

## PERFORMANCE EXPECTATIONS AND EMPLOYMENT LAW

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### A. INTRODUCTION

Performance management systems, as an ongoing communication process between employers and employees, offer a means of facilitating dialogue between employers and employees. They also offer an important means of avoiding, or reducing, allegations of bad faith treatment of employees by employers during the employment relationship and at the point of dismissal.

It must be understood, that while performance management systems offer a holistic approach to the employment relationship, and strive, through communications, to lead employers away from the more traditional command and control model towards a facilitation model of leadership, the law has, through legislation and court decisions, provided some guidelines which are relatively rigid, and which govern the employment relationship. These laws and court decisions will also govern any performance management system implemented by an employer.

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If you are involved in performance management, then you probably:

- ◆ Set specific job assignments for employees;
- ◆ Discuss job performance with employees and provide feedback on strengths and required improvements;
- ◆ Conduct annual or regular job performance evaluations;
- ◆ Plan for improved performance

Each of the tasks identified above is of great significance when an employee's performance has not met requirements, or when discipline is required. Recent case law has highlighted just how important these tasks are, in clearly highlighting requirements placed on employees, and ensuring that employees are provided with every reasonable opportunity for improving their performance prior to termination.

For the performance management process to succeed, it must be built on a clear understanding of the respective rights of employers and employees during the employment relationship and especially when the continuing viability of the employment relationship is being questioned, or indeed ended.

This talk will focus primarily on the discipline component of performance management and the use of progressive discipline by employers. It will also discuss general principles of employment law and the interplay of Human Rights legislation with common law principles regarding employment.

## **B. GENERAL PRINCIPLES**

- ◆ All employment relationships are contractual;
- ◆ Employment contracts may be written or unwritten;
- ◆ In a non-union setting, *Employment Standards Act, 2000* (“ESA”) sets minimum standards that can't be contracted out of;
- ◆ Either employee or employer can end the employment relationship;

An employer may dismiss an employee with or without cause. However, unless there is cause for the termination an employer must provide sufficient notice to the employee.

### C. TERMINATION WITHOUT CAUSE

Where there is a written contract, the parties can negotiate the amount of notice (or pay in lieu of notice) that an employee is to receive. If there is no term in the contract, or the contract is unwritten, then the *ESA* sets minimum notice standards or amounts of notice to be given. The common law has significantly extended this principle and courts regularly give lengthy notice periods to terminated employees, especially where the employee is middle or upper management.

Courts will look at the following factors, generally, to determine the appropriate notice to be given:

- i) age;
- ii) profession;
- iii) experience;
- iv) position;
- v) length of service; and
- vi) any other factors relevant to the ability of the employee to obtain new employment.

(See *Bardal v. Globe and Mail* (1960), 24 D.L.R.. (2D) 140)

Courts can extend the notice awarded to employees who have been subjected to a bad faith termination as in *Wallace v. United Grain Growers Ltd.* (1997), 152 D.L.R. (4<sup>th</sup>) 1 (SCC) (“Wallace”). In *Wallace* the Supreme Court held that employers have an obligation of “good faith and fair dealing in the manner of dismissal”.

In the recent Ontario decision of *Girmondi v. Toronto (City)* [2003] O.J. No. 1490 (“Girmondi”) the Ontario Court of Appeal held that in certain circumstances, the employer’s conduct, pre- and post- termination, can be considered as part of the ultimate termination, and may affect the amount of notice given. In *Girmondi* the court went on to review recent cases in light of *Wallace* and found that the common element is the presence of intent, malice or blatant disregard for the employee.

Other commonly pled causes of action brought by employees against employers include claims for:

- ◆ Breach of the duty of good faith during the course of employment;
- ◆ Intimidation;
- ◆ Defamation and loss of reputation;
- ◆ Intentional and/or negligent infliction of nervous shock;
- ◆ Sexual harassment; and
- ◆ Breach of fiduciary duty.

#### **D. TERMINATION WITH CAUSE**

Cause exists when an employee has acted in a manner which breaches a fundamental term of the employment relationship. Common grounds cited by employers as justifying dismissal with cause include:

- ◆ Dishonesty – theft, fraud etc.;
- ◆ Intoxication;
- ◆ Illness, if not temporary;
- ◆ Insolence; and
- ◆ Incompetence.

An employer will generally have cause where the employee engages in theft or fraud, or is incompetent at his or her job.

