HOW TO DEAL WITH

PROBLEM EMPLOYEES

WRONGFUL DISMISSAL FOR HR MANAGERS

SEMINAR - FEBRUARY 8 AND 9, 1996

PRESENTED BY THE CANADIAN INSTITUTE

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AN OVERVIEW:

Human Resources Managers probably spend 75% of their time dealing with less than 5% of the employees in any organization. To some extent being a HR professional is like being a policeman: you spend a great deal of your time dealing with the problem employees and sometimes forget that the vast majority of employees want to be useful and do a good job.

Many if not most people spend the vast majority of their waking hours at their place of employment. What we do for a living is almost always an important part of who we are. Thus, for the vast majority of employees, if there's a problem with their work, and if they are not doing a good job, its usually the sign of some other kind of problem.

I have been involved in labour and employment relations for more than twenty years. Over the years I've learned that if you have many problem employees, you have other issues in your organization. There is a cause and effect relationship. Problem employees are often the first symptom of other problems within the Company.

Employees need to feel that they matter. A great deal of an individual's sense of self worth

comes from the work that she does. If the job that she does is not appreciated; if she is made to feel unimportant and impotent, she will unconsciously come to resent the workplace and the Company. You have created a problem employee.

THE IMPORTANCE OF GOOD MANAGEMENT:

As part of my practice I often give seminars on unionization and how to avoid it. The seminar is based on the simple proposition that companies get the Union they deserve. The best way to avoid unionization is to show the employees **by what you do as a Company (not what you say)** that they don't need a union in order to be treated fairly. They need to feel important to the organization. Therefore you have to ensure that every employee, regardless of how insignificant their role may be in the grand scheme, has a real opportunity to establish a sense of self worth from what they do.

If what John does for you gives him no sense of self worth, what he does is probably of no worth to you.

My experience has convinced me that the majority of problems with employees are caused by the way in which they are managed. Many managers are chosen because they are the best at what they do. They can't understand the less talented employee and seem determined to establish their superior ability. The job of a manager is to manage, and what they are managing is not a thing at all. What they are managing is people.

The job of managing employees is a lot like coaching a team. A good manager knows how to get the best out of each of her employees. To do this each one has to feel part of the team and important to the final outcome, whatever that may be. A team has all kinds of players. Some are stars, some have minor roles. If the team is going to do well all the players have to give the best they have. It's the coach's job to ensure that this happens.

In my judgement the real job of an HR professional is to ensure that the organization understands and works to achieve these fundamental principles. If you do that, and if your organization lets you do that, the problem employee will be more of a rarity and the problems will often be simpler to solve.

SOME FUNDAMENTAL PRINCIPLES:

The best way to deal with problem employees as it turns out, is the way you should deal with all employees. If the Company has well established principles and personnel policies, the problem employee will be appropriately identified and the problems isolated at an early stage. Like cancer, problem employees can be helped if their problems are detected quickly and not left to fester. Here are some suggestions.

1. Regular "on the level" evaluations:

Where an employer has an established procedure and where real evaluations are done on a regular basis, the problems with an employee are automatically recorded. If the company and the evaluators are doing their job, the problems are identified and dealt with as they arise. The problem of course is to ensure that honest straightforward evaluations are done in every instance. All too often advice is sought concerning an employee who "has always been a problem". On reviewing the file you find a series of glowing evaluations. In these cases I would suggest that it is the evaluator who is the problem.

2. Documentation:

Whether the employee is covered by a collective agreement or otherwise, documentation of problems is crucial. Unionized settings have one advantage over non-unionized with respect to employee discipline. To use the discipline record, all that must be proven is that the discipline was given. Because the employee has the right to grieve improper discipline, discipline that is on the record and has not been removed under the grievance procedure is presumed to have been valid. What the record must contain is proof that the discipline was in fact given.

At common law, the employer of course, can rely on previous warnings and discipline that was given to an employee. The difference between the unionized and the non-unionized employee however is that there is no presumption that previous discipline or warnings were valid. Because the employee has no right to grieve discipline or warnings as they are given, as part of a wrongful dismissal action it is open to the employee to challenge such documentation as being wrong or not fairly given. It is thus doubly important in a non-unionized environment that managers understand the importance of keeping detailed documentation of previous discipline and warnings. Many cases where the employer is attempting to prove just cause for termination are lost solely because the employer cannot demonstrate that the offending employee was warned or disciplined with respect to the behaviour in question.

