



Was I Wrongfully Dismissed? 10 Things to Consider if Your Employment is Terminated

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Determining whether a severance package is reasonable is not always a simple matter. There are a number of issues which should be considered by both the employee and the employer. While this list is not intended to be exhaustive, it will hopefully highlight some common areas which both parties may wish to consider in attempting to agree upon a reasonable severance package and thereby avoid a wrongful dismissal claim. The list below assumes that the employer is not alleging “just cause” for termination.

1. Is there a written employment contract which addresses the employee’s entitlement in the event of termination?
2. If there is a written employment contract, is it enforceable? There are a number of considerations which may invalidate an employment contract, most commonly being that it fails to meet the minimum requirements of the Employment Standards Act, 2000.
3. If there is no enforceable employment contract, the employee will be entitled to reasonable common law notice and not just the minimum amounts prescribed by the Employment Standards Act, 2000.
4. Is the notice period (or corresponding severance payment) offered sufficient to satisfy the employee’s entitlement to reasonable notice? Several factors must be considered in making this determination.
5. Have all benefits (medical, dental, life insurance, disability insurance, pension, stock options, vehicle allowance, etc.) been addressed in the offer?
6. How is package structured? Some employees may prefer a smaller lump sum payment compared to ongoing salary payments for a longer period of time, especially if the ongoing payments cease or are reduced (often a 50% buyout) when the employee finds new employment. In some cases, a lump sum payment can be split into two installments paid in separate calendar years to reduce the employee’s taxable income.
7. Does the offer contemplate the employee being permitted to transfer some portion of the severance payments directly into an RRSP without withholdings, or permit some or all of the amount to be taxed as a retiring allowance using the lump sum withholding rates?

8. Can any portion of the offer be allocated as general damages or legal fees and, therefore, be received tax free? By working cooperatively on the structure of the deal, the employer may be able to put more money in the employee's pocket at no additional cost to itself.
9. Has the employer offered outplacement counselling and/or a reference letter to assist the employee in finding alternate employment?
10. Has the employee mitigated his/her losses or made reasonable efforts to do so? What are the employee's prospects for mitigation?

Even if an employer makes what appears to be a fairly reasonable offer, there is often room for negotiation and, at minimum, it may be possible to structure the severance package differently to reduce, defer or even eliminate taxes on a portion of it. Given the number and complexity of issues to consider, it is best to consult a lawyer before accepting a severance package and/or signing a release.

For more information, please contact:

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