A recent decision of the Supreme Court in *McKinley v. B.C. Tel.* [2001] 2 S.C.R. 161 (SCC) (“McKinley”) has cast some doubt on what will constitute just cause. McKinley engaged in a single act of dishonesty. The Supreme Court held that there was not sufficient cause to terminate. The conduct complained of by the employer must be of sufficient gravity that it violates an essential condition of the employment relationship.

As a result of *McKinley* the employer must now meet a much higher test before having grounds to terminate with cause. An employer must show a pattern of dishonesty or conduct that makes it impossible for the employment relationship to carry on.

## E. POOR PERFORMANCE AND INCOMPETENCE

An employer can dismiss an employee without notice for incompetence or poor performance. This does not mean that an employee can be dismissed simply because the employee is underperforming. Poor performance will rarely constitute cause for dismissal as it can often be addressed through appropriate measures of rehabilitation implemented by the employer.

Just cause will exist where the employer has implemented a system of compassionate, meaningful and progressive discipline that does not lead to an improvement by the employee. Case law clearly indicates that employers owe a duty to their employees to provide them with the opportunity and means required to improve their work performance. Employers must take progressive steps in warning employees of their poor work performance, and must be specific in identifying their concerns and provide sufficient time to remedy their performance.

### 1. Establishing Just Cause in Relation to Poor Performance

For an employer to establish just cause, an employer must be able to show:

- ◆ Reasonable objective standards of performance which were communicated to the employee;
- ◆ Suitable instruction and supervision was given to the employee to assist the employee in meeting the standards;
- ◆ The employee was not capable of meeting the standards;
- ◆ The employee was warned that failure to meet the standards would lead to dismissal; and
- ◆ The employee was afforded a reasonable time to correct the situation.

It will be incumbent upon the employer to provide suitable evidence to the court to prove the above. Where an employer fails to prove the above, they will be found liable for notice, and may be liable for damages for other causes of action, such as defamation if the employer has advised fellow employees or third parties of its concerns about the performance of the employee.

## 2. Good Faith Treatment of Employees

An employer must treat its employees fairly and with good faith. As such, an employer must disclose to an employee the errors being made by the employee. This underlines the importance of a compassionate, meaningful and progressive discipline process.

It is insufficient for the employer to simply be critical of an employee's performance, without informing the employee how to improve. In this regard, a discipline process, which is haphazard or inconsistent may do more harm than good. Where there is evidence that a discipline process is not applied equally to all employees, this evidence may lead to increased notice, or damages for other causes of action, such as intentional infliction of nervous shock, if the conduct of the employer emotionally injures the employee.

## F. HUMAN RIGHTS ISSUES

### 1. General Principles Regarding Employment

The *Ontario Human Rights Code* ("Code") is far-reaching remedial legislation, which specifically focuses in part on the employment relationship. Under the *Code* it is public policy in Ontario to uphold the inherent dignity and worth of every person and to provide for equal rights and opportunities without discrimination;

Under the *Code*:

Section 5.

(1) *Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, color, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offenses, marital status, family status or handicap*

(2) *Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, color, ethnic origin, citizenship, creed, age, record of offenses, marital status, family status or handicap.*

Employment is not defined in the *Code*, but the Ontario Human Rights Commission gives it a generous interpretation, such that even volunteer work may be subject to the *Code*.

## 2. Applications and Advertisements Regarding Employment

The *Code* specifically focuses on the hiring process. Section 23(2) of the *Code* provides that a right under section 5 of the *Code* is infringed where an employment application or advertisement for employment “*directly or indirectly classifies or indicates qualifications by a prohibited ground of discrimination.*” Section 23(3) of the *Code* allows certain questions to be asked at a personal interview where the questions may be discriminatory but are necessary for the job.

Prohibited questions on applications include:

- ◆ The race of an applicant (e.g. physical characteristics or requests for pictures etc.);
- ◆ The creed of an applicant (e.g. religious affiliation);
- ◆ The sexual orientation of an applicant;
- ◆ The marital status of an applicant.

The Ontario Human Rights Commission is clear that the main consideration in hiring an employee is qualifications.

As a result, when creating a job application it is important to ensure that it does not include requirements which are not essential to the job, but which might be perceived of being discriminatory. For example, putting in a height requirement when it is not relevant might discriminate against certain races. Placing requirements in a job application that a person must provide a criminal record check, or have a clear criminal record, when it is not necessary to carry out the job would likely violate the *Code*.

