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Discipline in the Workplace: Tips and Strategies for Employers

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Discipline in the Workplace Tips and Strategies for Employers

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What is the Purpose of a Progressive Discipline Program?

- Enforce the rules and standards that are valued by management
- Provide feedback and reaffirm expectations
- Fairness through consistency

Theory Behind Progressive Discipline

- Corrective and progressive
- Goal is prevention/behaviour modification

Misconceptions About Workplace Discipline

- Negative / involves punishment
- Inherently confrontational
- Time-consuming

Workplace Progressive Discipline Policies

- Do you have a policy or statement?
- Do employees know about it?
- Does it clearly identify expectations and consequences?



Steps of Progressive Discipline

- Counselling, training, feedback (non-disciplinary)
- Verbal warning
- Written warning
- Suspension/ Demotion
- Termination

What is the Appropriate Disciplinary Response?

- Depends upon the facts
- Misconduct v. Serious Misconduct

What is the Appropriate Disciplinary Response? - Misconduct

- Thoughtlessness/carelessness without intent
- No direct challenge to authority of management
- E.g. lateness, absenteeism, horseplay, longer than permitted breaks, poor work performance

What is the Appropriate Disciplinary Response? - Serious Misconduct

- Direct challenge to management's authority
- Insubordination
- Theft, fighting, bullying, willful carelessness
- Jeopardizing health and safety of fellow employees
- Divulging confidential information

What is the Appropriate Disciplinary Response? - Know all the Facts

- Nature of misconduct
- Employee history
- Nature of workplace



What is the Appropriate Disciplinary Response? - Know all the Facts

IMT Partnership [2006] O.L.A.A. No. 287

- Even where the employer has a discipline policy, “discipline should be based upon the particulars of each case”
- Discharge voided because employer applied discipline policy “in a mechanical fashion”

Obstacles to Implementing Successful Discipline Program

- Lack of knowledge, understanding
- Failure to act: *Ontario (Liquor Control Board)* [2005] O.G.S.B.A. No.94
- Uneven application of discipline

Obstacles to Implementing a Successful Discipline Program

- Failure to document
- Fear

Steps to Remember in Enforcing a Progressive Discipline Program

- Be informed
- Be clear
- Be fair
- Be consistent



Discipline in the Union Context

- What does the collective agreement say?
- Union representation at disciplinary meetings
- Opportunities to use union proactively

Documentation in Discipline

Documentation is one of the most effective tools for:

- Dealing with employee behaviour
- Preparing for potential litigation

The Three Rules of Documentation

Rule 1: Do it

Documentation:

- improves employee performance
- helps track employee work behaviour
- supports a termination for unsatisfactory work performance
- counters a discrimination charge
- helps improve the employer's position in arbitration or in court

The Three Rules of Documentation

Rule 2: Remember your audience

Canadian Union of Public Employees, Local 714 v. Fort Erie (Town) – No litigation privilege attached to investigation reports



The Three Rules of Documentation

Rule 3: Who, what, where, when, how

- Tell the story
- Be accurate and avoid exaggerations
- Avoid using inflammatory language which could lead to a discrimination or defamation claim
- Do not include personal opinions or biases

The Disciplinary Document

- All discipline, including verbal warnings, must be documented for the employee's personnel file and *must be provided to the employee*
- The disciplinary document must be timely

The Disciplinary Document

The document must:

- Describe what the employee did wrong
- Reference a the policy, rule etc. violated
- List any previous, related discipline
- State the consequences of further misconduct
- Offer to help the employee, if applicable
- Provide an opportunity for the employee to respond

Conducting an Investigation

PURPOSE = to obtain all the facts surrounding the alleged misconduct



Conducting an Investigation

- An investigation should be timely
- The investigation should be conducted fairly and objectively to obtain:
 - Background information leading to the relevant incident
 - Input from witnesses
 - The employee's response to the allegation(s)
 - The conclusion as to whether or not misconduct has taken place

Conducting an Investigation

The benefits of conducting a fact-finding investigation include:

- Provides a sound evidentiary basis for management action
- Minimizes labour relations issues
- Professionalism/credibility
- Opportunity to improve controls, identify systemic issues

Investigative Process

1. Preliminary Considerations
2. Fact-Finding Interviews
3. Disciplinary Conclusions



Preliminary Considerations

1. Who should investigate?
2. Should the Union participate?
3. Who are the witnesses?
4. Is the evidence secure?
5. Is outside help required?



