



EXPECT THE BEST

**Blaney
McMurtry**
BARRISTERS & SOLICITORS LLP

Discipline and Termination

Presented by :

Jack Siegel

November 1, 2013

2 QUEEN STREET EAST, SUITE 1500 TORONTO, CANADA M5C 3G5

TEL 416.593.1221

FAX 416.593.5437

WWW.BLANEY.COM

Discipline and Termination

1. Do's and Don'ts of Progressive Discipline
2. Damages: How They Are Calculated
3. Approaches to Minimizing Damages



The Do's And Don'ts Of Progressive Discipline

Progressive Discipline – Do's

- ▶ Do have a written progressive discipline policy
- ▶ Do provide clear exceptions where the regular steps will not apply (e.g. theft, misappropriation of employer property, serious fraud, harassment)
- ▶ Do provide for employee response to expressed concerns

Progressive Discipline – Do's

- ▶ Do provide supports to assist employee improvement for performance-based issues
- ▶ Do keep in mind, if considering a termination, that all misconduct must be considered in context – *McKinley v. BC Tel* (SCC) – Does the conduct result in an irreparable breakdown of the employment relationship?

Progressive Discipline – Don'ts

- ▶ Don't overlook Human Rights implications (e.g. alcohol or drug related issues)
- ▶ Don't implement suspensions in a non-union environment without ample warning or inclusion in contracts

Progressive Discipline – Don'ts

- ▶ Don't be afraid to skip steps for sufficiently serious transgressions (e.g. fighting in workplace)
- ▶ Don't rely on a policy to the exclusion of case by case good judgment (e.g. terminating a 10 year employee for taking home a box of pens)

Damages: How are they calculated?

Wrongful Dismissal Damages

- ▶ Notice – Bardal Factors
 - ▶ 1. Character of the employment (position, remuneration)
 - ▶ 2. Length of service
 - ▶ 3. Age of the employee
 - ▶ 4. Availability of similar employment (position, remuneration)

Wrongful Dismissal Damages - Bardal Factors

▶ Notice – Bardal Factors

- ▶ Factors 1 and 4 (character of employment and availability of similar employment) are often restated as position and remuneration
- ▶ Ontario Court of Appeal in *Love v. Accuity Investment Management* (2011): **DO NOT OVEREMPHASIZE LENGTH OF SERVICE**

Wrongful Dismissal Damages – Other Factors

- ▶ Inducement – direct or through internal recruiter / external search firm
- ▶ Restrictive covenants that limit alternative employment
- ▶ Employer misconduct (giving rise to punitive, exemplary, bad faith etc. damages)

Categories of Wrongful Dismissal Damages (1)

- ▶ Pay in Lieu of Notice (usually in months) – including Salary, Commission, Bonus
- ▶ Loss of Benefits – health, life, disability,
- ▶ Loss of Perquisites – car, etc.
- ▶ Loss of Pension / Pension Value
- ▶ Statutory Vacation Pay

Categories of Wrongful Dismissal Damages (2)

- ▶ Mitigation Expense
- ▶ General Damages – mental distress,
- ▶ Punitive, Exemplary, Bad Faith Damages
- ▶ Interest
- ▶ Legal Costs



Approaches to Minimizing Damages

How Do You Minimize Damages ?

- ▶ Contracts
- ▶ Contracts
- ▶ Contracts

How Do You Minimize Damages ?

- ▶ Reasonable offers to encourage early resolution
- ▶ Structured offers that provide financial incentives to resolve promptly and obtain replacement employment
- ▶ Facilitate mitigation (legal and behavioural minimization)



Jack Siegel

jsiegel@blaney.com

416-707-6401