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## Terminating an employee without cause - why the amount of notice you give may not be enough

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An employee whose employment is terminated without cause is normally entitled to notice of termination or, alternatively, pay in lieu of notice. What counts as the right amount of notice or pay in lieu thereof can be a source of uncertainty or confusion for employers, including condominium corporations, who are seeking to terminate an employee without cause.

This is because of a disconnect between minimum notice periods prescribed by statutory law (i.e., the *Employment Standards Act, 2000* (the "ESA")), and what the courts in Ontario have considered to be reasonable notice under the common law. (common law is law developed based on previous court decisions as opposed to statutory law like the ESA which is enacted by the legislature).

The ESA prescribes a minimum notice of one week for every year of employment, up to a minimum eight weeks' notice for an employment length of eight years or more. Many employers take this to mean that they are in full compliance with the law if they give notice of one week for every year worked up to a maximum of eight weeks. For instance, a condominium corporation might be reassured in giving eight weeks' pay in lieu of notice when terminating a superintendent without cause who had a length of employment of 8, 10, 15 or more years, only to be faced with a wrongful dismissal lawsuit.

This is because courts typically take a different view of what counts as reasonable notice for termination without cause. Under the common law, courts regularly determine reasonable notice to be far in excess of the minimum statutory notice periods in the ESA, considering various factors including the length and character of employment, the employee's age, availability of similar work, and any special circumstances that might be at play.

The determination of reasonable notice depends heavily on the circumstances of each case. It is quite possible for a court to award an 8-year employee with damages equivalent to pay in lieu of notice in the range of 6-12 months or even more.

Employers who give the minimum notice under the ESA when terminating a long serving employee should not be surprised if they are sued by their former employee seeking much higher pay in lieu of notice in damages.

An employer would be well served to get legal advice even before entering into an employment contract with a new employee. Properly drafted termination provisions that meet the statutory requirements and are agreed to by both employer and employee can in principle supersede what a court otherwise determines to be reasonable notice, subject to the circumstances of each case.

Employers who are unsure of notice requirements when terminating an employee without cause should consult a qualified lawyer before giving out the pink slip.





## Owners' Code of Ethics

J. Robert Gardiner, B.A., LL.B., ACCI, FCCI



Owners are encouraged to participate democratically and ethically in the Corporation's affairs using the following guidelines:

- a) Important decisions and recommendations are often made at owners' meetings which may substantially affect the value of your unit as well as the appearance and quality of lifestyle at your condominium. It is strongly recommended that owners attend these meetings instead of signing a proxy form and delegating their votes to a third party. Only owners who attend the meeting have a chance to find out what is going on, participate in discussions, raise any concerns, assess directorial candidates and exercise their own wisdom to elect qualified people to the board of directors.
- b) Since the board of directors is solely responsible to make the vast majority of decisions for the Corporation, owners should carefully select capable candidates to be elected as directors. Recognize the contributions of volunteer directors who have the skills, qualifications, experience and commitment to protect the owners' best interests, enhance unit value, supervise management of the Corporation's affairs in a financially responsible manner and promote a harmonious atmosphere in the condominium community. Ask candidates who promise cost savings to explain in detail their cost-saving justifications. Which existing services will they cut, how can they practically accomplish that, and how will reduction or elimination of such services affect you? Ask candidates if they will comply with the Directors' Code of Ethics. Prefer candidates who have completed the *Condominium Courses* presented by the Canadian Condominium Institute, particularly candidates who have had at least three years' experience as a director.
- c) Directorial candidates must comply with their statutory standard of care, diligence and skill and their duty to act honestly and in good faith. Directors must undertake necessary maintenance and repairs of the Corporation's common elements and assets and ensure proper funding of the Corporation's reserve fund, in addition to numerous other duties. Common expense increases are inevitable as buildings age and will save owners the risk of special assessments and increased maintenance and repair costs in the future. Owners should support directors who establish realistic budgets and a forward-looking funding plan, even if they call for necessary common expense increases to avoid special assessments.
- d) If you must be represented at the meeting by proxy, only appoint as your proxy holder a person you know, respect and trust to protect your interests and act wisely on the spot. If a candidate is attempting to get elected by defaming existing directors, don't give your proxy away – instead, go to the meeting so you can act judiciously and hear all sides of the story before voting.
- e) If you choose a candidate by proxy instead of attending at an election meeting, you will lose the opportunity to assess the abilities of candidates nominated from the floor. Consider amending your proxy form with one of these alternatives: (a) clearly print, in your own hand, the name of any candidate you wish to be elected as a director (or initial your choice of any candidate(s) already listed in the proxy) – do not allow any other person to select on your behalf the candidate(s) to be elected as a director; (b) restrict your proxy form for specified purposes only, such as "to be used only to vote for (or against) the by-law"; or (c) insert and initial the words "for quorum purposes only".
- f) Do not be swayed by undocumented allegations made during proxy solicitations or in newsletters. In a democracy, legitimate criticisms can be expressed without malice where a critic has undertaken the due diligence to ascertain the accuracy of negative statements. Before accepting the validity of accusations, unfounded conjecture, innuendo or other techniques of fear-mongering, owners should question the accuracy of such statements and the use of those techniques. If you feel a candidate is making self-serving accusations against another candidate in order to get himself elected, examine the accuracy and reliability of the accusations.
- g) Before criticising others or accusing others of defamation, bear in mind that, at law, any defamer who originates, repeats or publishes to any third party a libellous (written) or slanderous (oral) statement or a rumour which is erroneous and defames the reputation of an identifiable person is personally liable for monetary damages. A defamer can only defend a defamation claim by proving one of three defences: (a) JUSTIFICATION (i.e. proving the truth of the allegation); (b) QUALIFIED PRIVILEGE (where a person has a special duty to make such a statement *bona fide* and in good faith (even if the statement is wrong), if the defamer can prove no malice is present); or (c) FAIR COMMENT (where a defamer makes an erroneous defamatory statement while rendering a *bona fide* opinion based upon true facts after conducting due diligence, if the defamer can prove no malice is present).
- h) Owners should participate in owners' meetings by speaking clearly, while refraining from shouting, speaking in an aggressive or hostile manner, interrupting others who are speaking, monopolizing the discussion or displaying a lack of consideration for others. Genuine disagreements, questions and concerns should be expressed politely and at their appropriate time in the meeting agenda. Instructions of the meeting chair must be followed.
- i) Support your board of directors and appreciate the complexities facing property managers. Act reasonably at all times in your dealings with the board of directors and the property manager.