Requirements or duties of employment should be reasonable and related to the performance of the job only.

Job advertisements should not make references to or include questions regarding race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, record of offences, age, marital status, family status or handicap. For example, a job advertisement, which states a preference for a single person, or a childless person would be discriminatory.

### 3. Discrimination in Employment

Under the *Code*, discrimination means unfair treatment in employment situations based on:

- ♦ Race;
- ♦ Sex;
- ♦ Color;
- ♦ Handicap or perceived handicap;
- ♦ Ancestry;
- ♦ Sexual orientation;
- ♦ Place of origin;
- ♦ Age;
- ♦ Ethnic origin;
- ♦ Marital status;
- ♦ Citizenship;
- ♦ Family status;
- ♦ Creed; or
- ♦ Record of offences (in employment only).

### 4. Harassment in the Workplace

Employers have an obligation to ensure that the work environment is free from behaviour that could constitute harassment. Harassment is a form of discrimination under the *Code*, which includes behaviour or comment that puts down, insults or offends another person because of his or her sex, creed, race, ancestry, age, sexual orientation, place of origin, ethnic origin etc. Harassment is defined under the *Code* as:

*engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome;*



An employer may be liable for harassment by supervisors, managers, and co-workers. It is important to remember that there may also be human rights issues that must be addressed in any disciplinary process. Harassment can occur through comments made in a progress review or discipline procedure.

Examples of behaviour by an employer that might constitute a violation of the *Code*:

- ♦ Commenting on an employee's conduct or performance and relating it to one of the grounds for discrimination. For example in a discipline meeting a supervisor makes the following statement to a female employee "Your performance would probably improve if you were tougher like a man", or relating conduct to the race of the employee or their religion;
- ♦ Disciplining an employee for taking off religious holidays appropriate to that employee's faith;
- ♦ Disciplining an employee for alcohol consumption when the employee suffers from the medical condition of alcoholism;
- ♦ Disciplining an employee for failing to meet elements of his or her job, when the failure is the result of a disability.

One paper put out by the Ontario Human Rights Commission contains the following statement on the issue of discipline and harassment:

The Commission recognizes the right of the employer to manage its workforce. In order to avoid the appearance of a code violation, it is important for the employer to make sure that when discipline (including termination) is imposed, it is done in a fair and consistent manner, within the organization's established policies and based on objective and quantifiable information. Additionally, the reasons for discipline should be consistent with the organization's established policies and history of terminating employees.

Example:

Mr. Smith, a white male, is constantly late for work but his supervisor has never warned him about this inappropriate behavior. A co-worker, Mr. Lyn, a Chinese male, was late twice and received a warning letter from the supervisor. There may be a perception on the part of Mr. Lyn that he is being treated unfairly by the supervisor because Mr. Smith never received a similar letter.

(See OHRC-*Human Rights at Work* at [www.ohrc.on.ca/english/publications/hr-at-work.shtml](http://www.ohrc.on.ca/english/publications/hr-at-work.shtml))

## 5. Conclusions Regarding the *Human Rights Code* and Employment

It is very important for employers to remember that there is an inherent power imbalance between employers and employees, which is clearly highlighted in the discipline process. Employers must be sensitive to how they discipline to ensure that the discipline is free of discriminatory conduct and is not driven by stereotypes.

Human rights law is based upon the principle that employment decisions should be based on the ability of the person to perform the job, and not factors that are unrelated to job requirements, qualifications or performance. Section 17 of the *Code* requires an employer to accommodate the needs of a person with a disability in the performance of the essential features of a job, unless it could be demonstrated that the needs of the person cannot be accommodated short of undue hardship on the person responsible for accommodating those needs.

## **G. RECOMMENDATIONS REGARDING DISCIPLINE**

Unless there are very clear grounds for termination without notice, where an employee is not performing up to standards, a form of progressive discipline is recommended.

Progressive discipline should be seen as a tool available to employers to assist employees in understanding that there is a performance problem, and should provide employees with a means to address the concern. The process should include increasingly formal discipline efforts designed to fully inform employees of performance concerns, as well as providing employees with feedback regarding their improvement or lack thereof. It is premised on the understanding that sufficient time will be provided to employees to improve their performance.

Progressive discipline should begin with the initial hiring of employees through clearly worded written employment contracts containing detailed job descriptions. In this way, employees know what they are to do.

