

## **DEFENDING A WRONGFUL DISMISSAL CLAIM**

By: Lauren M. Bernardi

This article explores the ways in which employers can successfully defend themselves against a wrongful dismissal claim. Specifically, it explores the documents and information you should gather to assist in the defence of such an action.

### **Statistical Information**

In determining how much severance an employee is owed, the courts examine some basic statistical information, including the number of years the employee worked for you, his or her age, position held and compensation:

#### ***Years of Service***

If the employee was induced to leave a secure position for the one in question, his or her years of service with the previous employer might be taken into consideration by a court in calculating notice. Therefore, you should consider whether inducement is a factor and, if it is, how long the employee worked for the previous employer.

#### ***Age***

Older employees tend to get larger severance packages since it is more difficult for them to find new employment. Therefore, you will need to know the former employee's age.

#### ***Position***

In addition to the employee's current position, you should review his or her history with your organization. This can be important if incompetence is being alleged.

It is also useful to ascertain what positions, if any, reported to the employee's position, since managerial positions tend to attract longer notice periods.

#### ***Compensation and Benefits***

In order to calculate the appropriate severance package, you will need to determine the employee's rate of pay prior to termination. When looking at compensation, the employee's overtime record should be taken into consideration, especially if the employee regularly worked overtime.

The employee may also have accumulated time in lieu of overtime that will need to be paid out at termination.

It is not just salary that is awarded to terminated employees, but all forms of compensation that would have been received had the employee continued to work during the applicable notice period.

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Bonuses, profit sharing, and stock option plans are being offered to employees with greater frequency. Often an employee's eligibility for a payout will depend on the terms of the plan (for example, the date on which options vest will be significant) so you will need to review the related materials and agreements.

Benefits are also a very important but somewhat ignored aspect of an employee's compensation package. Some of the benefits that may be relevant to a wrongful dismissal action and settlement include:

- Health and dental insurance
- Disability insurance
- Professional dues
- Conference attendance and travel
- Tuition/training course reimbursement, particularly if the employee was scheduled to attend a program during the applicable notice period or has been taking a subsidized educational program
- Fitness club membership
- Home office computer or Internet access
- Employee discounts
- Car allowance

### Hiring Documents

#### ***Application Form and Résumé***

A completed application form and/or résumé may be important if, for example, you are alleging that the employee lied about his or her credentials.

#### ***Employment Agreement or Offer Letter***

Offer letters and employment agreements often specify what payments will be made on termination. These documents may effectively block a wrongful dismissal action and should be carefully reviewed. One important aspect to consider is when the agreement was actually signed. If it were signed after the employee started working, the agreement may not be binding.

#### ***Non-Competition Agreements***

You will need to review any restrictive covenants such as non-competition, non-solicitation and confidentiality agreements to determine what impact, if any, they have on the claim. For example, if a non-competition agreement specifies a six month waiting period before working for a competitor, the employee may be able to argue that the notice period should be at least as long as that.

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## Documents During Employment

Many documents that are created or exchanged during the course of employment may be relevant to a wrongful dismissal action.

### ***Performance Evaluations***

Performance evaluations will be critical if you are alleging incompetence. Evaluations may also be important if the employee were given positive reviews and then terminated shortly thereafter, in which case he or she may argue that you have acted in bad faith, thereby increasing the damage award.

### ***Discipline Notices, Performance Improvement or Probationary Notices***

These are relevant where just cause is alleged. They should be reviewed carefully to be sure that they are clear, reasonable and specify consequences for any further breaches. Sometimes an employee is placed on probation or given a performance improvement plan prior to termination. In such cases, you will need to examine the related documents to determine whether the employee understood what was required, the plan was reasonable and implemented in good faith and sufficient time and resources were provided to the employee to enable him or her to meet the specified conditions.

### ***Job Descriptions***

Written job descriptions and any changes to them will be of particular importance to a constructive dismissal claim in which the employee argues that changes to the job were so significant that he or she was, in effect, terminated.

### ***Employment Policies and Practices***

Your policies and practices may play an important role in a wrongful dismissal action. For example, if an employee was terminated for violating an e-mail and Internet policy, you will need to examine that policy and ascertain whether the employee was made aware of the policy and signed any form of acknowledgement.

## Termination Documents

### ***Termination Letter and Release***

The termination letter plays an important role in ascertaining the grounds for termination and may indicate whether there is a basis for a claim that the employer has acted in bad faith. It is often prudent to have an employment lawyer draft, or at least review, your termination letters.

### ***Record of Employment***

Recent court cases have increased the significance of the Record of Employment (“ROE”) in a wrongful dismissal action. Therefore, you should be consistent in documenting the dismissal. If you are alleging that you had just cause for terminating the employee, you should classify it as a termination for cause on the ROE.

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### Conclusion

There is no end to the number and type of documents that may be relevant to a wrongful dismissal action. The important thing to remember is to review all documents and information in support of your defence and to provide them to your lawyer so that he or she is in the best position to help you mount a successful defence.

\* Effective 2008

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### About Bernardi Human Resource Law

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Balancing your legal obligations and business objectives can be hard. We act as your trusted advisors; not simply as lawyers but as an integral part of your management team. Through our practical advice, workshops and articles, we arm you with the knowledge and tools to address rapidly changing human resource issues.

Above all, we're on your side. We work with you to prevent costly problems and when litigation is necessary, we act as strong advocates to protect your interests.

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### About Lauren Bernardi

Lauren is a lawyer and human resource advisor with the Mississauga firm of Bernardi Human Resource Law. Lauren's advisory, training and educational services help managers direct their human resources in a strategically sound and legally appropriate manner. She is an accomplished and entertaining speaker on management and human resource issues.

For more information, you may reach Ms. Bernardi at 905-486-1991, by e-mail at [lbernardi@hrlawyers.ca](mailto:lbernardi@hrlawyers.ca) or on the web at [www.hrlawyers.ca](http://www.hrlawyers.ca).

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