Employment Terminations: Dos, Don’ts and Dollars

Considerations for Employers When Contemplating Employee Terminations, How the Hiring Process Might Affect the Termination Process, and How Much Terminations Might Cost

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Please note that the following material is for informational purposes only and should not be considered or relied upon as legal advice. For any specific questions or concerns you may have, please do not hesitate to contact our office. This paper has been prepared specifically for the purposes of the Association of Manitoba Municipalities Municipal Officials Seminar held April 15 & 16, 2009 in Brandon, Manitoba.

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Introduction

Section 159 of the former *Municipal Act* in Manitoba (R.S.M. 1988, c. M225) provided that municipal officers could only be dismissed where cause for dismissal could be shown. The Act provided for a Civic Services Board with the jurisdiction to review the employer’s decision. However, the law has changed since the old *Municipal Act* was repealed and the new Act no longer provides that an officer must only be dismissed for cause. Gone is also the Civic Services Board to review the decision. Therefore, the contract law and common law principles apply with respect to the dismissal of municipal employees, except to the extent the employees are unionized.

As the title suggests, this paper addresses some of the key considerations and cost implications an employer must consider in dismissing an employee. It should be noted that this paper will only apply to the dismissal of employees who are not unionized. In the unionized

context, the collective agreement will have to be carefully analyzed in order to determine the employer and employees' rights. Labour law will have to be considered – and that is a topic for another day. Finally, it should also be noted that the nature of the considerations in this paper are written with specific attention to the position of the Chief Administrative Officer (the "CAO"). As the CAO holds a management position, the provisions of *The Employment Standards Code* (Manitoba, C.C.S.M., c. E110) (the "*ESC*") do not apply with respect to standard hours of work and overtime.[1] However, for lower level, non-unionized municipal employees, the *ESC* will have a greater impact on the dismissal.

The Law of Wrongful Dismissal

At common law, an action for wrongful dismissal - where an employee has been terminated without cause by his or her employer - is based on an implied obligation in the employment contract that an employee must be given "reasonable notice" of his or her termination.[2] In other words, if an employment contract is otherwise silent on the length of notice to be given on termination, the courts will conclude that both the employer and employee meant that "reasonable notice" of termination would be given. However, where the parties do expressly agree to a notice period in the employment contract, such notice period will generally be binding whether or not the courts would find it reasonable, subject to the minimum standards prescribed by the *ESC* which cannot be contracted out of (as discussed further on in this paper).

"Notice" is merely information that the employment will end on a certain date. It does not necessarily equate to money and, in the meantime during the notice period, the employment continues.[3] This type of notice is sometimes referred to as "working notice." Of course, an employer may instead compensate an employee in an amount that is equivalent to what the employee would have earned if he or she had worked out the notice period. This is what is commonly known as "pay in lieu of notice."

[1] See the *ESC,* section 2(4).
[2] *Honda Canada Inc. v. Keays,* 2008 SCC 39.
[3] *Deputat v. Edmonton School District No. 7,* 2008 ABCA 13.

So what constitutes "reasonable notice"? Such is the question of much litigation and the sticking point in many severance negotiations. Accordingly, the courts over the years have adopted some guidelines for determining what notice is "reasonable," which will be further discussed later on in this paper.

The concept of "reasonable notice" applies to all employees in Manitoba and in Canada. As an employer, municipalities must be aware that their CAOs are no exception. The employment of CAOs in this province is governed expressly by Part 4 of *The Municipal Act* (the "Act") of Manitoba. Under the Act, every municipal council must pass a by-law establishing the position of a CAO - effectively the administrative head of the municipality - and must appoint a person to that position.[4] Not only must the appointment be approved by a majority of the council's members,. so must his or her revocation.[5]

In addition to these statutory obligations, municipalities as employers must be aware that common law principles with respect to wrongful dismissal apply to the dismissal of CAOs and have in fact been written right into the Act itself:

> **C.A.O. entitlement in certain circumstances**
> 126 A chief administrative officer whose appointment is revoked without cause is, subject to any written agreement between the council and the officer, entitled to reasonable notice or to compensation instead of reasonable notice.

Section 126 of the Act is completely consistent with the basic common law principles of "reasonable notice" as explained above. CAOs under the Act have the same legal rights to institute an action for wrongful dismissal against their employer as do private sector employees.[6]

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[4] *The Municipal Act,* Section 125(1).
[5] *The Municipal Act,* Section 125(2).
[6] See generally Rogers, *The Law of Canadian Municipal Corporations,* 2nd ed., vol. 1, (Toronto: Thomson, 2003) [Looseleaf], at 302.

Employers must be proactive in their approaches to dismissing employees. This means that considerations should start early on, right from the time the municipality contemplates hiring a CAO. As such, the remainder of this paper will identify the key considerations for municipalities in addressing the hiring, performance, and ultimately the termination of their CAOs.

Consideration #1: Hiring

The key considerations which employers should turn their mind to at the hiring stages include:

- Human rights concerns in the application process;
- Representations made by the employer to the applicant;
- "Inducing" an applicant to leave his or her previous or current employment; and
- Following policy and procedure.

Human Rights Concerns

Employers, including municipalities,[7] are prohibited from refusing to hire an applicant or from dismissing an employee on the basis of any of the prohibited grounds set out in *The Human Rights Code* (Manitoba, C.C.S.M., c. H175) (the "*HRC*"). These prohibited grounds include ancestry, nationality, ethnicity, religion, age, sex (including pregnancy or the possibility of pregnancy); any gender-determined characteristics; sexual orientation; marital or family status; source of income; political belief or association; or any physical or mental disability. In fact, an employer may be considered to engage in discriminatory behaviour if an application form for employment might reveal any of the above information.

If an individual is not hired (or is fired) based on any one of these grounds, he or she may bring a complaint to the Manitoba Human Rights Commission (MHRC), which has the authority to award damages against an employer if found in contravention of the *HRC*.

[7] Municipalities are included in the definition of "local authority" under *The Human Rights Code.* Section 56(1) of the *Code* stipulates that every contract entered into by a local authority is deemed to include a term that it will not violate any part of the *Code.*

Discrimination may be permitted only in the limited circumstances where discrimination can be classified as a *bona fide* occupational requirement ("BFOR"). An example of a BFOR would be an airline that refuses to hire a blind pilot, which is discrimination on the basis of a disability.

Representations Made by the Employer

An employer must be careful not to make representations about the employment which are not true. A misrepresentation as to the character of employment may expose the employer to tort liability. This issue was dealt with by the Supreme Court of Canada in the leading case of *Queen v. Cognos Inc.*,[8] wherein the court held that there is a duty on employers not to misrepresent an employment opportunity. Where the applicant relies on the misrepresentation and accepts employment, he or she could later sue the employer in tort for any damages suffered as a result of the misrepresentation. This may be in addition to damages awarded for wrongful dismissal. Therefore, employers must take great care to represent employment opportunities accurately. As a measure of protection, employers should include a clause in any employment contract stipulating that the written agreement (i.e. the employment contract) contains the entire terms of the employment and any other representations made do not form part of the agreement and are not to be relied on.