Fact-Finding Interviews

- An investigative interview is the most valuable tool at management's disposal for gathering information about misconduct in the workplace

Fact-Finding Interviews

Some of the more important reasons for conducting interviews are:

- To gather direct evidence from the employee
- To gather evidence from third party witnesses about a misconduct

Fact-Finding Interviews: Witnesses

- The “suspect” employee should be interviewed first followed by other witnesses
- Witness interviews should be treated formally
- A refusal to provide information about a co-worker’s misconduct may be cause for discipline: *Vancouver Firefighters Union, Local 18 and Vancouver (City)* (2004), 126 L.A.C. (4th) 83 (Nordinger)

Fact-Finding Interviews: The Employee

- After speaking to witnesses and reviewing all the available evidence, the “suspect” employee should be interviewed again
- All the evidence gathered during the investigation stage should be presented to the employee

Fact-Finding Interviews: The Employee

The employee should be asked for:

- An explanation of the misconduct
 - In *CAW-Canada v. New Flyer Industries Ltd.* – maintaining a false explanation is a disciplinable “breach of trust”
- Evidence to support his/her story if his/her account differs from that of other witnesses
- Mitigating circumstances such as, provocation, personal/health problems

Common Interview Problems

1. Uncooperative Employee

- The prevailing view is that the employer has a right to expect employees to be truthful and honest when facts are put to them in an interview
 - *See Association of Postal Officials of Canada v. Canada Post Corporation*

Common Interview Problems

2. Uncooperative Union

- The Union representative attempts to answer interview questions for the employee
- The interviewer must be the only person asking a question and the employee must be the only person answering that question.

Summary and Disciplinary Conclusions

- Investigative interviews should always take place before discipline is issued
- Discipline should never be issued or even discussed with the employee during the investigation process

Consequences of a Flawed Investigation

- In *Tong v. Home Depot of Canada Inc.* (2004) – employer conducted flawed investigation; employee found wrongfully dismissed

Termination for Cause: Some Practical Considerations

What is just cause?

An elusive concept either:

- (1) Conduct of such a serious nature that it justifies immediate dismissal
- (2) Conduct which, although not excessive or flagrant, justifies termination when considered cumulatively with past conduct

Termination For Cause: Some Practical Considerations

What is just cause?

Port Arthur Shipbuilding Co. v. Arthurs (OCA)
1967

“serious misconduct, habitual neglect of duty, incompetence, or conduct incompatible with [the employee’s duties], or prejudicial to ... the employer’s business, or.... willful disobedience to the employer’s orders in a matter of substance...”



Termination for Cause: Some Practical Considerations

As the employer, some things you should consider when terminating for cause:

- Have you acted in a fair or reasonable manner?
- Have you completed a thorough investigation?
- Are there any *Human Rights Code* (such as medical issues) in play?
- Have collective agreement requirements been satisfied?

Termination for Cause: Some Practical Considerations

Things you should consider (cont'd):

- Is the evidence clear and cogent?
- Have you articulated ALL of the reasons for termination?
- Have the employee's possible *ESA* entitlements been considered?

Termination Considerations

Have You Acted Fairly and Reasonably?

- Has the employee been told of the allegations?
- Has the employee been given an opportunity to explain?
- Have you followed relevant company policies and procedures (if any)?

Termination Considerations

A Thorough Investigation?

- Have you obtained (signed) statements from witnesses?
- Have you considered the employee's explanation, if any?
- Have you preserved the evidence?

Termination for Cause: Some Practical Considerations

Are there any Human Rights Code Issues in play?

- Are there suspected drug/alcohol issues and if so, have you attempted to address them?
- Are there accommodation issues that may complicate matters?

