

Just Cause and Performance Management: A Legal Perspective on Employee Dismissal

The message from the courtrooms is crystal clear: when it comes to establishing just cause for performance-based concerns, effective performance management programs are critical. Employees must be given clear direction, clear warnings and opportunities to improve.

Shelley-Mae Mitchell, a partner with one of Canada's largest corporate law firms, Borden Ladner Gervais has been practicing in the employment field for 20 years. Her approach to performance management is straight forward: proper performance management can avoid lawsuits and significantly reduce risk associated with human rights cases.

Consider the case of *Coupe vs. Malone's Restaurants Ltd.* In this case, a manager was dismissed on the basis of alleged breaches of a zero tolerance policy for staff drinking on the job and liquor inventory policies. The outcome? You be the judge when reviewing the following facts:

- The zero-tolerance policy was unclear and was not uniformly applied. In fact, the occasional drink at work was common and the manager had on occasion been offered alcohol by a superior.
- After being spoken to the manager began to follow the inventory policy.

The Court found no just cause for dismissal, finding in particular that the zero-tolerance policy was not clearly defined and not uniformly applied. As for the inventory policy, the evidence established that the employee had followed the policy after being warned to do so. Perhaps most importantly, the Court found that the employee had not been given adequate warning regarding any policy breaches, misconduct, or performance problems. The warnings he did receive were unclear and unequivocal, and did not indicate that the employee's job was at risk.

PERFORMANCE MANAGEMENT AND THE COURTS

Simply put, effective performance management practices are necessary because, generally, employees cannot be terminated for cause without them. Performance management encompasses more than a once-per-year evaluation. It is a comprehensive, ongoing process of communicating expectations, monitoring performance (good and bad), and providing both formal and informal feedback.

Up-to-date, well-written job descriptions are the basis of effective performance management. Employees and managers must work together to prepare a performance plan that sets out goals and accomplishments based on the requirements of the job. Feedback should be provided throughout the year and regularly incorporated into the plan, so as to avoid the element of surprise during formal reviews.

In addition, effective performance management plans should:

- measure performance individually based on job description, goals, and objectives;
- be honest, accurate and constructive, always setting out areas where improvement is needed;
- ensure proper training and supervision is available for employees; and
- provide for constant, consistent feedback verbally and in writing, whether it is for poor performance or good performance.

ADDRESSING PROBLEM PERFORMANCE

When performance problems are identified, the employee must be clearly advised of the employer's concerns and put on a performance improvement plan (PIP). A PIP identifies areas of required improvement and assigns a reasonable time for correction. An effective PIP will always:

- clearly identify the specific performance deficiencies;
- establish clear performance expectations and goals;
- identify the specific steps to be taken to improve performance;
- offer the necessary training to improve performance;
- involve supervisory support for required assistance and feedback during the improvement process; and
- provide a final warning of the consequences if there is no improvement in performance.

A termination for just cause is more likely to be upheld by the courts if a well prepared and documented performance improvement plan was implemented and exhausted.

THE TEST FOR JUST CAUSE

Determining whether a termination for cause was justified requires a contextual approach: the courts will not consider the employee's conduct in isolation, but will consider several factors to determine whether the unsatisfactory performance justifies cause. Three main factors include: (i) the context and circumstances in question; (ii) the employee's length of service; and (iii) the nature or character of the employment.

CONTEXT AND CIRCUMSTANCES OF THE UNSATISFACTORY PERFORMANCE

In determining the context of unsatisfactory performance the courts will consider several factors, including:

- the type and severity of the unsatisfactory performance;
- the duration or frequency of the incidents of unsatisfactory performance;
- whether or not the employee has been warned about the unsatisfactory performance; and
- whether the employee has accepted accountability for the unsatisfactory performance, demonstrated improvement and established a likelihood of satisfactory performance in the near term.

LENGTH OF SERVICE

In determining a ruling the court will consider the employee's length of service. Isolated incidents of misjudgement or unsatisfactory performance by a long-term employee are less likely to provide just cause for dismissal than the same issues demonstrated by a short term employee.

CHARACTER OF EMPLOYMENT

The position held by the employee in question may or may not support dismissal for cause depending on the circumstances. Cause is more likely to be found for a management employee who flagrantly breaches a policy which he or she knew or should have known about. On the other hand, dismissal for cause is less likely to be upheld for a lower level employee, where performance issues have less impact on the employer.

Beyond the legal issues, effective performance management is an important tool that helps to guide and assess the contribution of every employee in an organization. By engaging employees in their own success, the performance management process is a proven method for improving employee performance and developing staff who serve you — and guests — with loyalty and dedication.

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