"Inducing" Employment

The calculation of the "reasonable notice" period an employee may be entitled to when dismissed without cause will be discussed in greater detail below. However, it is significant to point out at the hiring stage that actively encouraging an employee to leave a previous secure employment may result in an increase in the reasonable notice period that the employee will be entitled to on termination.[9] Factors that the courts will look at in determining whether an "inducement" by the current employer lengthens the notice period include:

- The brevity or length of the new employment *vis à vis* the length and security of the employee's former employment;
- Whether the employer made representations designed to entice the employee to leave his or her former employment; and

[8] [1993] 1 S.C.R. 87.
[9] David Harris, *Wrongful Dismissal* (Toronto: Thomson Canada Limited, 1989) [Looseleaf], at 4-28.5.

- The security of the previous employment.[10]

Following Policy and Procedure

It is important for the employer to follow any policies, procedures, or by-laws it has established related to the hiring of employees. For example, in the case of *Gismondi v. Toronto (City)*[11], Mr. Gismondi had been a 20 year employee of the City of North York and at the time of his dismissal was the Director of Roads and Sidewalks Operations. He was dismissed when his position was eliminated upon a merger and restructuring of the cities comprising the Municipality of Metropolitan Toronto. The merger did create a number of new management positions, however, for which the City's human resources department prepared guidelines for job competition and for which a selection panel was set up. Mr. Gismondi applied for, but did not get, one of the new management positions. Mr. Gismondi seemed to meet all of the guidelines established by the human resources department. However, the selection panel ultimately selected the successful candidate based on some favourable remarks about that candidate made personally to one of the panel members. Reliance on these personal remarks was not one of the established selection criteria. Mr. Gismondi also complained that the panel failed to consider other relevant information pertaining to him, such as his job references. The trial judge found:

> "….it would seem to me that the City dropped the ball, or as the H.R. personnel observed, they lost control of the competition, in failing to apply the City's own fair, open and equitable hiring criteria uniformly across the board. While there is no doubt that the conduct of the directors….was not malevolent, and was probably well intentioned, he or the other directors failed to follow the process settled upon…The process went off the fairness-rails when Mr. Gismondi was effectively, but not purposefully, treated in a manner different from other candidates. What is ironic is that the conduct complained of was not egregious. It was, simply put, sloppy."

As a result, the trial judge awarded an increase in the "reasonable notice" period that Mr. Gismondi was entitled to. Although this decision was ultimately reversed at the appeal level,[12] it shows that decisions made in the hiring process which do amount to egregious or

[10] Harris, *Wrongful Dismissal,* at 3-28.5 to 4-28.14(2).
[11] (2002), 16 C.C.E.L. (3d) 97 (Ont. Sup. Ct. Jus.).
[12] (2003) 24 C.C.E.L. (3d) 1 (Ont. C.A.). The Court of Appeal did not agree that an extension to the notice period could be granted for conduct that was merely sloppy without any underlying malevolence.

malevolent conduct could have an impact on the amount of wrongful dismissal damages the employee may be awarded.

Consideration #2: Assessing and Addressing Performance

An employee's performance (or lack thereof) is often the key factor in an employer's decision to continue to employ or to dismiss an employee. Conducting periodic performance reviews, even before an employee's performance becomes an issue, is a valuable tool by which an employer can measure an employee's performance and answer questions an employee might have. Similarly, it is a useful way for an employee to get a sense of how the employer perceives his or her skills. Areas that should be reviewed with the employee include his or her:

- Knowledge, skills and abilities;
- Character and behavioural qualities (for example, initiative, reliability, motivation, judgment); and
- Other relevant considerations specific to the employment, for example, coping with stress or maintaining confidentiality.[13] In the municipal context, specifically, a key consideration may be how a CAO is carrying out the specific duties and powers delegated to him or her under *The Municipal Act.*

In conducting a performance review, the employer should ensure to properly document the meeting and to keep accurate records. Keep in mind that if an employee is ultimately terminated for a performance issue, the matter may end up in the courts and the performance reviews will likely be entered into evidence and viewed by a judge.

When actually faced with performance problems, employers would be wise to take the following steps:

- Identify and describe the problem to the employee;

[13] Robin M. Kersey, "From Hiring to Firing (and Everything in Between)," AEC Seminar, Winnipeg (June 4, 2002).

- Determine how long the problem has existed;
- Communicate performance standards to the employee and ensure that the employee understands what is required of him or her;
- Consider whether the employee has or is receiving adequate instruction or training;
- Give the employee a warning that his or her performance is unsatisfactory. The most effective warnings will be in writing and will stipulate a timeframe by which the employee is to correct his or her performance; and
- Monitor performance post-warnings and follow up with the employee.[14]

The essence of this discussion is that an employer must give an employee a reasonable opportunity to be made aware of and correct poor performance. Absent any behaviour that is significant and egregious (for example, theft or fraud), the employer should not be overly quick to terminate an employee but should rather address and attempt to rectify performance issues.

A Note on the Duty to Accommodate

An important concept of employment law in Manitoba, and in Canada generally, is the duty of an employer to accommodate its employees. In other words, an employer must not make accommodations for an employee with special needs and must not be too hasty to dismiss an employee whose performance may be impaired. This could include an employee who has a disability, who is pregnant, who has special religious considerations, or who otherwise is affected by any of the prohibited grounds for discrimination set out in the *HRC* (as explained above). The standard on the employer with respect to the duty to accommodate is quite high as the employer is obligated to accommodate the employee to the point of "undue hardship." This suggests that the employer will in fact be expected to suffer some hardship in order to accommodate an employee. The Supreme Court of Canada recently commented on the "undue hardship" test:

> The test is not whether it was impossible for the employer to accommodate the employee's characteristics. The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship,

[14] Kersey, "From Hiring to Firing (and Everything in Between)."

> to arrange the employee's workplace or duties to enable the employee to do his or her work.[15]

An example of the duty to accommodate is an employer who may be required to put in a ramp for an employee who uses a wheelchair, even if the employer has to incur an expense to put in the ramp. Another example is an employer who may be required to provide a leave of absence to an employee who has a drug or alcohol addiction (which is considered to be a disability) or to provide an employee assistance program. Of course, what constitutes undue hardship will vary depending on the circumstances.

It should be noted, however, that the "duty to accommodate" principle is a vast area of law and a more detailed review is beyond the scope of this paper.

Consideration #3: Is the Termination For Cause or Without Cause?

Whether under the general common law of wrongful dismissal or more specifically under section 126 of the Act, note that the duty to provide "reasonable notice" (or compensation instead of "reasonable notice") arises only where the employee is dismissed without cause. An employer is under no obligation to provide notice, however, where the employee is terminated for cause.

