of statutory notice required before letting an employee go.

Length of Employment	Notice Required
Less than 3 months	None
3 months but less than 1 year	1 week
1 year but but less than 3 years	2 weeks
3 years but but less than 4 years	3 weeks
4 years but but less than 5 years	4 weeks
5 years but but less than 6 years	5 weeks
6 years but but less than 7 years	6 weeks
7 years but but less than 8 years	7 weeks
8 years or more	8 weeks

Although you start with the *Employment Standards Act*, it is important to understand that this is only the minimum standard. In a large majority of dismissal cases, the courts have determined that an employee will be entitled to a much greater notice period.

Reasonable Notice - The Common Law

Pursuant to the common law, reasonable notice can vary greatly from one situation to another. The courts have set out a number of factors to be considered when attempting to determine the proper amount of notice required in a particular case. The following are the most common considerations:

- The type of employment (e.g. clerical, managerial, labourer)
- The length of the service;
- The age of the employee;
- The availability of similar employment in the area, having regard to the experience, training and qualifications of the employee.

Several years ago, the Supreme Court of Canada revisited the issue of reasonable notice. In addition to confirming the traditional factors, the Court concluded that the manner in which an employee is fired may also be relevant. Specifically, if an employer’s conduct during the termination demonstrates bad faith, then the length of the notice period may be extended.

Dismissal for Cause

The issue of reasonable notice **is not** relevant in situations where an employer has just cause to fire an employee. While this may sound straightforward, proving just cause can be quite difficult. In order to establish just cause, substantial misconduct or incompetence will need to be shown. In fact, it will only be in exceptional circumstances that a single act of misconduct will be grounds for immediate dismissal.

The following examples would probably constitute just cause supporting immediate dismissal.

- Theft of the employer’s property,
- Acts of dishonesty committed against the employer,
- Making a secret profit out of one’s employment, and
- An act of wilful and deliberate disobedience of orders.

Disciplining an Employee

Cases allowing for immediate dismissal are rare occurrences. Usually there must be evidence of progressive discipline of an employee before he/she can be dismissed for just cause, i.e. without notice.

Progressive discipline will usually include the following:

- Verbal reprimand.
- Written reprimand.
- Suspension from the job.
- Dismissal.

Depending on the nature of the transgression, the number of

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warnings, both verbal and written, as well as the length of a suspension will vary. What is important is that any policy be communicated to the employees, be implemented consistently and fairly, and that written documentation be kept.

It is important that employees be aware that certain actions can be cause for discipline and potentially dismissal. An employer would be wise to ensure that employees are made aware of such policies at the time they are hired.

Poor Performance and Incompetence

An employee who is performing below standard or who is proving to be the wrong choice will generally be entitled to reasonable notice or payment in lieu before being dismissed. In order to elevate poor performance or incompetence to the level of just cause, an employer will, in most instances, have to follow a series of steps. The employer must provide the employee with:

- Objective performance standards to be met;
- Direction and supervision with the aim of helping the employee to meet those standards;
- A reasonable time to correct the situation;
- Knowledge that a failure to meet the standards will lead to dismissal.

The burden rests with the employer to demonstrate that these steps were followed in cases of just cause for poor performance or incompetence.

Dismissing an Employee on Sick Leave

Dismissing an employee who is on sick leave can be fraught with peril. Although the general rule of reasonable notice applies in these cases, it is important to tread very carefully in these situations.

Just Cause

The first and most important thing to remember in these situations are that neither illness nor disability amounts to just cause for termination. Just cause is reserved for instances of dishonesty, theft, gross insubordination or conflict of interest.

Frustration

Although the employer may not have just cause to terminate the employment relationship, an employee's illness or disability may nevertheless lead to what is called frustration of the employment contract. Frustration is a legal term that describes an event which was unforeseen at the time the parties entered into their agreement and which is uncontrollable. This event makes it impossible for one of the parties to fulfil his/her duties under the contract.

