

Settlement Issues Arising in Wrongful Dismissal

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STEP ONE: How much is the dispute actually worth?

An employee is entitled to reasonable notice of termination or pay in lieu of notice. During the notice period or as payment, the employee is entitled to receive compensation and benefits as per their employment contract. The first task is to quantify this sum.

- ❖ What does the contract say? Is notice limited to the *Employment Standards Act* minimums?
- ❖ If common law reasonable notice, the essential question is how long will it take the employee to gain new, equivalent employment? Consideration is given to the character of the existing position, length of service, age and the availability of alternative employment given the employee's training and qualifications.
- ❖ Has the employee mitigated his or her damages by finding alternative employment?

STEP TWO: Can we reduce the offer by including items with an intangible value?

Once an estimate of the reasonable notice period is determined (and its associated cost), consider whether there are non-monetary considerations that might facilitate acceptance of a lower sum.

- ❖ Public statement – Jointly drafted explanation of departure
- ❖ An apology – Keeping in mind a court cannot make an employer apologize
- ❖ Letter of Reference – Address the employee's fear of future inquiries and negative responses
- ❖ Help them move on – Consider facilitating re-training, paying for courses or contributing to moving expenses

STEP THREE: How can we maximize the present value of the payment?

An employee might be willing to accept a substantially lower sum if the payment can be structured in a manner that will avoid severe tax consequences, including transferring amounts into an RRSP or taking care to categorize the payments.

- ❖ Employment Income – Taxed in the normal course, including CPP and EI deductions
- ❖ Retiring Allowance – Reduced withholding tax rate, special RRSP and RPP contribution rules, no CPP or EI deductions
- ❖ Personal Injury Damages – Not taxable
- ❖ Legal Costs – Tax deductible by employee, but if paid must be declared as income

Any tax treatment must be "reasonable in the circumstances" and capable of justification to the Canada Revenue Agency by the employer as it could be assessed the cost of taxes not withheld, including penalties and interest.

Obtaining an Enforceable Release

Courts are increasingly willing to set aside releases demanded by employers at termination and hastily signed by employees. Four key elements have been identified by the Ontario Court of Appeal as necessary to demonstrate that the release is unconscionable and should be struck:

1. “a grossly unfair and improvident transaction”;
2. the “victim’s lack of independent legal advice or other suitable advice”;
3. an “overwhelming imbalance in bargaining power caused by the victim’s ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or other disability”; and
4. the “other party knowingly taking advantage of this vulnerability”.

Elements of an Effective Release

What value is the employee actually receiving?	A common mistake employers make is to pay the employee an amount equivalent to what their contract says or simply the <i>Employment Standards Act</i> minimum entitlement. A release will not be effective unless it provides a benefit to the employee above and beyond what is required by contract or legislation (what is called “consideration”).
Who does the release protect?	Does the release cover the employer and all its employees, directors, related companies, etc.?
Is the action being dismissed?	A release should provide for the dismissal of the action (versus discontinuance) and contain an agreement not to commence further actions or make further demands, including actions against third parties who may claim against the employer.
Is the employee releasing the employer from <u>all</u> benefit and statutory obligations?	e.g.,: employment standards, pay equity (if applicable), human rights, workplace safety and insurance and claims to employment benefits, including vacation pay, overtime, long term disability benefits, bonuses, commissions, etc. Note, the release will <u>not</u> free the employer from statute-based obligations that cannot be contracted out of, e.g., maintaining benefits during the ESA notice period.
Employee indemnifications	It is common for employees to agree to pay all taxes, or any employment insurance repayments or any interest, fines, penalties or other charges of any kind whatsoever that may be claimed or levied in relation to the income tax, employment insurance, etc. Remember: Indemnifications will not prevent taxes and charges from being levied against the employer, but will instead only assist in collection of the cost back from the employee. Always inquire whether EI benefits have been received and make inquiries with Service Canada as to the repayment obligation and remit it directly to the Receiver General. Also, consider the income tax consequences of any payment and deduct the appropriate amounts.
Confidentiality and non-disparagement	Beware of Facebook and Twitter! Courts are increasingly willing to enforce confidentiality and non-disparagement provisions. Ensure there is a “claw back” provision (usually an amount equal to the settlement funds paid) so the employee understands the peril.
Legal advice	Provide the opportunity to obtain legal advice and consider offering funds to assist with this cost.