Dismissal For Cause

Determining whether or not an employer had cause to terminate an employee is an often litigated matter and the decision will turn on the facts of the case. Generally, it can be said that an employer has cause to terminate an employee where an employee has committed misconduct that goes to the root of the employment contract.[16] Misconduct warranting dismissal may come in the form of a single incident, or may come from a pattern or history of unsatisfactory behaviour. What will constitute misconduct that goes to the root of the

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[15] *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ),* 2008 SCC 43.
[16] Harris, *Wrongful Dismissal,* at 3-53.

employment contract is a question of fact and will depend on the circumstances of the case. A good definition of what constitutes just cause can be found below:

> "If an employee has been guilty of 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 to the employer's order in a matter of substance, the law recognizes the employer's right summarily to dismiss the delinquent employee." [17]

The Manitoba Court of Queen's Bench shed some light on the issue of dismissing an employee for "just cause" in the case of *Boulet v. Federated Co-operatives Ltd.*[18] and affirmed the following helpful guidelines:

1. Each case must be decided on its facts.

2. An employer's displeasure at an employee's performance is not enough to warrant dismissal. There must be some serious misconduct or substantial incompetence.

3. The onus of proving just cause rests with the employer and the standard of proof is [on] a balance of probabilities.

4. The performance of an employee, especially one in a management position, must be gauged against an objective standard.

5. The employer must establish:

   (a) The level of the job performance required,

   (b) That the standard was communicated to the employee,

   (c) That suitable instruction and/or supervision was given to enable the employee to meet the standard,

   (d) The employee was incapable of meeting the standard, and

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[17] *U.S.W.A. v. Port Arthur Shipbuilding Co.* (1967), 62 D.L.R. (2d) 342.

[18] 2001 MBQB 174, aff'd 2002 MBCA 114. [

(e) The employee was warned that failure to meet the standard would result in dismissal.

6. Where the employee's performance is grossly deficient and the likelihood of discharge should be obvious to the employee, warnings and reasonable notice are not required.

7. While the standard of incompetence to warrant discharge for cause is severe, the threshold for incompetency necessary to warrant dismissal for cause is significantly lower where dismissal is preceded by many warnings indicating unsatisfactory performance.

8. In considering whether an employer has provided adequate warning to an employee, where the dismissal is for repeated instances of inadequate work performance, the employer must show:

(a) It has established a reasonable objective standard of performance,

(b) The employee has failed to meet those standards, the employee has had warnings that he or she has failed to meet those standards and the employee's position will be in jeopardy if he or she continues to fail to meet them; and

(c) The employee has been given reasonable time to correct the situation.

9. An employer who had condoned an inadequate level of performance by his employee may not later rely on any condoned behaviour as a ground for dismissal.

10. Condoned behaviour is relevant if the employee fails to respond after appropriate warnings. Condonation is always subject to the implied condition that the employee will be of good behaviour and will attempt to improve. [citations omitted]

Where termination is for cause, any employer, including a municipality, must be aware that the case may end up in court in a lawsuit for wrongful dismissal. Therefore, upon making a decision to terminate, an employer should, at minimum, be able to do the following in order to reduce its exposure to damages: (1) identify the employee's misconduct with enough precision and particularity that both the employee and the court, if necessary, can ascertain the

nature of the questions to be tried and so that the employee can respond to the employer's case; (2) be able to prove the misconduct on a balance of probabilities; and (3) be able to establish that the nature or degree of the misconduct warranted the employee's dismissal.[19] These steps may not be overly difficult to meet where the employee's behaviour is clearly egregious, however may not be so clear where the employee is being dismissed for a pattern of poor performance.

Examples of egregious behaviour may include significant incidents of theft, fraud, or dishonesty, to name a few. In the CAO context, displaying a lack of loyalty to the municipality may constitute just cause. For example, in the case of *Bishop v. Trochu (Town),*[20] the Municipal Administrator prepared misleading reports in order to obtain business grants and then used such grants for unauthorized purposes. The council subsequently had a meeting with the administrator to address poor performance issues: his poor grammar, spelling, public relations, accounting, communications and leadership skills. After this meeting, the administrator sent a letter to the provincial government accusing the council of engaging in misappropriation of grant monies. The administrator was dismissed, not for his poor performance as per the review, but for accusing the municipal council of unethical behaviour and because of the way he dealt with the grants. The court upheld the dismissal while outlining some of the duties and responsibilities of a municipal employee:

- A municipal employee must not engage in activities that attack the municipal government policies or activities. If he or she does so, this displays a lack of loyalty to the municipality that is inconsistent with his or her duties as a municipal government employee.
- A municipal employee must exercise restraint where his or her written communications to provincial government relate to duties of the position or the policies and programs of the municipality. The employee is as free as a private citizen to criticize municipal government policies provided they are unrelated to his or her specific job or department.
- A municipal employee must exercise a degree of restraint in criticizing town policy or council in order to insure that municipal service is perceived as impartial and effective in

[19] Harris, *Wrongful Dismissal,* at 3-53.
[20] (1998) 23 A.R. 147 (Alta. Q.B.).

fulfilling its duties. The degree of restraint which must be exercised is relative to the position and visibility of the municipal administrator in the community.

- In some circumstances, however, a municipal employee may actively and publicly express opposition to the actions and policies of the municipal government, for example, if the municipality engaged in illegal acts or if its policies jeopardized the life, health or safety of others.

Further, under section 92(3) of *The Municipal Act,* a CAO in Manitoba can neither seek nomination as, and be, a candidate in a municipal, provincial or federal election and, if elected, serve.

Thus, the standard of conduct for a municipal officer may be higher than the average employee. In *Clark v. Rocky View (Municipal District) No. 44,* the Alberta Court of Queen's Bench held that "[i]t is a necessary supplement in the public interest of statutory regulation and accountability which are an acknowledgment of the importance of the corporation in the life of the community and the need to compel obedience by it and by its promoters, directors and managers to norms of exemplary behaviour."[21]

Dismissal Without Cause

Under *The Municipal Act,* of course, termination does not have to be for just cause and can in fact be for any reason. Perhaps performance is poor but just cause cannot be proved on a balance of probabilities. However, where a CAO (or any other municipal officer or employee, for that matter) is terminated without cause, "reasonable notice" or pay in lieu of notice must be provided. While this affords the municipality a degree of flexibility, it raises a host of legal issues that must be considered.

Consideration #4: Calculating "Reasonable Notice" in the Circumstances

Determining the Notice Period

[21] (1996) 186 A.R. 321.

