

CANADIAN FUNDRAISER WORKSHOP
Not-for-Profit Performance Management Made Easy
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Performance Expectations and Employment Law
– Maintaining a Balance

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Introduction

Performance management systems offer:

- a means of facilitating dialogue between employers and employees
- a means of avoiding, or reducing, allegations of bad faith treatment of employees

The law provides some guidelines which govern the employment relationship and performance management systems in place

This talk will focus primarily on:

- General principles of employment law
- The interplay of Human Rights legislation with common law principles regarding employment
- The use of progressive discipline in performance management systems
- Termination of employees

General Principles

- All employment relationships are contractual
- In a non-union setting, *Employment Standards Act, 2000* (“ESA”) sets minimum standards that can’t be contracted out of

An employer may dismiss an employee with or without cause. Termination without cause require that an employer provide sufficient notice to the employee

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Termination Without Cause

- Where there is a written employment contract, the parties can negotiate the amount of notice an employee is to receive
- If there is no term written into an employment contract the ESA minimum notice standards apply
- The common law has significantly extended this principle and courts regularly award lengthy notice periods to terminated employees, especially in middle or upper management

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- Courts can extend the notice awarded to employees who have been subjected to a bad faith termination
- In certain circumstances, the employer’s conduct, pre- and post- termination, may affect the amount of notice given
- The common element is the presence of intent, malice or blatant disregard for the employee

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• **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**
- **Breach of fiduciary duty**

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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 include:**

- **Dishonesty – theft, fraud, etc.**
- **Intoxication**
- **Illness, if not temporary**
- **Insolence**
- **Incompetence**

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- **However the conduct must violate an essential condition of the employment relationship**
- **Employers must now meet a much higher test before having grounds to terminate for cause**
- **Employers must show a pattern of dishonesty or conduct that makes it impossible for the employment relationship to carry on**

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Poor Performance and Incompetence

- Employers can dismiss an employee without notice for incompetence or poor performance
- Just cause will exist if the employer has implemented a system of compassionate, meaningful and progressive discipline that does not result in an improvement by the employee
- Employers owe a duty to their employees to provide them with the opportunity and means required to improve their work performance

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Establishing Just Cause in Relation to Poor Performance

- For an employer to establish just cause, they must be able to show:
 - Reasonable and objective standards of performance which were communicated to the employee
 - Suitable instruction and supervision was given to the employee to assist them in meeting the standards
 - The employee was warned that failure to meet the standards would lead to dismissal
 - The employee was afforded a reasonable time to correct the situation

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- The employee was not capable of meeting the standards in spite of the employers efforts

Good Faith Treatment of Employees

- An employer must treat its employees fairly and with good faith
 - A discipline process which is haphazard or inconsistent may do more harm than good and may lead to increased notice, or damages for other causes of action, such as intentional infliction of nervous shock, being awarded

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Human Rights Issues
General principles Regarding Employment

The *Ontario Human Rights Code* (“Code”) is far-reaching remedial legislation which specifically focuses on the employment relationship.

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

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(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

Applications and Advertisements Regarding Employment

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*”

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Applications or advertisements should not reference

- 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

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

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Discrimination in Employment

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

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

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Harassment in the Workplace

Employers have an obligation to ensure that the work environment is free from behavior that could constitute harassment. An employer may be liable for harassment by supervisors, managers, and co-workers. Employers must be careful that comments made in a progress review or discipline procedure could not constitute harassment.

Examples of behavior 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.

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- 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
- Disciplining an employee in an inconsistent manner

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• **The Ontario Human Rights Commission has made the following statement on the issue of discipline and harassment**

- The Commission recognized 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.

(see OHRC – Human Rights at Work www.ohrc.on.ca/english/publications/hr-at-wrok.shtml)

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Conclusions Regarding the Human Rights Code and Employment

- There is an inherent power imbalance between employers and employees
- Employers must be mindful of discipline procedures to ensure that they are free of discriminatory conduct

Employers must accommodate the needs of a person with a disability in the performance of the essential features of a job

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Recommendations Regarding Discipline

Unless there are very clear grounds for termination without notice, a form of progressive discipline is recommended

Progressive discipline should

- Assist employees in understanding that there is a performance problem
- Provide employees with a means to address the concern
- Provide employees with feed back regarding their improvement or lack thereof

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- Provide sufficient time for employees to improve their performance
- Begin with clearly worded and detailed job descriptions

Progressive discipline should not:

- Be driven by, or based upon inappropriate considerations, such as the sex of employees, their age or creed
- Be looked upon by employers as a means of punishing employees
- Be implemented in an unfair or inconsistent manner

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

- Maintain sufficient employment records and files, with all complaints and performance concerns in 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 develop a performance plan to meet future goals

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- If there are concerns about performance, a determination should be made, 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 discussed with the employee, signed by the employee and the employer and placed in the employee file

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- Where possible, employees should commit in writing to the changes that they are to make in order to improve performance
- The discipline process should be private and confidential
- All employer records should be maintained in confidentiality by the human resources department

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Recommendations Regarding Performance Management

Open, frank and fruitful dialogue is key for performance management systems to work

Performance management systems can provide a valuable tool for addressing any allegations which might be raised by disgruntled employees who are ultimately let go when used properly

The following recommendations are made to avoid legal difficulties when employing performance management systems:

- Ensure that job advertisements comply with the Code and that no inappropriate criteria are introduced into the application

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- Ensure that no inappropriate questions are posed during an interview which might be in violation of the Code
- Try to start every relationship with a clear and detailed job description
- Ensure that criteria not relevant to the job and that might violate the Code are not introduced when setting job assignments
- Be aware of special needs, such as disabilities, which the employer will have a duty to accommodate

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- Ensure that the conversations in performance reviews 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

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- 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

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