In the employment scenario, if the employee's long term or permanent illness prevents him or her from returning to work in a timely fashion, the employment contract may be frustrated. When the employment contract is frustrated, the em-

ployer is not required to give reasonable notice of the termination.

Human Rights

Another consideration to be aware of is human rights. If an employee is capable of per-

forming the essential duties of his or her job then the employee is entitled to equal treatment under the *Ontario Human Rights Code*. This means that employers have a duty to accommodate a person with a disability if doing so does not create an undue hardship for the employer.

Ultimatums

When dealing with an employee who is on sick leave, it is important that the employer refrain from giving the employee an ultimatum about returning to work. Telling an employee that he or she must return to work by a particular date could have unpleasant consequences for the employer. Not only might a court determine that the employee was wrongfully dismissed, but the damage award may be increased to reflect this treatment of the employee.

Disciplining and dismissing employees can be a real obstacle course. But if you know and follow the rules, it does not have to be.

In many instances, it is worth seeking professional legal advice. At SMHI we work in the field of employment law. We would be happy to assist you in developing policies around progressive discipline, performance review and accommodation. We can also advise you if you have been dismissed. 

Disciplining and dismissing employees can be a real obstacle course. But if you know and follow the rules, it does not have to be.

To view past newsletters and to learn more about our lawyers and our firm

visit us at www.smhilaw.com

Legal Updates for Ontario

The Ontario Government has recently proposed a number of legal changes that could affect you.

The first change is to the minimum wage. Currently, the general minimum wage in Ontario is \$10.25 an hour. This amount will increase to \$11 an hour effective June 1, 2014. This increase is made pursuant to the regulations of the *Employment Standards Act* and therefore will not be affected even if a general election is called prior to June 1st.

The Ontario government has also introduced bill 165 to amend the *Employment Standards Act*. The amendment, if passed would tie future minimum wage increases to the annual inflation rate. The bill is currently at second reading. If a general election is called before this bill becomes law, it will die. Such a change would have to be reintroduced by the new government, if it so chooses.

The Government has also proposed changes to the *Highway Traffic Act* (Bill 173). The proposed changes include:

- Changes to the penalties for those convicted of distracted driving, including increasing the fine range from \$60 - \$500 to \$300 - \$1,000, assigning three demerit points upon conviction

of a distracted driving offence and making a distracted driving conviction a contravention of one of the licence conditions placed on new drivers.

- A requirement that drivers yield the whole roadway to pedestrians at school crossings and pedestrian crossovers, currently drivers must yield only half of the roadway.
- An increase in the fine range for convictions of “dooring” of cyclists from \$60 - \$500 to \$300 - \$1,000 and raising the demerit points from two to three. The changes would also require all drivers to maintain a distance of one metre when passing cyclists.
- Cyclists would also be affected in that there would be an increase to the maximum fine from \$20 to a set fine amount that falls in the range of \$60 - \$500 for not using required bicycle lights and other reflectors/reflective material.

Bill 173 has just begun second reading. It too would die if a general election is called prior to it receiving Royal Assent. ☞

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actual location of the property line. In such cases, you must speak to a lawyer and/or a surveyor.

The arbitration process does not apply to situations where a fence has already been erected without permission. In such cases, you should seek legal advice.

The arbitration process does not apply to fences that are not built on the actual property line.

The arbitration process does apply to

fences built on the property line that need to be replaced or repaired.

For more information about fences on property lines visit the city of Toronto’s website, www.toronto.ca/fence You can also download *A Guide to the Line Fences Act, 2006* from the Ministry of Municipal Affairs and Housing’s website, www.mah.gov.on.ca (Go to Frequently Asked Questions - Line Fences.)

For issues involving fences, boundary disputes or similar issues not dealt with under the *Line Fences Act*, contact our firm. We have several lawyers who specialize in real estate law. ☞

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