The major question for employers is often how much notice will constitute "reasonable notice." The *ESC* prescribes a minimum amount of notice that all employees who are dismissed without cause are entitled to, based on their length of employment and regardless of the employee's position. The table below sets out the notice requirements under the *ESC*[22]:

Length of Employment	**Notice Period**
Less than 1 year	1 week
At least 1 year and less than 3 years	2 weeks
At least 3 years and less than 5 years	4 weeks
At least 5 years and less than 10 years	6 weeks
At least 10 years	8 weeks

However, the above notice requirements are *minimums* only and an employee might in fact be entitled to much more notice under the common law. Although the courts have been clear to hold that each case must be decided on a case-by-case basis, a key set of factors has been widely accepted and applied. Those factors, which have come to be known as the "*Bardal* factors," include:

- The character of the employment;
- The length of service of the employee;
- The age of the employee; and
- The availability of similar employment having regard to the expertise, training and qualifications of the employee.[23]
- Industry and general economic downturn may also be factors affecting re-employability.[24]

[22] The *ESC,* section 61(2).
[23] *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140, and *Machtinger v. HOJ Industries Ltd.,* [1992] 1 S.C.R. 986.
[24] Harris, *Wrongful Dismissal,* at 4-12.

No one factor should be given disproportionate weight.[25] The main focus in determining the reasonable notice period should be the particular circumstances of the individual.[26] Finally, an employee's position relative to the management structure of the employer may be an important role in some cases, but may be significantly less relevant in others.[27] In the CAO context, the sample of similar cases below give a flavour as to how much notice might be reasonable on termination without cause.

Case	**Employee's Position**	**Age**	**Term**	**Notice Awarded**
Gismondi v. Toronto (City) (2002), 16 C.C.E.L. (3d) 97	Director of Roads. Duties included managing an annual budget of $25 million and supervision 100 employees	n/a	20 years	**80 weeks (20 months)**
Jones v. New Westminster (City), (1983) 148 D.L.R. (3d) 279	Administrator of the Welfare Department	53	20 years	**18 months**
Loder v. Newfoundland, (1995), 13 C.C.E.L. (2d) 81	Superintendent of Public Works	50	18 years	**18 months***
Dunbar v. Port Coquitlam (City), (1992) 44 C.C.E.L. 206	Fire Chief	50	17 years	**24 months**
Harvey v. Conception Bay South (2001), 23 M.P.L.R. (3d) 131	Town Clerk	n/a	16 years	**16 months**
Harvey v. Conception Bay South (2001), 23 M.P.L.R. (3d) 131	Town Treasurer	n/a	8 years	**8 months**
Judge v. Pelhham (Town), (1995) 9 C.C.E.L. (2d) 134	Chief Building Official/ By-Law Enforcement	47	7 ½ years	**6 months**

[25] *Honda Canada Inc.*
[26] *Honda Canada Inc.*
[27] *Honda Canada Inc.*

	Officer			
Schattenkirk v. Squamish (District), [1986] B.C.J. No. 2326	Clerk/Adminstrator	49	5 years	**15 months**

**Note that in the* Loder *case, the superintendent was in fact reinstated, but the court held that it would have awarded 18 months notice if it were to award wrongful dismissal damages.*

As can be seen from the table above, courts in the past have granted approximately 1 month of notice for each year of service. However, this is by no means meant to stand for any hard and fast rule - the individual circumstances of the case are still key. The additional considerations in *Schattenkirk* leading to a longer notice period, for example, included the fact that the economy was entering a recession at the time of the dismissal, and that the officer had significant experience and education in the highly specialized area of municipal affairs. The officer could neither find employment in his field of work post-dismissal, and had to start fresh in a new career. In other words, emphasis was placed on the fact that the officer held a highly specialized job and now had to adjust to new and different employment. The reasoning in *Dunbar,* which also awarded a longer notice period, was similar.

It should be noted as a general rule that the courts have set 24 months as the "upper limit" of reasonable notice and are hesitant to award a reasonable notice period beyond 24 months absent exceptional circumstances.[28]

There are certain *limited* circumstances where an employee will <u>not</u> be entitled to reasonable notice - even the minimum as prescribed by the *ESC* - on dismissal. Some of those circumstances include:

- The employment is for a fixed term and terminates at the end of the term;
- the employee is employed under an agreement or contract of employment that is impossible to perform or has been frustrated by a fortuitous or unforeseeable circumstance; or
- where the employee has given the employer written notice of his or her intent to retire or quit on a specific date, and the employment is terminated on that date.[29]

[28] *Wallace v. United Grain Growers Ltd.,* [1997] 3 S.C.R. 701.
[29] The *ESC,* section 62(1).

<u>Calculating Compensation</u>

Once a reasonable notice period has been determined, the employee will be entitled the salary that he or she would have earned during the notice period. However, compensation other than salary may be factored into the equation as well. Employers may have to pay such things as

- any increase in salary that the employee would have been entitled to during the notice period;
- overtime;
- bonuses;
- pension benefits;
- reimbursement for the employee's mitigation efforts (the duty to mitigate will be discussed further on in this paper);
- fringe benefits; and
- vacation pay.

However, the employee's entitlement to each of the above "extras" will require an analysis of the circumstances of the case and in any event likely be highly dependent on any contract of employment between the employer and the employee.

Consideration #5: Provide "Working Notice" or "Pay in Lieu of Notice?"

<u>"Working Notice"</u>

"Working notice" connotes notice of the termination of an employee, effective at a date subsequent to the notice. As the name suggests, the employee continues to work up until the date of termination. From the employer's perspective, this may be the simplest means to avoid a lawsuit and liability for wrongful dismissal damages. Of course, the ability to provide working notice rests on the assumption that it is possible for the employee to "work out" the notice period. First, the employee must be willing to work out the notice period. Second, if the employment relationship has deteriorated to the extent that it would be intolerable to the

employee to continue the employment, working notice will be of no benefit to either the employer or employee.[30] However, the period of "working notice" must still be reasonable and calculated as precisely as possible having regard to the *Bardal* factors above - the failure of the employer to offer a sufficient "working notice" period could give the employee a cause of action for wrongful dismissal.[31] On the other hand, if the employee accepts the "working notice," he or she remains obligated to make his or her services available, and a failure to do so will disentitle the employee from suing for the rest of the period that he or she refuses to work.[32]

"Pay in Lieu of Notice"

There are two ways in which an employer can pay damages to an employee in lieu of reasonable notice: (1) by a one-time lump-sum payment; or (2) by salary continuance (where the employer pays the employee's regular salary for a number of months or weeks corresponding to a reasonable notice period).[33]

Consideration #6: The Manner of Termination

At this point, any employer can see that the decision to terminate an employee - with or without cause - must be a carefully considered decision. However, one major consideration remains, and that is *how* the employer is going to carry out the termination. This is a vital consideration, as the manner in which the termination is conducted may either (1) violate principles of procedural fairness in an administrative law context; or (2) give rise to a claim for punitive or other damages.

