

without just cause will only be required to pay damages – reinstatement is not available under the provincial *Employment Standards Act*.

Accordingly, before deciding to dismiss an employee, a First Nations employer should consider and potentially seek legal advice on whether it is governed by the federal *Canada Labour Code*, and, if so, whether there is a risk of the employee being reinstated.

'Demoted' School Principal Awarded 15 Months' Pay from First Nation

A former principal of a First Nations school filed an unjust dismissal complaint under the Canada Labour Code after she was demoted to a teaching position. The complainant, Ms. Morrisseau, had been employed by a First Nations school for 12 years and was promoted to the position of principal in her final year. With approximately six weeks remaining in the school year, Ms. Morrisseau received a letter in her school mailbox 'offering' her a position as the Grade 1 teacher for the following year.

Ms. Morrisseau wrote a letter to the Chief and Band Council protesting her demotion and requesting an explanation. No one contacted the complainant about her employment. Ms. Morrisseau testified that she suffered "intense embarrassment" throughout the remainder of the school year and suffered serious depression as a result of the demotion.

The adjudicator found that the written contract for the position of principal did not clearly limit Ms. Morrisseau's employment to a one-year term. Rather, she was employed under a contract for indefinite employment, and was entitled to reasonable notice of dismissal. The demotion from principal to teacher constituted constructive dismissal, and Ms. Morrisseau was entitled to damages. The employer's financial difficulties did not discharge its obligations to give the employee reasonable notice of termination.

As a result, the adjudicator ordered the First Nation to pay Ms. Morrisseau 12 months' salary and benefits. The adjudicator also found that the manner in which the employee was dismissed was 'highly improper' and ordered a further payment of three months' severance for the employee's humiliation and depression, a letter of reference and a letter of apology.

Morrisseau v. Tootinaowaziibeeng First Nation, [2004] C.L.A.D. No. 357

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Employment Law Primer: Dismissal of Employees by First Nations Employers

Band councils and other First Nations employers in British Columbia from time-to-time will be faced with the unpleasant task of dismissing employees. When planning for a dismissal, it is important to determine whether the dismissal is "for cause" or, without cause. It is also important to determine whether the employee is governed by federal or provincial employment legislation.

Just Cause

An employer has the legal right to dismiss an employee without notice and without compensation if it has "just cause" for the dismissal. An employee's serious misconduct will constitute just cause. There is no fixed rule defining the degree of misconduct which justifies dismissal. In general, the Supreme Court of Canada has stated that an employer has the right to dismiss an employee "guilty of serious misconduct, habitual neglect of duty, incompetence or conduct incompatible with his duties, or prejudicial to the employer's business".

What is a "Wrongful" Dismissal?

If the employer does not have just cause, the dismissal is "without cause" and the employer must give the employee reasonable working notice of dismissal. A dismissal is wrongful, if, not having just cause, the employer fails to provide the employee with adequate notice of dismissal.

What is Reasonable Working Notice?

The amount of notice an employer must provide an employee for a "without cause" dismissal will vary, based on a number of factors the courts have previously set out. Generally, the most important factors are the character of

the employee's employment, length of service, age and the availability of similar employment.

In British Columbia, the courts have stated that the upper limit of notice should be 18 to 24 months.

What is "Severance"?

Often, perhaps in most cases, an employer is unable to provide reasonable working notice of dismissal. For example, employees who have been given notice may suffer from morale problems and may not be motivated knowing their employment is coming to an end.

If an employer cannot provide reasonable working notice of dismissal, it must instead pay the employee "severance", which is equivalent to the pay and benefits the employee would have earned during the working notice period. In the case of senior or long-service employees, these severance obligations can be significant.

Can an Employer Limit its Obligations to Pay Severance?

Yes. All First Nations employers, whether regulated provincially or federally, can limit their obligations to pay severance by explicitly setting out their

obligations in a written employment contract.

Provincial and federal employment statutes require employers to pay certain amounts of severance, depending on the employee's length of service. An employment contract can explicitly state that the employer's obligation to pay severance is limited to these amounts. If the employment contract does not contain such a clause, the courts, in most cases, will require employers to pay significantly more severance.

Provincial vs. Federal Jurisdiction – What's the difference?

Provincially-regulated employers are subject to British Columbia's *Employment Standards Act*, whereas federally-regulated employers are subject to the *Canada Labour Code*. The *Act* and the *Code* are similar in many respects, setting out minimum standards in an employment relationship.

The main difference between the two pieces of legislation is the availability of reinstatement under the *Canada Labour Code*. If a federal employer dismisses an employee without just cause, the employee may have the option of filing a complaint under the *Code* and seeking both reinstatement and back pay.

By contrast, a provincially-regulated employer that dismisses an employee

Harris & Company – Labour and Employment Lawyers

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Litigation – defending claims for wrongful dismissal and human rights complaints

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Pre-termination Issues – advice to employers on each step in the process of preparing for and conducting an employee dismissal

Severance Packages – advice on the amount of severance or reasonable notice and assistance in preparing letters of termination and designing severance packages

Employment Contracts – advising, designing, writing, negotiating and implementing employment contracts and assistance with interpretation and monitoring of employment contracts

Investigation of Employee Conduct – policy enforcement involving and investigating employee misconduct, substance abuse, fraudulent activities, workplace violence and misuse of property and equipment

Seminars – delivery of specialized seminars for managers of First Nations employers, covering a wide spectrum of employment issues managers face on a regular basis

Should you require advice or assistance regarding any of these matters or wish to learn more about Harris & Company, feel free to contact any of our lawyers from our First Nations practice group:

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