

Wrongful Dismissal Settlements 101: Minutes of Settlement, Releases and Everything In Between

Presented by: Meaghan Russell

May 31, 2019

Introduction

- Settlement Terms and Tax Treatment
 - Financial
 - Non-Financial
- Minutes of Settlement
- Full and Final Releases



Settlement Terms

- Statutory Entitlements to Notice/Severance
 - Provincial: Ontario *Employment Standards Act, 2000*, as amended (“*ESA*”)
 - Federal: *Canada Labour Code* (“*CLC*”)
 - Notice: Statutory notice or pay in lieu thereof subject to all statutory deductions.
 - Up to 8 weeks under the *ESA*.
 - 2 weeks notice under the *CLC*.
 - Lump sum payment or working notice of termination (or both).
 - Pro-rated vacation pay over the statutory notice period.
 - Severance Pay: Statutory severance pay properly payable as a retiring allowance.
 - Amount owing to employee cannot be “worked” out.
 - *ESA*: Up to maximum of 26 weeks of pay.
 - *CLC*: Minimum of 5 days or 2 days per completed year of service.
 - If paid out before the date of settlement, MOS should reflect payment.

Settlement Terms

- Common Law Notice
 - Lump Sum Payment
 - Payable as a retiring allowance subject to the lump sum withholding rates.
 - Retiring allowance: “means an amount... received (b) in respect of a loss of an office or employment of a taxpayer, whether or not received as, on account or in lieu of payment of, damages or pursuant to an order or judgment of a competent tribunal.”
 - Lump Sum Withholding Tax Rates.
 - 10% (5% for Quebec) on amounts up to and including \$5,000.
 - 20% (10% for Quebec) on amounts over \$5,000 up to and including \$15,000.
 - 30% (15% for Quebec) on amounts over \$15,000.
 - Salary Continuation
 - Payable subject to your regular payroll schedule, subject to all applicable statutory deductions, withholdings and remittances.
 - Withholding Tax Rates Above Do Not Apply.
 - Subject to the Duty to mitigate/clawback?

Settlement Terms

- EI Repayment Obligations
 - EE has collected EI since Date of Termination – how does that affect a settlement?
 - Obligation to repay to Service Canada/HRSDC.
 - Withhold approximate or actual amount received for EI.
 - Use of Service Canada EI Portal – request copy prior to mediation.
 - Employee requests Notice of Debt.
 - Repayment issued to “Receiver General for Canada.”
 - Client ID No.

Settlement Terms

- General Damages
 - Employers should exercise caution when considering a proposal to allocate to general damages.
 - Do the facts as plead support the allocation?
 - CRA can question the failure to withhold tax even where employer/employee agree to the allocation.
 - *Ontario Human Rights Code*
 - No cap on damages, not subject to deduction, no T4 or ROE issued.
 - *Canadian Human Rights Act*
 - Cap of \$20,000 for pain and suffering.
 - Cap \$20,000 if the discrimination was willful or reckless.
 - General Damages not subject to deduction, no T4 or ROE issued.

Settlement Terms

- RRSP Contributions
 - Internal payroll processes if Company already contributes (GRSP)
 - Personal RRSP Account
 - Sufficient proof of contribution room (NOA).
 - RRSP Account No.
 - Institution name, address, contact person.
 - Cheque payable to institution.
 - ITA also allows for a contribution of:
 - \$2,000 for each year or part of a year before 1996 that the employee or former employee was employed; plus
 - \$1,500 for each year or part of a year before 1989 of that employment in which none of the former employer's contributions to the RPP or deferred profit sharing plan (DPSP) were vested in the employee's name when you paid the retiring allowance.

Settlement Terms

- Payment of Employee's Legal Fees
 - Allocation or Additional Amount Payable?
 - Cheque is always payable to "Law Firm/Lawyer," not to the employee.
 - Amount is not subject to statutory deductions.
 - Amount not recorded on a ROE.

Settlement Terms

- Reimbursement of Mitigation/Medical Expenses
 - Reasonable expenses?
 - Receipts/supporting documentation required.
 - Amount not subject to deduction.
 - Payable directly to employee.

Non-Financial Settlement Terms

- Outplacement Services
 - Employer's provider or requested provider?
 - If requested provider, reimburse or pay the invoice directly.
 - Value of services is not included as income.
- Letter of Employment
 - Dates, role, duties.
 - Identify contact person for oral references.
- Letter of Reference
 - Company policy?

Minutes of Settlement

- Core Components
 - Reflect what has already been paid.
 - Confidentiality.
 - Fundamental term.
 - Return of Company Property.
 - No admission of liability.
 - Who pays for the mediator and/or cost to take out dismissal order?
 - Employee provided with opportunity to seek legal advice.
 - Employee provided with reasonable time to review terms (if negotiated outside of mediation session).

Full and Final Release

- Core Components
 - Release of all claims relating to “employment and the cessation of employment.”
 - Release of all claims relating to Court File No. XXXX or HRTO File No. XXX.
 - Tax Indemnity.
 - Confidentiality
 - “Fundamental term” of the settlement.
- Unenforceable Releases
 - Employee is only provided with statutory minimums.
 - Employee is only provided with contractual entitlements.
 - Offer letter/employment contract does not specify that amounts paid in excess of statutory minimums will only be provided in exchange for a release.
 - Employee did not have capacity.

Thank you

大成 DENTONS

Dentons Canada LLP
77 King Street West
Suite 400
Toronto, Ontario M5K 0A1
Canada

Dentons is the world's largest law firm, delivering quality and value to clients around the globe. Dentons is a leader on the Acritas Global Elite Brand Index, a BTI Client Service 30 Award winner and recognized by prominent business and legal publications for its innovations in client service, including founding Nextlaw Labs and the Nextlaw Global Referral Network. Dentons' polycentric approach and world-class talent challenge the status quo to advance client interests in the communities in which we live and work.
www.dentons.com

© 2017 Dentons. Dentons is a global legal practice providing client services worldwide through its member firms and affiliates. This document is not designed to provide legal or other advice and you should not take, or refrain from taking, action based on its content. We are providing information to you on the basis you agree to keep it confidential. If you give us confidential information but do not instruct or retain us, we may act for another client on any matter to which that confidential information may be relevant. Please see dentons.com for Legal Notices.