

WRONGFUL DISMISSAL

Risk Management – protecting your organization from wrongful dismissal charges

Community Associations are employers and in their human resource management need to know the legislated rights and required practices. Employer obligations include compliance with human rights, employment standards, Canada Revenue Agency, legal contracts and many other considerations.

A component of risk management is a thorough knowledge of employment practices. At one time employers were able to hire and fire at will. This is no longer the case as protection for employees is now provided through legislation and common law. The courts are ruling that employees have earned a right to maintain their jobs, with longer term and senior employees having substantially more rights than short term employees.

This does not mean that employers can no longer terminate employees, but certain processes must be followed in order to avoid, or defend against allegations of wrongful or constructive dismissal. In the absence of a “just cause” for dismissing an employee, reasonable notice must be provided, or compensation provided instead of reasonable notice. Proper risk management through all stages of the employment process, including recruitment, ongoing evaluations and termination is required since court determined settlements against employers can be substantial, especially for long term, senior employees who are likely to have difficulty finding other employment.

What constitutes ‘just cause’?

Employers can terminate employees without notice or liability for damages if they can establish they have *just cause* for doing so.

The courts have defined ‘*just cause*’ as:

“if an employee has been guilty of a serious misconduct, habitual neglect of duty, incompetence or conduct incompatible with his duties or prejudicial to the employer’s business, or if he has been guilty of wilful disobedience of the employer’s orders in a matter of substance, the law recognizes the employer’s right to summarily dismiss the delinquent employee.”

The courts are going to require substantial evidence that one or several of those elements exists. It must be satisfied that sufficient warning was given about unsatisfactory performance, a reasonable period of time to correct the problem(s) was given, that the expected performance levels were well defined and that the employee was made aware of the consequences of failing to correct the problem area. In severe cases, such as theft of substantial amounts of property or violent acts, no corrective opportunity will be required to be provided.

What is ‘constructive dismissal’?

A substantial change in any of the major terms of the employment imposed by the employer on the employee could be interpreted by the courts as constructive dismissal allegations are demotion, reduction in salary, or a change of responsibilities or reporting. The employee can not accept the changes imposed on them and later sue for constructive dismissal. In order to succeed with a constructive dismissal action they must first resign and issue a statement of claim against the employer, otherwise they voluntarily give up their right of action.

Risk Management Measures:

1. Recruitment

Recruitment includes; hiring the appropriate person, review resumes carefully, check references, use a probationary period, make employment offer in writing, and seek legal advice as required.

2. Ongoing Personnel Management

Personnel management has many components; well developed personnel policies, appropriate training to support the learning of new skills, a performance measurement process that is measurable rather than subjective, where performance improvements are required the implementation of a formal process, seek legal assistance, and develop a plan for significant changes to employment or operations.

3. Termination

Seek legal advice before doing anything. This only makes good risk management sense. From an organizational perspective follow personnel policy and procedures, when terminating for other than cause make a fair settlement offer. For just cause dismissals issue a termination letter with as much detail as possible surrounding the reasons for dismissal and for termination without just cause issue a letter detailing the notice period, allowing sufficient time to respond, recommend they seek legal advice, offer outplacement services as part of the package if feasible, and get a release from the employee. Always remember, treat people with respect and dignity.

Information taken AUMA Risk Management Manual



FEDERATION OF CALGARY COMMUNITIES

#301, 1609 14 Street SW, Calgary, AB T3C 1E4

Tel: 244 4111 Fax: 244 4129

Website: www.calgarycommunities.com