

You Raise the Issue

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Reducing an Employee's Resignation Term

Question: Recently an employee gave us four months' notice of resignation. Do we have to keep that employee until his resignation date or can we let him go now?



Answer: Four months is an unusually long notice period. Alberta's Employment Standards Code requires an employee to provide a minimum of one week's notice of resignation if the employee had been employed for more than three months but less than 2 years and two weeks' notice of resignation if the employee had been employed for 2 years or longer. The Courts have held that some employees may owe a longer notice period to their employer because they possess special or unique skills which are difficult to replace. In rare circumstances, an employer may be able to successfully sue an employee who has not given proper notice of resignation.

In your case, four months notice is obviously too long. You should advise the employee that the company will be able to manage without him and propose a more reasonable resignation date. If the employee agrees, confirm the new resignation date in writing.

If the employee does not agree, then the employer has the option, pursuant to section 59 of the Employment Standards Code, to terminate the employment relationship by paying to the employee the wages he would have earned during the minimum termination notice period that the employer is required to provide under the Employment Standards Code. For example, if the employee had been employed for more than 10 years, the Employment Standards Code requires the employer to pay eight weeks wages.

Section 59 does not necessarily end the matter there. Since you have now terminated the employment relationship, the employee can bring a civil action for wrongful dismissal. In other words, the case is no longer one of resignation, but one of termination. The Alberta Court of Appeal has confirmed that section 59 does not take away the employee's right to sue for any additional entitlement to notice of termination as determined by the courts. In your case, it is possible that a court could be influenced by the resignation notice period initially offered by the employee and set the period of reasonable notice of termination at four months. It is also possible, where the employee has long service, that the court could assess the reasonable notice period (of termination) as being greater than the four months' notice of resignation provided by your employee.

Consequently, you should carefully consider the risks before terminating the employment relationship under section 59. If the employee has relatively short service, such that four months' exceeds his entitlement to reasonable notice, then there is merit to invoking section 59. In the event the employee has long service, such that his entitlement to reasonable notice of termination, likely exceeds four months, you will want to carefully consider whether to invoke section 59.

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Paying Bonuses to Resigning Employees

Question: Do we have to pay an annual bonus to an employee who is resigning?

Answer: The answer depends on many factors. Firstly, a court will consider whether the entitlement to a bonus is in the sole discretion of the company or whether it is non-discretionary. If the payment of a bonus is entirely in the discretion of the company, then it is your decision whether or not to pay a bonus or part of a bonus to the employee. In the absence of an employment contract or letter of hire which makes the bonus part of the employment contract or which defines whether the bonus is discretionary, the courts will examine what has been done in the past to determine whether the entitlement to a bonus is discretionary or non-discretionary. The courts have usually found a bonus to be non-discretionary where the employee has received a bonus in each year, or the employer has never exercised its discretion against an employee, or the bonus represents a large portion of the employee's overall compensation package.

Secondly, if it is non-discretionary, a court will look at the terms of the bonus plan or information provided to employees setting out the conditions of the bonus program. Some bonus plans state that an employee has to be in the active employ of the company on a certain date in order to receive payment under the plan or that the entitlement to a bonus is waived in the event of resignation or termination of employment. Even if such a condition exists in your plan, some courts have refused to apply conditions like these where the employer could not establish that they had been brought to the employee's attention. Furthermore, some courts have been reluctant to apply a provision which purports to take away an employee's earned bonus merely because they have resigned.

Thirdly, it may depend on whether the bonus year has concluded (in which event the employee would be claiming a full bonus) or whether the resignation is effective prior to the completion of the bonus year (in which event the employee is seeking a pro rata share). Unfortunately, the cases are not consistent in this area. The employee may have a stronger claim where the bonus year had concluded prior to resignation, as the employee can argue that he is entitled to the bonus because he had already "earned it". This argument fails to consider that there are usually two components to a bonus: a reward for past service and an incentive for

future service. Clearly, that second component is lost for a resigning employee. Nevertheless, the courts appear more willing to make an award for a lost bonus where the bonus year has concluded than to award a pro rata share of the bonus. However, as stated, the cases have not been consistent and go both ways.

As this is a complicated area of employment law, you should provide the relevant material and background information to your legal advisor for their advice on the particular circumstances in the event the employee claims entitlement to a bonus.

DISCLAIMER This article should not be interpreted as providing legal advice. Consult your legal adviser before acting on any of the information contained in it. Questions, comments, suggestions and address updates are most appreciated and should be directed to:

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