

## How employment ends

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Nobody likes to think about leaving their employment except for a better opportunity or for retirement, but employment can end unexpectedly.

In Canada, most employment contracts are common law contracts of employment meaning that employees are hired, often without a written agreement, or even with a written contract that provides for the termination of employment by the employer or the employee. Unionized employees are subject to different rules, which are beyond the scope of this article.

Under a common law contract of employment, an employee usually terminates the employment relationship by resigning. However, an employer can also terminate the employment relationship, either for just cause or by giving notice or paying wages in lieu of notice.

Just cause arises when the employee breaches the terms of the contract of employment. Examples of a breach include insubordination, theft, or repeated misbehaviour that is not corrected after multiple warnings. In the case of a dismissal for just cause, no notice is required.

More often, employers terminate the employment contract without cause in which case notice is required. In Manitoba, the *Employment Standards Code* sets out minimum periods of notice which roughly equate to a week per year of service, to a maximum of eight weeks after 10 years of service. However, these are minimum notice periods, and the courts will often award much higher amounts.

How much a court will award depends on a variety of circumstances. An Ontario court decision from the 1960s called *Bardal v. Globe and Mail*, still governs how the courts determine notice. They look at factors such as the employee's years of service, education, age, experience, availability of similar work, position, salary, whether they will be required to relocate, and whether they were enticed to leave other employment to work for the employer. An employee with fewer years of service will receive less notice, but an older employee who is towards the end of their career may

receive more notice than a younger employee with the same number of years of service.

Similarly, where there are many jobs available in the employee's field, lesser notice will be awarded than where the jobs are few and far between and may require the employee to relocate. Higher paid employees, employees with specialized skills or in management roles generally receive more notice than those in lower paid and lower skilled positions.

In the 1997 decision of *Wallace v. United Grain Growers*, the Supreme Court of Canada set a rough upper limit for notice of 24 months. Manitoba has, thus far, respected that limit but the courts in Ontario are starting to go beyond it. Typically, notice periods approaching two years are only awarded to very long-term employees who have made most of their career at the same employer.

Another factor the courts will consider is the manner of dismissal. If the employee is poorly treated by the employer during dismissal, bad faith damages may be awarded. An employer who ridicules or publicly humiliates the employee during dismissal may be entitled to bad faith damages, but the courts also understand that any termination will cause the employee stress and embarrassment, and the usual stress and embarrassment associated with a dismissal is not grounds to award bad faith damages.

For employers, the key takeaways are to treat the employee with sensitivity and care during a dismissal and do not assume that the minimum notice periods in the *Employment Standards Code* will be sufficient. Employers are well advised to seek legal advice prior to making the decision to dismiss an employee. As *Bardal* confirms, there is no formula for notice. An experienced employment lawyer will advise the employer on the ranges of notice which are appropriate in the circumstances and on the manner of dismissal to ensure that the employee is treated fairly and respectfully, to minimize the risk of a wrongful dismissal claim.

For employees, if you find yourself in the situation where you lose employment due to a dismissal and are offered a package, be sure to seek legal advice from an experienced employment lawyer to verify that the notice is reasonable and appropriate in the circumstances before signing a release.

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