Procedural Fairness

A special consideration applies to municipalities that may not apply to other employers. As municipalities are bodies which derive their authority from statute, the principles

[30] This paragraph is a paraphrase of Harris, *Wrongful Dismissal,* at 3-16.8 and 3-16.9.
[31] Harris, *Wrongful Dismissal,* at 3-16.13.
[32] Harris, *Wrongful Dismissal,* at 3-16.14.
[33] Harris, *Wrongful Dismissal,* at 4-17.

of administrative law apply. One important principle is that municipal councils are under a duty to act fairly in dismissing officers.[34]

The leading case with respect to the duty of fairness in dismissing municipal officers is the Supreme Court of Canada decision of *Knight v. Indian head School Divisions No. 19*.[35] In that case, the court considered that just because an officer's employment can be terminated without just cause, this does not mean that the procedure by which he or she is terminated can be arbitrary. The court held that the council owed the former officer a duty to be fair in its manner of dismissal. This decision was based on three grounds:

- **The nature of the decision to dismiss.** The decision to terminate an officer's employment is final and is an extremely specific decision pertaining to a particular individual.
- **The relationship between the council and the officer.** Generally, a duty to act fairly does not arise in dismissing a true employee (where the relationship is one of "master-servant"). However, a duty to act fairly does arise where the employee holds an office, whether "at pleasure" (where the officer can be dismissed at the will of the council) or whether the officer can only be dismissed with just cause. The reason for this is that the administrative body making the decision to terminate must be cognizant of all relevant circumstances surrounding the officer's employment and its termination, and one person with important insight into these circumstances is the office-holder him or herself.
- **The impact of the decision on the employee.** The loss of employment against the office-holder's will is a significant decision that could justify imposing a duty to act fairly on the administrative decision-making body.

Thus, a municipality has a duty to be fair in dismissing a CAO. This duty is a variable standard and should be determined based on the circumstances of a particular case.[36] The duty to be fair generally is comprised of two key components. First, the municipal council

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[34] Harris, *Wrongful Dismissal,* at 2-64.16.

[35] [1990] 1 S.C.R. 653. Note that although the *Knight* case dealt with the dismissal of a director from a school board, the principles have been held to equally apply to municipal councils. See *Reglin v. Creston (Town)*, 2004 BCSC 790.

[36] *Syndicat des employés de production du Qué. & de l'Acadie v. Can. (Can. Human Rights Comm.),* [1989] 2 S.C.R. 879.

has a duty to provide reasons to the officer for his or her dismissal. Second, the dismissed officer is to be given an opportunity to respond to those reasons.[37] The duty to give reasons does not require municipalities to give full and complete disclosure of all of its reasons for dismissing the CAO; however the municipality must at least communicate its grounds broadly enough to reveal the general substance of the reason for dismissal. Similarly, the opportunity to be heard does not mean that a municipality must give the CAO a full oral hearing; it may be sufficient to allow the CAO to submit written evidence and argument to the council, or to make itself sufficiently available for discussion.[38] The municipality will also be required to give the CAO adequate notice of the meeting of the council called to consider the question of dismissal.[39]

The failure of a municipality to carry out its duty of fairness in dismissing a CAO could have significant ramifications. Not only may the case end up in court, but if the court agrees that the council failed to afford the CAO procedural fairness, it may quash the decision of the council to terminate the officer. The CAO may also seek an order for reinstatement.[40]

So what about officers and employees <u>other</u> than CAOs? As can be seen from the reasoning in the *Knight* case, the general rule is that true employees of municipalities are not entitled to procedural fairness on dismissal, but municipal officers are. There is no clear consensus on which employees can be considered "municipal officers" and the line may be blurred where the employee is in a supervisory or middle-management position with significant responsibility and authority. Nonetheless, at least one court has attempted to define a "municipal officer" as:

> "one who holds a permanent position of responsibility with definite rights and duties usually prescribed by statute and sometimes by by-law. As distinguished from a servant employed by a municipality, an officer appointed by it has, in the performance of his duties, some discretionary authority and has a responsibility to perform vital duties of the corporation; a mere servant has only a duty to obey orders. This class includes such persons who occupy offices of an executive or administrative

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[37] Harris, *Wrongful Dismissal,* at 2-67.
[38] *Knight v. Indian head School Divisions No. 19.*
[39] Rogers, *The Law of Municipal Corporations,* at 300.
[40] Rogers, *The Law of Municipal Corporations* at 302. Reinstatement will not be possible, however, where the employee has accepted the dismissal and has sought re-employment.

> nature established by the legislature who exercise powers and who are appointed by and subject to the control of the council of such municipality."[41]

For example, in the case of *Hughes v. Moncton (City),*[42] the solicitor for the city was determined to hold an "office" even though the office of city solicitor was not in the statute. The court based its decision on the fact that the city council specifically created the office, funds were appropriated by council for payment of the office holder, and a job description was prepared by the city council.

Punitive Damages

Punitive damages may be awarded against employers who dismiss an employee in a manner that is so malicious and outrageous that they are deserving of punishment. The standard is high - the employer's conduct must be harsh, vindictive, reprehensible and malicious and so extreme in nature that the conduct goes beyond the ordinary standards of decent behaviour. The conduct must also give rise to an "independent actionable wrong." In other words, the conduct must give rise to another type of legal action, for example, a claim for discrimination or defamation. Factors the courts will consider in determining the amount of punitive damages to award include:

- The blameworthiness of the conduct
- The vulnerability of the employee
- The degree of harm caused by the conduct
- Whether the employee has already suffered any penalty with respect to the same conduct
- Whether there is a need for deterrence
- Whether the employer sustained any advantage because of its conduct.[43]

Other Damages

Since 1999, the courts have applied the concept of what has commonly become known as *Wallace* damages or the "*Wallace* bump up" when determining damages for wrongful

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[41] *Broderick v. Kanata (City)* (1995), 18 CCEL (2d) 193 (Ont. Gen. Div.).
[42] (1990), 34 C.C.E.L. 201 (N.B. Q.B).
[43] *Whiten v. Pilot Insurance Co.,* [2002] 1 S.C.R. 595.

dismissal. *Wallace v. United Grain Growers Ltd.*[44] was a Supreme Court of Canada case wherein the court held that it would extend the reasonable notice period the employee was entitled to by a few months because of the bad faith conduct used by the employer when dismissing Mr. Wallace. As a result, *Wallace* imposed a duty on employers to be candid, reasonable, forthright and honest in carrying out dismissals, and a failure to do so could result in an increased reasonable notice period. This served for many years as a form of additional redress for employees where an employer's conduct did not meet the "egregious conduct" standard required for punitive damages but nonetheless constituted bad faith. However, *Wallace* has been highly criticized in that it created an unclear test and has "perplexed, if not vexed, the Bench and Bar alike since it was pronounced."[45]

The Supreme Court of Canada, however, very recently got rid of the "*Wallace* bump up" in *Honda v. Keays.*[46] Keays was a 14 year employee of Honda Canada Inc. He had no formal education and had in fact spent his entire adult working life at Honda working front line assembly and data entry. Unfortunately, he developed Chronic Fatigue Syndrome about 11 years after he began his employment. Over the next 2 years, his lack of attendance at work became significant. Despite a request by Honda, Keays refused to meet with an independent doctor selected by Honda and was subsequently terminated without notice. Keays sued for wrongful dismissal.

