Helpful Legal Information for MAHCP Members

Employer's Must Have Just Cause to Discipline an Employee

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One of the most traumatic events in a person's life is being disciplined by their employer. Being represented by a union means that if it does happen Association members don't have to deal with it alone. Every collective agreement that the MAHCP has entered into contains a provision prohibiting an employer from disciplining or discharging an employee without cause. That means the employer retains the right to discipline or dismiss an employee but only where that discipline is as a result of the employee's own actions. **Where an employee is disciplined, the employee has the right to have a union representative attend the disciplinary hearing.** This article will discuss some of the issues at play when an employer attempts to discipline an employee for cause.

An employer is not usually allowed to dismiss an employee without first providing a warning or a series of warnings before taking drastic action. For example, one incidence of tardiness will not constitute cause for dismissal. A pattern of tardiness may constitute grounds for discipline and if that pattern persists, may ultimately, after first attempting to rectify the problem using lesser discipline, be grounds for dismissal. An employer should notify an employee that a certain course of conduct will result in discipline if the employer is to impose discipline.

The law is clear that an employee facing discipline should be provided with notice of that event. As stated by Brown and Beatty in Canadian Labour Arbitration:

> Of all of the conditions that collective agreements require employers to satisfy in exercising their disciplinary powers, none is more basic than giving the employee and/or some union official notice of what action it proposes to take.
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> …Where the giving of notice is regarded as mandatory and fundamental, communications late and/or not sufficiently precise may render the discipline void.

The arbitral jurisprudence is also clear that the discipline should be reasonable in the circumstances. Terminating a long-term employee in the peremptory manner for a failure to follow an established rule may not be reasonable. Arbitrators treat years of good service somewhat like deposits in a bank account; it takes a large withdrawal to justify the closure of the account. Just so with a long-term employee who has spent many years earning the loyalty of her employer, it would require very serious misconduct to wipe all of that loyalty away in one stroke.

Some arbitral authorities state that when imposing discipline, employers are not to rely on incidents, even if they showed culpability on the part of the employee, where no disciplinary action was imposed when it occurred. This position is sometimes taken even where there was an oral warning at the time. The authorities state that where there is no progressive system of discipline, the employer is not entitled to rely on earlier acts of misconduct where the employer did not impose any form of discipline at the time.

On the issue of timeliness of imposing discipline, the arbitral authorities are again clear that the penalty imposed for misconduct must follow in quick succession to the misconduct. Delay in imposing discipline can cause the employee to forget the facts surrounding the misconduct and so prejudice her when defending her actions. Delay can also cause the employee to feel that she "got away with it" and that the misconduct was condoned by the employer. Where the employer cannot provide an explanation as to why they did not impose discipline at the time of the misconduct, some arbitrators have overturned the discipline.

Where the employer wishes to impose discipline because an employee is not able to properly perform her duties, the employer has to follow certain steps in order to impose discipline. Brown & Beatty state on the issue of "Incompetence" that:

> In the words of one arbitrator, to substantiate any disciplinary sanction the employer must establish "not only a failure to meet reasonable standards, but also some degree of culpable behaviour on the part of the employee which gives rise to this failure".
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> …Generally, it has been said that to substantiate a non-disciplinary termination in such circumstances, the employer must establish the level of job performance it required, that such a standard was communicated to the employee, that it gave suitable instruction and supervision to enable the employee to meet the standard, that the employee was incapable of meeting the standard of that job or other positions presumably within her competence, and that it warned the employee that failure to meet the standard would result in her dismissal.

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On the issue of "Unsuitability", Brown and Beatty state:

> In instances of repeated unsatisfactory performance, arbitrators have often been inclined to sustain the discharge or such a person.
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> … what is required to be shown is a pattern of persistent behaviour or performance which on balance indicates that the employee is unsuitable or unsatisfactory. Further, if the employer is unable to satisfy the board of arbitration that the grievor had been fully apprised of the duties she was alleged to have carried out improperly, that she had received adequate training on the job, that the determination that the grievor was unsuitable was drawn against relevant and defined standards which had been communicated to her, or that it was the grievor rather than some other person who was responsible for the defective performance, any discipline imposed will not likely be sustained.

On the issue of warning the employee of discharge, the authorities take the position that the employer make the employee aware of the shortfalls it sees in the employee's job performance. Where the shortfall arises as a result of a factor outside of the control of the employee, the employer should not be warning the employee about disciplinary consequences if the job performance does not improve. Arbitrators have taken the position that "only if the employer advises him of its concern, will an employee have the knowledge necessary to induce him to seek whatever assistance is available to enable him to improve his performance." (Brown and Beatty)

None of the forgoing is to say that one, culminating incident can not give rise to dismissal or other severe discipline. If the incident is so drastic (an assault for instance) as to cause a breakdown in the employment relationship, the employer may have just cause to discharge on the basis of that one incident. This may be especially true in the medical field where an employee is directly responsible for the physical care of the public. Arbitrators have taken the position that where the employee actions directly affects the public and there are issues of public safety, where a lapse in judgment can have potentially grave consequences, there may be the ability on the part of the employer to summarily dismiss the employee. Arbitrators have however stated that: **"In the absence of such aggravating circumstances, arbitrators have uniformly rejected the claim that deficient work performance, by itself, merits dismissal."**

To sum up, if an employer determines that it will impose discipline of any kind the employer has an obligation to provide notice that discipline will be imposed. **The employer must have an accurate record of a course of conduct that warrants discipline and then must have outlined that the course of conduct, if it continues, will result in discipline.** Where discipline is imposed, it must be imposed on a timely basis and the union must be made aware of and given the opportunity to attend at the disciplinary meeting.

An employee can insure that they don't become the subject of unwarranted discipline by being alert to the rules that the employer has to follow in this regard. **If an employee receives an unwarranted reprimand that remains on their file, it may become the substance on which discipline is imposed in the future if another incident occurs.** When an employee is not sure of what their rights are they should talk to their union rep about the issue.

This paper is intended as an introduction to the topic and not as legal advice. If you require specific advice with respect to your situation, you should contact a lawyer.

This is one of a series of articles that will be appearing in future editions of the MAHCP News.