Termination for Cause: Some Practical Considerations

Human Rights Code issues (cont'd)

- Is your case a “*hybrid*”? - i.e. mixture of voluntary behaviour (i.e. culpable behaviour warranting discipline) and involuntary behaviour (i.e. non-culpable behaviour requiring accommodation)



O-I Canada Corp. and United Steelworkers of America, Local 260G (2005)

- Although arbitrator concluded grievor's theft warranted termination, he concluded significant mitigating factors outweighed the gravity of the offence
- Grievor reinstated with numerous conditions

Termination for Cause: Some Practical Considerations

Have collective agreement requirements been satisfied?

- Have any time limits for taking action been met?
- Has employee been provided with Union representation?
- Does the collective agreement contain a “*sunset provision*” in regard to prior discipline?

Termination For Cause: Some Practical Considerations

Clear and cogent evidence?

- Does the evidence objectively support cause?
- If the evidence is circumstantial, can other explanations be ruled out?
- Can intent be proved?

Termination for Cause: Some Practical Considerations

Have all reasons been particularized?

- All reasons that employer intends to rely upon to justify termination must be cited at the time of termination (unless the rare exception of “*after acquired cause*” applies)

Termination for Cause: Some Practical Considerations

ESA Entitlements

- Distinction between “*just cause*” and “*willful misconduct*” relevant to *termination pay* and *severance pay*
- Accrued vacation is an “*earned*” entitlement which generally must be paid regardless of cause



Cases

McKinley v. BC Tel (SCC) 2001

- Dishonest behaviour does not necessarily give cause for termination
- Principle of “*proportionality*” applies
- To warrant termination for cause, dishonesty must be to “*a degree incompatible with the employment relationship*”

Cases

McKinley (cont'd)

2 step analysis:

- (1) Does evidence establish employee's deceitful conduct on balance of probabilities?
- (2) If so, does nature and degree of dishonesty justify dismissal for cause (i.e. does it cause breakdown in the employment relationship)?

Cases

Wallace v. United Grain Growers Ltd. (SCC) **1997**

“the manner in which employment [is] terminated is equally important to an individual's identity as the work itself”



Cases

Wallace (cont'd)

Factors considered relevant by court:

- “*Abrupt manner*” of dismissal despite compliments from superiors only days before
- Conscious decision to “*play hardball*” with unfounded allegations of cause maintained until day of trial
- Word got around, resulting in rumours of involvement in wrongdoing

Cases

Wallace (cont'd)

“The point at which the employment relationship ruptures is the time when the employee is most vulnerable and... most in need of protection...the law ought to encourage conduct that minimizes the damage and dislocation (both economic and personal) that result from dismissal.”

Cases

Wallace (cont'd)

“In the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive.”

Cases

Keays v. Honda Canada Inc. (OCA) 2006

“.. employer must show that the order was reasonable... [particularly if order was given] in the context of ...[accommodation of] employee's disability, a process fundamental to the dignity and equality of persons with disabilities in our society.”

Cases

Riverdale Hospital and C.U.P.E., Local 79 (2000)

- Allegation of patient abuse
- Employee sent home pending investigation but not offered union representation at this point
- Discharge void due to failure to ensure union representation at the outset

CASES

Riverdale Hospital (cont'd)

“The chain of events [leading] to the discharge... was irrevocably tainted by the Hospital's failure to comply with [the collective agreement] and provide the grievor with the opportunity to obtain the union representation to which she was entitled.”



Cases

USWA, Local 1005 v. Stelco (2003)

“...the Grievor [must] be forthright and cooperate with reasonable efforts to investigate the causes of the incident. Given the Grievor's actions before and [after] the explosion, one can have little confidence in his ability to recognize his mistakes and return to the workplace without legitimate concerns for the safety of the other employees.”



CASES

USWA, Local 1005 v. Stelco (cont'd)

“...where [an employee’s] acts involve the breach of an important safety rule exposing [others] to serious injury or risk of death, ...a disciplinary response emphasizing ...deterrence...will override principles of... progressive discipline ...and will justify a stern disciplinary response even for first-time offenders.”