The finding that Keays had been wrongfully dismissed was not at issue in that case. What was at issue, however, was the amount of damages to which Keays was entitled as a result of his wrongful dismissal. At the trial level, the judge found that Keays was entitled to a reasonable notice period of 15 months (as determined using the *Bardal* factors outlined above). However, the judge increased the notice period by almost double (to 24 months) as *Wallace* damages. The court found that Honda's manner of dismissing Keays was egregious and done in a bad faith manner of dismissal based on findings that Honda misrepresented the views of its doctors to Keays, that Keays was being "set up" to see Honda's doctor, and that Keays became depressed and unable to work following his dismissal. The trial judge also awarded punitive

[44] [1997] 3 S.C.R. 701.
[45] *Gismondi,* Ont. Sup. Ct. Jus.
[46] *Honda Canada Inc.*

damages against Honda in the amount of $500,000. The Ontario Court of Appeal's findings were, for all intents and purposes, the same except for a reduction in the award of punitive damages against Honda.

The Supreme Court of Canada, however, had a much different idea, and used Mr. Keays' case as an "opportunity to clarify and redefine some aspects of the law of damages in the context of employment." Those aspects included:

- **The factors to be considered when allocating compensatory damages in lieu of notice for wrongful dismissal.** As discussed above, the Supreme Court of Canada confirmed once again the factors for determining reasonable notice as described in the *Bardal* case, but emphasized that no one factor is determinative and that each case is to be decided with regard to the particular circumstances of the individual employee.
- **The basis for and calculation of damages for conduct in dismissal.** The Supreme Court of Canada re-analyzed the "*Wallace* bump up" and determined that the damages relating to the manner in which an employee was terminated must be awarded based on actual damage caused (for example, compensation for an employee who has suffered mental distress) and not just by way of arbitrary extension to the "reasonable notice" period. In other words, this was the court's way of getting rid of the *Wallace* damages. Examples of an employer's conduct in dismissal which might result in compensable damages under the *Honda* decision include: (1) making declarations at the time of dismissal which attack the employee's reputation; (2) misrepresenting the reasons for the dismissal to the employer; or (3) dismissing the employee in order to deprive the employee of a pension benefit or other right. However, damages will only be awarded if the employee can prove that the employer's conduct caused him or her actual damage; for example, a psychological injury.
- **The allocation of punitive damages and the need to avoid overlap of damages for conduct and punitive damages.** The court held that punitive damages may still be awarded in the appropriate cases. The employer's conduct must still give rise to the "independent actionable wrong" and must be harsh, vindictive, reprehensible, malicious, and "extreme in nature and such that by any reasonable standard it is deserving of full condemnation and punishment".

The end result in *Honda* was that the Supreme Court of Canada agreed that Keays was entitled to 15 months notice, but did not suffer damages as a result of his termination. Also, Honda's actions were not sufficiently egregious to warrant punitive damages.

Reducing Exposure to Punitive and Other Damages

Providing the employee with reasons for dismissal and an opportunity to respond is not only necessary in order to fulfill the employer's duty of fairness, but can also be used to reduce the risk of punitive or other damages being awarded in a wrongful dismissal claim. Another way to lessen the risk of punitive or other damages being awarded upon dismissal would be to provide the employee with an appropriately worded termination letter and/or conduct a termination interview.

The goal of a termination interview is to clearly communicate to the employee that his or her employment with the employer is over, in a manner which is professional and accords the employee some measure of dignity; and insofar as is possible, to protect (or, at the very least, not damage) the employer's legal position.[47] Employers should be sensitive to the timing of the interview. For example, employers should avoid conducting the interview on an employee's birthday or in proximity to special events or holidays (e.g. Christmas). Employers should also consider conducting the interview away from the workplace or at the end of a business day or week to save the dismissed employee embarrassment.

A termination letter is critical as an employee may not actually "hear" anything after the primary message as to termination has been communicated. Therefore, it is worthwhile to provide a letter, which may include the following points:

- Confirmation of the termination and its effective date.
- The reason for the termination.
- The employee should be advised as to the timing of payment of all outstanding amounts, such as salary and vacation pay.

[47] Kersey, "From Hiring to Firing (and Everything in Between)."

- If relevant, the return of corporate property (e.g. a vehicle, a corporate credit card, a computer) should be addressed.
- The letter should include a request that the employee acknowledge receipt of a copy.[48]

If the termination is for cause, there are several alternatives. Either:

- detail the reasons for the termination;
- simply advise that employment is being terminated for just cause; or
- advise that the employer has received legal advice to the effect that, in light of the employee's conduct, the employer has just cause to terminate.

If the termination is not for cause (such as discontinuance of a function) this should be clearly stated. The following points should also be considered:

- Any proposal regarding pay in lieu of notice and any other payments proposed by the employer.
- Benefit considerations, including conversion privileges, should be clearly addressed.
- An employer ought to then give the terminated employee a reasonable amount of time to seek legal advice prior to accepting, for instance, payment in lieu of notice, which would invariably include a release to be signed by the employee.

In either case, an employer should also provide the employee with a reference letter where requested to do so. Whether the employee is terminated for cause or not, the letter can be written in neutral language which avoids suggestions about the employee’s performance if so desired.

Duty to Mitigate

Even though an employee may be entitled to wrongful dismissal damages, he or she nonetheless has a duty to mitigate those damages. This means that the employee must take reasonable steps to obtain equivalent employment and to accept such employment if available.[49] If the employee fails in his or her duty to mitigate, this may ultimately reduce the amount of

[48] Kersey, “From Hiring to Firing (and Everything in Between).”
[49] *Forshaw v. Alumiex Extrusions Ltd.* (1989), 27 C.C.E.L. 208.

wrongful dismissal damages awarded. The onus is on the employer, however, to assert that the employee has failed to mitigate his or her damages. The employer will be required to prove that the former employee could have found alternative employment if he or she had taken reasonable steps and did not.[50]

The duty to mitigate does require that the former employee spend money, time and ingenuity in devising and carrying out re-employment strategies.[51] Recently, the Supreme Court of Canada, in *Evans v. Teamsters, Local 31*[52] stated that in order for an employee to meet its duty to mitigate damages, he or she may be required to work out the notice period or to accept another position with the same employer as long as there is no material change in the terms of employment. The court held that where an employer offers the employee a chance to mitigate damages by returning to work for a period, the central issue is whether a reasonable person would accept such an opportunity. The critical element was that an employee not be obliged to mitigate by working in an atmosphere of hostility, embarrassment or humiliation. *Evans* sets a test for employees that is employer-friendly and requires employees to be reasonable.[53]

Consideration #7: Other Cost Considerations

Errors & Omissions/Public Entity Management Insurance Policy*

The AMM subscribes to a Group General Insurance Program through HED Insurance and Risk Services brokerage. It is our understanding that most municipalities participate in this program..

