A. GETTING THE WRONG PEOPLE "OFF" THE BUS

In a companion Grey Book in this Series, ***"Hiring & the Law: Tips for Getting the Right People on the Bus"*****,** we examined the employer's pre-employment obligations, i.e. the legal risks an employer faces if that employer is not mindful of its legal obligations during the recruitment process. It is indeed critical, according to management guru Jim Collins, authour of the best selling book *Good to Great*, to get the right people *on* the bus if the business is to excel; but it is just as critical to get the wrong people *off* the bus. And the risks associated with doing that, i.e. with dismissal or unilateral termination of employment by the employer, are even greater in this phase than they are in the recruitment phase.

The recruitment process can be analogized to the "courtship" phase of a marriage; dismissal or unilateral termination of employment by the employer, to its divorce. The greatest risks faced by employers contemplating dismissal (or engineering the environment to bring about involuntary resignation) are *wrongful dismissal* or *constructive dismissal,* each of which can result in substantial damages, including punitive damages, damages for mental distress, and what lawyers call *Wallace* damages after the landmark decision of the Supreme Court of Canada in *Wallace v. United grain Growers Ltd.* (1997), 152 D.L.R. (4th) 1, imposing extended notice periods for breach of the employer's duty of good faith in conducting the dismissal (sometimes referred to as "bad faith discharge"). In other words, an employer can find itself in trouble not only if it wrongfully or constructively terminates an employee's contract, but for *how* it does it, i.e. whether or not it treats the employee with dignity and respect in the process. Getting the wrong people off the bus, therefore, is a delicate matter indeed, requiring sophisticated planning and management to mitigate risk.

But we're getting ahead of ourselves. First, we want to take a brief look at the employment relationship itself, in particular at the contractual aspects of the relationship, to determine more precisely what rights and obligations the employer has and does not have in relation to maintaining or terminating the employment relationship. We will also discuss pitfalls and strategies for mitigating the employer's risks if it elects to proceed with termination.

B. THE EMPLOYMENT RELATIONSHIP

In our companion Grey Book, ***"Management Guide for Defining the Employment Relationship"*****,** we reviewed the contextual dimensions of the employment relationship, i.e. the gateway to the bus, including some of its contractual aspects. In this Grey Book we want to focus specifically on those contractual elements of the relationship that have a direct impact on what the employer can and cannot do in terms of bringing the employment contract to an end.

To begin, it is important to state unequivocally that no employee has a constitutional or implied right to employment "for life". What is sometimes colloquially referred to as "permanent" employment is, at best, an employment contract of "indefinite duration". With very few exceptions, an employer *can* elect to terminate any employee, no matter how senior, at any time, for any reason - provided it does so thoughtfully and intelligently, and in full compliance with its statutory and common law obligations. This typically includes the provision of reasonable notice (or pay in lieu of notice), and good faith in carrying out the actual termination. In certain egregious cases such as fraud, theft, insubordination, gross incompetence, breach of fiduciary duty, and irreconcilable corporate incompatibility, for example, an employer may be justified in dismissing an employee "for cause", without notice or further liability. But this is a minefield fraught with peril and and should not be undertaken without careful planning and competent counsel.

Defining the Nature of the Employment Relationship

An employer's rights and obligations in relation to the termination of employment will be determined, first of all, by the nature of the employment relationship; and, secondly, to a large extent, by the language of the employment agreement (if there is one). If the employment contract is one for a fixed term, e.g. 12 months, the employer will be highly restricted in its ability to terminate the contract before the 12 months period is up, unless that employer had the foresight to reserve for itself the right of early termination of contract in the employment agreement, or is prepared to "buy out" the remainder of the contract. On the other hand, if the employment relationship is one of "indefinite duration" (the typical employment situation), the employer will ordinarily be free to terminate the employment contract by providing reasonable notice. What exactly is "reasonable notice" in any given case is discussed more fully below.

C. TERMINATION FOR "CAUSE"

We have already touched very briefly on this. There are circumstances where continued existence of the employment relationship becomes unthinkable or intolerable. Examples of such cases include employee fraud, theft, insubordination, gross incompetence, breach of fiduciary duty, and irreconcilable corporate incompatibility. In such cases, dismissal for "cause" *may* be justified. The employer must be careful to diligently investigate, document and support its allegations, or it may find itself facing a *wrongful dismissal* action and substantial damages, or even defamation. Employers should also be aware that the standard for showing cause in such cases is very high, and that a single incident of fault will not generally support just cause termination (although there are exceptions). Where a *bona fide* case of just cause for termination exists, however, the employer will be justified in dismissing the employee without notice or further obligation (other than that required by the applicable employment standard legislation).

D. TERMINATION "WITHOUT CAUSE"

As noted earlier, no employee has a constitutional or implied right to employment "for life*".* With very few exceptions, an employer can elect to terminate any employee, no matter how senior, at any time, for any reason (for example, where work is slow or the nature of the business has changed and new skill sets are required) - provided it does so thoughtfully and intelligently, and in full compliance with its statutory and common law obligations.This typically includes the provision of reasonable notice (or pay in lieu of notice), and good faith in carrying out the actual termination.

What is "Reasonable Notice"?

Before attempting to define "reasonable notice"*,* it is important to distinguish reasonable notice at common law from statutory termination notice required to be given by employment standards legislation. Statutory notice as a rule is shorter than common law reasonable notice, and typically amounts to about one week's notice (or pay in lieu) for each full year of employment (in Ontario). Reasonable notice at common law, on the other hand, can be significantly longer, and is based on an objective evaluation of judicially defined criteria, known as the *"Bardol"* factors. These include such criteria as the nature and length of employment, the age of the employee, availability of suitable alternative employment, and other relevant factors. Each case is different; and each factor must be scrutinized afresh in every case.

It would not be surprising, for example, for a 50 year old senior manager or high-level employee with 2-3 years of service to be entitled to anywhere from 3 - 5 months' notice (or more, for example, if she was induced away from secure employment, or if the termination was mishandled giving rise to extended *Wallace* notice). The policy rationale for common law notice is to provide the employee with a financial bridge to enable her to secure comparable alternative employment. After all, with this kind of termination, the employee has lost her source of livelihood through no fault of her own. The most strategic course for the employer to mitigate its risk in this area is to set out its own termination notice in a well-drafted employment agreement signed by the employee at the outset of employment (provided notice set out in the agreement is no less than what the employee would be entitled to under employment standards).

D. "CONSTRUCTIVE DISMISSAL"

Constructive dismissal is a form of *wrongful dismissal* that arises when an employer unilaterally changes fundamental terms of the employment contract such as unilateral reduction in pay, demotion or forced geographic relocation, or otherwise creates a poisonous working environment rendering continued employment intolerable for the employee, bringing about "involuntary resignation". Not all such changes will automatically result in constructive dismissal. Again, each case is context specific. Getting the wrong people *off* the "bus" is a perilous enterprise. Employers would be well advised to seek counsel before undertaking unilateral changes to fundamental terms of the employment contract.

The above summary of the employer's dismissal rights, obligations and strategies is intended as a basic introduction for entrepreneurs, business executives, officers and directors. It is not intended as legal advice. Consult your solicitors if you have any specific questions.