

## **Ho ho hold the December firings**

Published in the National Post – December 19, 2002

*Kenneth A. Krupat*

Downsized. Right-sized. Laid-off. Let-go. Whichever words are used, there is never really a good time to lose a job. But legally speaking, is it worse to be fired just before the December holidays? It may be. December terminations can create a number of special problems in wrongful dismissal cases.

First, there is the timing itself. In many jobs, December is a time of networking. Calendars are filled with invitations to seasonal parties. These can include industry get-togethers, client affairs and of course, the annual company holiday party. In some industries, this is a crucial time of year for developing new business. It can also be a time for rekindling friendships with old clients and other contacts.

Losing these networking opportunities can be devastating. Attending these functions after being dismissed can be difficult and disheartening. Since many of us define ourselves to some degree by our work, unemployment creates a loss of part of our identity. The Supreme Court of Canada has recognized this problem, referring to work as an essential component to our sense of identity, self-worth and emotional well-being.

In a landmark decision in 1997, Canada's highest court ruled that employees must be treated honestly and fairly when being dismissed. If a person is treated in a "bad faith" manner at the time of dismissal, the bad faith treatment can extend the person's wrongful dismissal damages. Since the "*Wallace* decision," as it has become known, courts across Canada have listened carefully to evidence about conduct that might justify these extra damages. Refusing to give a reference or to pay wages and vacation pay amounts owing are examples of conduct that has been cited. Giving false reasons for dismissal is another example. Firing pregnant employees or employees on sick leave has also met the test. All told, being fired just before the holidays alone may not be mean extra damages. But a court might consider the poor timing as one of the factors in determining whether the employer acted in bad faith.

In one recent case, decided by an Ontario Court on October 18, 2002, Robinson Group Limited had decided to hold back three weeks' wages when it dismissed Mary Black in December 2000. The Court called the Robinson Group's actions "unconscionable" and awarded an extra two months' pay to Ms Black on top of her twelve-month notice award.

Even if there is no bad faith in the way a person is fired, December dismissals can still lead to longer notice periods. Most employees dismissed in Canada are entitled to reasonable notice or payment instead of notice. There is no set

formula. The Ontario Court of Appeal has called the process of setting notice periods an art rather than a science. Courts award these notice periods based on a person's length of service, age, position and other related factors. The goal is to estimate the expected time needed to find a new similar job. Since few employers are actively recruiting in December, employees may need additional time if dismissed this time of year.

Another difficulty is the loss of a bonus. Bonuses are often paid either just before Christmas or just after the New Year. Some are calculated to year-end but paid later. If an employee is dismissed just before the holidays, can the employee still collect the year-end bonus?

Here the answer is usually easier. During the reasonable notice period, employees are entitled to be compensated for everything that they would have had if they had continued to work. So if a bonus would have been paid, dismissed employees should still be entitled to it. This might not mean getting the annual Christmas present but at least it is some consolation.

Employees who are let go this time of year should put together a careful record of everything they are missing as a result of the timing; parties, bonuses, presents and networking opportunities. It may all be relevant evidence for a judge to consider in setting a notice period.

For employers, it often seems easier to get expenses off the books before the end of the year. Starting out with a clean slate, especially after a rough year, can be attractive. But before jumping too fast, employers should weigh the human toll of ill-timed terminations. Although waiting one more month might make things more difficult from an accounting viewpoint, accounting is only one part of the equation. Any steps that employers can take to help their dismissed employees to get resettled and find new work are steps that can save money on severance pay. Handling dismissals in an honest, professional and compassionate manner is sound business practice. It fits the Supreme Court's guidelines on dealing with employee dismissals. It may save money. And more often than not, it means letting employees enjoy their holidays and dealing with reorganizations early in the New Year.

*Kenneth Krupat is an employment law lawyer, who represents individuals and employers in wrongful dismissal actions. Email: [kkrupat@joblaw.ca](mailto:kkrupat@joblaw.ca)*  
© Kenneth Krupat 2002.