The master policy covers amounts that any person protected under the policy is legally required to pay "as damages for covered loss that is caused by any act, error or omission in the conduct of duties by or for a public entity, including any *employment-related* practices, act, error or omission." 2 key terms emerge from this wording:

[50] Harris, *Wrongful Dismissal,* at 4-280.1
[51] Harris, *Wrongful Dismissal,* at 4-281.
[52] 2008 SCC 20.
[53] Ann Macaulay, "Rewiring the Workplace," Canadian Corporate Council Association (Spring 2009), at 32.

- **Protected Person** - this includes any public entity (municipality, county or other governmental body, department or unit) and any lawfully elected or appointed officials or board members. Employees are also covered for work done within the scope of their employment.
- **Employment-related practices** - included in coverage is : (a) wrongful refusal to employ, failure to promote, wrongful evaluation, demotion, reassignment or termination; (b) sexual harassment, hostile or abusive work environment or other discriminatory harassment; (c) violation of laws prohibiting employment discrimination; or (d) other employment-related act, error, or omission, including libel, slander, defamation, misrepresentation, failure to supervise, coercion and wrongful discipline.

Thus, employment-related practices are automatically included in coverage. The total coverage limit of the policy is $2 million; however, employment-related practices are limited to the following sub-limits:

- **TOTAL sub-limit of $200,000** - in other words, the most that the insurer will pay as losses resulting from employment-related practices claims or suits in a policy year is $200,000; and
- **EACH WRONGFUL ACT sub-limit of $200,000** - in other words, the most the insurer will pay as damages for all claims or suits resulting from any one employment-related wrongful act or series of related employment-related practices is $200,000.
- **DEDUCTIBLE -** for employment-related practices pay-outs, the municipality will be subject to a deductible equal to 10% of the damage, inclusive of legal defense cost.

An important aspect of an insurance policy is the insurer's duty to defend a claim brought against its insured. Under the current policy, the insurer also has a duty to defend an employment-related practices claim up to the coverage limits. This duty to defend would extend to court proceedings, arbitration proceedings or other alternative dispute resolution proceedings seeking monetary damages. It does not extend, however, to an administrative hearing or proceeding.

Also take note of the potentially relevant exclusion clauses which may operate to deny coverage in certain circumstances:

- **Collective bargaining** - the insurer will not cover claims for compensation or benefits, including back wages, front pay, or overtime under any collective bargaining agreement; or any strike, riot, protest, demonstration, lock-out or civil commotion.
- **Declaratory, injunctive or non-monetary relief** - the insurer will not cover loss or any amount required to comply with a court order that results from any action or demand, or any party of any claim or suit, that seeks declaratory or injunctive relief. This includes a judgment which declares the rights and duties of any person or organization; or any type of injunction, restraining order or other non-monetary relief.
- **Employee Benefit Plans Administration** - the insurer will not cover loss that results from any wrongful act committed by or for any protected person in the administration of any employee benefit plan; or the conduct of any fiduciary duty for any employee benefit plan.
- **Employees' Compensation and Other Benefits Laws** - the insurer will not cover loss resulting from any claim or suit or nay resulting loss or obligating under any law with respect to employees' compensation, disability benefits, unemployment compensation, or pension/retirement/other benefits.
- **Unpaid wages, salary and bonuses** - the insurer does not consider a loss under the employment-related practices wrongful act to include
    - compensation earned by the claimant in the course of employment but not paid (including unpaid salary, wages, bonuses);
    - <u>fringe benefits, deferred payments, or other perquisites, or other liability imposed upon or costs incurred by any protected person</u> for damage for breach of any common or civil law or statutory right or entitlement to compensation (including, but not limited to, salary) in lieu of notice of termination, or termination or severance pay.

The effect of this last "unpaid wages, salary and bonuses" exclusion is that only damages for wrongful dismissal awarded by a court or tribunal are covered under the insurance policy. Any severance offered and/or accepted would not be covered under the insurance policy.

**Please note that the information above is a paraphrase only of certain portions of the Errors & Omissions/Public Entity Management Insurance Policy (the "Policy") and is not to be relied upon. Rather, the exact terms of the Policy govern. For the exact language of its Policy, each municipality should contact HED Insurance and Risk Services directly. HED Insurance and Risk Services has no way endorsed, verified or confirmed any information contained in this paper and in no way offers any advice or makes any representation with respect to any information contained in this paper.*

Tax Considerations[54]

Different manners of paying an employee a severance or settlement attract different tax treatments. While most tax treatments concern the employee, the employer should still be aware of such treatments in order to anticipate the types of requests or demands of the employee might make. The following are of some of the different tax considerations that may come into play when paying out an employee terminated without cause:

1. **A payment for wrongful dismissal is taxable as a "retiring allowance" while a continuation of salary is taxable as "employment income."** Payments received by an employee as damages for wrongful dismissal, whether as part of a settlement or awarded by the court, fall into the definition of "retiring allowance" under the Income Tax Act (Canada) ("*ITA*"). Amounts paid to a person as "retiring allowance" are generally included for income tax purposes. From CRA's point of view, it does not matter when the "retiring allowance" is paid (i.e. it is still taxable if paid years after the employment is terminated). Where paid as a single settlement, it may be possible that the settlement will only be characterized partly as a "retiring allowance" and partly as something else (for example, psychological damages). Income characterized as "retiring allowance" is subject to different RRSP rollover rules. However, if the amount is paid pursuant to the terms of an employment contract and constitutes salary continuation, it will be classified as employment income and will be subject to the normal rules for RRSP contributions (18% of the taxpayer's previous year's "earned income").

2. **A "retiring allowance" can be rolled tax-free into an RRSP to the extent of $2,000 per pre-1996 calendar year of employment plus $1,500 per pre-1989 year for which**

[54] This section paraphrased from Harris, *Wrongful Dismissal,* starting at 8-3.

no employer pension contributions have vested. This is only available on portions of settlements or awards that form part of the "retiring allowance." However, the rollover is only available in respect of employment before 1996. The deferral operates as a deduction in computing net income and the funds remain in the RRSP and grow tax-free until they are withdrawn. The transfer of a "retiring allowance" to an RRSP in this manner does not affect the taxpayer's annual RRSP contribution limits.