Progressive discipline should never be driven by, or based upon inappropriate considerations, such as the sex of employees, their age or creed. If they are, then it is the employer that has the problem, not the employee,

and the employer faces the very real possibility of having that problem exposed through a Human Rights complaint.

Progressive discipline should not be looked upon by employers as a means of punishing employees, but is instead designed to assist employees in meeting their full potential. However, it should be understood by employers that not all employees meet job expectations, despite progressive discipline being implemented. In those situations, employers will be placed in a far better evidentiary position to justify termination of the employment relationship for cause.

Progressive discipline must be implemented in a fair and consistent manner. It must be blind to issues of color, creed or other, unimportant issues. Employees must understand that they will all be subject to it, if their work performance fails to meet employer expectations.

In carrying out progressive discipline, the following approaches may be helpful:

- ◆ Regularly gather data about the performance of employees. Maintain sufficient employment records and files. Reduce all complaints and concerns to writing;
- ◆ Regularly ask for input and provide feedback from employees about their performance and the requirements placed upon them in their jobs;
- ◆ Carry out regular performance reviews. In those reviews document the conversation, identifying past performance goals, and future goals;
- ◆ In a routine performance review, work with employees to jointly develop a performance plan to meet identified goals;
- ◆ If there are concerns about performance, a determination should be made, at the earliest possible stage in the process, if there are other issues which may be affecting performance such as illness, emotional stress, or workplace issues such as harassment. Employers should respond to these issues in a compassionate and assistive manner;
- ◆ Provide warnings in writing and ensure that they are placed in employee files. The warnings should be verbally discussed with the employee and the employee should sign a copy of the written warning confirming that he or she received it, read it and understood it;
- ◆ Where meetings are to be held, have two employer representatives available and present. Make sure that notes of the meetings are taken, and where possible, they should be reduced to a written memorandum, which should be presented to the employee for review. The employee should be

asked to sign the memorandum as accurately setting out what occurred in the meeting. Again, this document should be put in the employee's file;

- ◆ Where possible, employees should commit in writing to the changes that they are to make in order to improve performance. In other words, a form of performance improvement contract should be created, setting out reasonable timelines and performance measures to be met by the employee; and
- ◆ Make sure that the discipline process, where possible, is kept private and confidential between the employer and the employee. Co-employees should not have access to such records, which should be maintained in confidentiality by the human resources department.

## H. RECOMMENDATIONS REGARDING PERFORMANCE MANAGEMENT

Open, frank and fruitful dialogue is key for performance management systems to work. Such dialogue will hopefully meet the needs of employers and employees alike and lead to long and mutually beneficial employment relationships.

Performance management systems also provide a very valuable tool for addressing any allegations, which might be raised by disgruntled employees who are ultimately let go. It establishes a fair and thoroughly documented employment review process, where each side is given the opportunity to express their position.

It can also prove dangerous if not properly implemented. It leaves a very detailed body of documentary evidence, if it is used in an inappropriate manner.

As mentioned above, the *Code* is powerful, remedial legislation. A violation of the *Code* by an employer can prove damaging to an employer's reputation. Court decisions have established that employers can be liable for damages arising from the employment relationship, and inappropriate conduct by employers.

As such, the following recommendations are made to avoid legal difficulties in carrying out performance management:

- ◆ In creating an advertisement for a job, ensure that it complies with the *Code* and that no inappropriate criteria are introduced into the application;
- ◆ In carrying out a job interview, ensure that no inappropriate questions are posed which might be in violation of the *Code*;

- ◆ In setting specific job assignments ensure that criteria not relevant to the job and that might violate the *Code* are not introduced;
- ◆ In setting specific job assignments for employees, be aware of special needs, such as disabilities, which the employer will have a duty to accommodate;
- ◆ In carrying out performance reviews, ensure that the conversations are reduced to writing and clearly and accurately outline what was discussed;
- ◆ Ensure that no inappropriate issues are raised or considered in performance reviews, such as might be a violation of the *Code*;
- ◆ Do not share performance review results with co-workers. Maintain confidentiality over such records;
- ◆ Create clear policies regarding conduct in the workplace, including sexual harassment and discrimination policies;
- ◆ Treat all employees consistently;
- ◆ Performance measures must be consistent, and objectively sensible. Each employee should, when performing the same job, be subject to the same performance measures.

*This paper was presented as part of a Canadian Fundraiser 'Key to the Sector Workshop' entitled Not-for-Profit Performance Management Made Easy.*

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