3. **A "retiring allowance," however, is subject to source deduction by the employer. The taxpayer reports the income for the year but gets credit for the tax withheld.**

4. **A wrongful dismissal payment is normally deductive to the employer as a business expense. A wrongful dismissal payment to someone who does not qualify as an "employee" for tax purposes may be taxed as business income and treated as a GST-included amount.**

5. **Some forms of payment are completely tax-free: damages for breaching a future employment contract; pre-judgment interest; reimbursements; damages for mental distress, harassment or human rights violations; exemplary or punitive damages; retirement or re-employment counseling.** If a wrongful dismissal suit is framed in such a way as to produce damages arising out of tort rather than directly connected to the employment, such damages can fall out side the definition of "retiring allowance." Amounts for re-employment or mental or physical health counseling may also be non-taxable in the hands of the taxpayer and may be deductible by the employer.

Miscellaneous Consideration - Harassment and Violence in the Workplace

Like any other workplace, a municipality must be aware that regulations to *The Workplace Safety and Health Act* (Manitoba, C.C.S.M., c. W210) (the "*WSHA*") impose on

employers an obligation to provide a workplace free of harassment and violence. Take note that "harassment" is defined very broadly under the *WSHA* as:

> any objectionable conduct, comment or display by a person that
>
> (a) is directed at a worker in a workplace;
>
> (b) is made on the basis of race, creed, religion, colour, sex, sexual orientation, gender determined characteristics, political belief, political association or political activity, marital status, family status, source of income, disability, physical size or weight, age, nationality, ancestry or place of origin; and
>
> (c) creates a risk to the health of the worker.

Employers must develop and implement a harassment policy and ensure that it is being carried out. The harassment policy must include the following statements:

- every employee is entitled to work free of harassment;
- the employer must ensure, so far as is reasonably practicable, that no employee is subjected to harassment in the workplace;
- the employer will take corrective action respecting any person under the employer's direction who subjects a employee to harassment;
- the employer will not disclose the name of a complainant or an alleged harasser or the circumstances related to the complaint to any person (except where the disclosure is necessary to investigate the complaint or to take corrective action with respect to the complaint or where the disclosure is required by law);
- an employee has the right to file a complaint with the Manitoba Human Rights Commission; and
- the employer's harassment prevention policy is not intended to discourage or prevent the complainant from exercising any other legal rights pursuant to any other law.

The harassment policy must also provide information as to how an employee can make a harassment complaint, how the complaint will be investigated, and how the complainant and the alleged harasser will be informed of the results of the investigation.

With respect to violence in the workplace, all employers must identify and assess the risk of violence in the workplace. Violence is also defined broadly under the *WSHA* and includes:

> (a) the <u>attempted</u> or <u>actual</u> exercise of physical force against a person; and
>
> (b) any <u>threatening statement or behaviour</u> that gives a person reasonable cause to believe that physical force will be used against the person. [Underlining added]

If a risk of violence is identified, the employer must warn employees about the nature and extent of the risk and the risk of violence from whom employees are likely to encounter in the course of their work. The employer will also have to develop and implement a violence prevention policy, train employees in the policy, and ensure that employees comply with the policy. A violence prevention policy must include the following statements:

- the employer must ensure, so far as is reasonably practicable, that no employee is subjected to violence in the workplace;
- the employer will take corrective action respecting any person under the employer's direction who subjects a employee to violence;
- the employer will not disclose the name of a complainant or the circumstances related to the complaint to any person (except where disclosure is necessary in order to investigate the complaint, required in order to take corrective action in response to the complaint, or required by law); and
- the violence prevention policy is not intended to discourage or prevent the complainant from exercising any other legal rights pursuant to any other law.

The violence prevention policy must also provide information with respect to:

- how to eliminate the risk of violence to an employee, or where not possible, how to minimize the risk of violence to an employee;
- how to report an incident of violence; and
- how an incident of violence will be investigated.

Conclusion

Now that you have made it to the end of this paper, it is fairly obvious that the decision to hire and dismiss an employee, in this case a CAO specifically, is a decision that should not be taken lightly. Dismissing a CAO for cause is an involved decision, which may attract legal liability if not properly determined and executed. Dismissing a CAO without cause, and without a term in a contract stipulating a defined notice period, involves even more legal considerations and can attract even more legal liability. Of course, much of the risk of attracting legal liability can be significantly reduced if not eliminated with a carefully worded employment contract between the employer and the CAO.

The areas of law discussed in this paper are intended to give you a better understanding of the law, the rationale behind the law, to shed some insight on what to do and what to avoid in employee dismissals, and to give municipalities a flavour of the costs involved in terminating a CAO. Attached for you convenience is, as our title suggests, a list of do's, don'ts, and dollars for CAO dismissals.

DO'S, DON'TS & DOLLARS

Hiring

- DO: Establish policies and procedures for how positions will be advertised and how candidates will be interviewed, screened, selected and appointed and follow them carefully.

- DON'T: Forget to follow them or cut corners in following them. Similarly, if there are by-laws that deal with hiring, follow them carefully.

- $$$: A failure to comply with policies and/or by-laws could impact an award for punitive or other damages in a wrongful dismissal claim.

- DO: Be aware that inducing employees or prospective employees from their previously held positions may be a factor which will increase the reasonable notice period an employee might be entitled to upon dismissal.

- DON'T: Make any representations to a prospective employee that you can't keep.

- $$$: Failure to take note of the above may result in an extended notice period and additional legal proceedings with cost ramifications to employers.

- DO: Put employment contracts in writing and use the clearest terms possible. Although there is no requirement for an employment contract to be in writing, a clearly worded agreement dealing with the terms of employment and dismissal can take much of the guess work out of termination.

- DON'T: Rely on the common law and leave things up to a judge to deal with at a later date.

- $$$: Arguing over unclear or non-existent contractual terms can rack up costly legal bills.

Assessing & Addressing Performance

- DO: Clearly communicate to employees the standards by which they are expected to perform prior to performance becoming an issue. Carefully carry out performance reviews and document those reviews. Carefully document and communicate performance issues to employees.

- DON'T: Condone poor performance, keep sloppy records, or keep employees in the dark about their performance issues.

- $$$: Not being able to dismiss an employee who might otherwise be dismissed for cause because of poor communication and record keeping will result in paying out a settlement or severance.

Carrying out a Dismissal

- DO: Conduct a termination interview. Be clear, concise, and sensitive to the employee. Be sure to have a witness sit in on the interview. Follow any procedural fairness requirements of giving employees adequate notice and reasons for the dismissal and allowing him or her an opportunity to be heard.

- DON'T: Carry out the dismissal in a way that is designed to embarrass the employee.

- $$$: An employee who suffers a loss of reputation, mental distress or other damage as a result of the way the dismissal was carried out could result in a court awarding punitive or other damages if the employee brings an action in court.

Paying out the Dismissal

- DO: Offer a reasonable severance package when terminating an employee without cause based on reasonable notice. Be sure to offer severances on a "without prejudice" and "without precedent" basis. "Without prejudice" means that the offer cannot be used as evidence if the case goes to court. "Without precedent" means that one employee can't use another former employee's severance package as a negotiating tool.

- DON'T: Play "hardball" with an employee.

- $$$: Not being reasonable may lead to the severance package being rejected and the matter ending up in court.