3. An Appropriate Discipline Policy:

An appropriate discipline policy goes hand in hand with documentation. The one produces the other. The purpose of discipline, including warning and counselling, is to correct inappropriate behaviour. If the employer sets out, and is seen to set out, to help the employee to become fully productive and to correct whatever problems the employee is having, the employee is far less likely to commence an action against the employer when as a result of the employee's failure to take the appropriate remedial steps suggested by the company, he fails to meet the required standard.

An employer I acted for had an employee who simply could not seem to get to work on time. The employee was otherwise excellent, and would have been promoted to a managerial position but for this problem. The problem persisted until finally the employee was told he would be terminated if his punctuality did not improve immediately to an acceptable level. But the employee's manager went further. He offered on an interim basis to personally phone the employee's house in the morning to make sure he was up in time. The employee indicated that was not necessary. His punctuality improved immediately and he was later promoted. Later he was asked what happened to change his habit. He indicated that the fact his manager was prepared to personally help him change his ways so impressed him that he determined to not "let his manager down".

It is very difficult to resent someone (or the Company) when that person is clearly

attempting to help even though they may be issuing discipline. An appropriate discipline policy can reinforce other employment policies intended to empower employees and increase their sense of self worth because they are seen as fair and appropriate. They also have the effect of favourably impressing a trial judge in cases where they don't work and termination is required.

4. Employee Screening and Probationary Periods:

Many employers ask for references but never check them. A little time spent at the hiring stage can save a lot of trouble down the road. True problem employees - i.e. those that cannot be salvaged - are problem employees wherever they are. If you make it an absolute policy to actively check references your company will be aware of potential problems before you start.

You may decide to hire someone who has had problems elsewhere. Sometimes an under challenged person in a poorly run enterprise will be a problem employee. In a well run challenging environment they might be a star. If you check references, at least you will know what questions to ask yourself and the potential employee.

Many companies establish a probationary period and then don't use it. Establish it properly (in writing with specific notice provided and prior to hiring taking place), and then ensure that appropriate evaluations are done throughout the period. Let the employee know how he's doing as the probation continues. Don't wait until the end

of the probation period to deal with problems - that negates the whole purpose of a probationary period.

5. Regular Communication:

The rumour mill is a real killer for many companies. When you don't tell them what you are doing and why, rumours flourish. Regular communication, and by this I mean two way communication, builds community. Being informed gives the sense of being involved and therefore important to the enterprise.

6. Establish a Procedure for Fair Treatment:

Employees who feel they have not been treated fairly can become problem employees. Sometimes it's a way of getting even. If you have a stated "open door" policy or the equivalent, employees have an opportunity to deal with their sense of injustice. Often just allowing an employee's concern to be heard can be enough to prevent the resentment, even if the employee in the end does not get what she initially felt was due to her. The existence of such a policy is also further helpful evidence in a case where an employee raises complaints with the way they were treated leading up to a termination. If they have failed to take advantage of a remedial policy, that evidence can assist in establishing the validity of the employer's process.

WE'VE DONE EVERYTHING AND WE STILL HAVE A PROBLEM EMPLOYEE: WHAT NOW?

TERMINATION FOR JUST CAUSE:

The test for just cause has been stated many ways:

> "... something was done clearly inconsistent with the proper discharge of the employee's duties that reasonably indicates a risk of injury to the employer's interest through continued employment."

> "... misconduct inconsistent with the fulfilment of the express or implied conditions of service."

> "... serious misconduct, habitual neglect of duty, incompetence, or conduct incompatible with his duties, or prejudicial to the employer's business, ... or wilful disobedience to the employer's orders in a matter of substance."

The formulations are somewhat different in each case. The fundamental concept is the same. The matter must be serious and not just incidental. The breach of contract must be a material breach and it must go to the fundamental purpose of the contract of employment. Dismissal for cause is the exception to the employer's normal obligation to give reasonable

notice. The employer must have cogent, persuasive evidence that serious misconduct, or a serious breach of the employment contract has occurred in order to justify summary dismissal without cause.

It is easy to state the test in general. It is often much more difficult to apply the test in a given situation. Most of the time when a client phones to ask whether or not they have just cause to terminate, they want the answer to be yes. Often the client will tell you the facts with unconscious emphasis on the negative and with insufficient details concerning alternative explanations, or other relevant evidence.

In advising employers the advisor, be she a lawyer, or an internal HR professional, needs to dig and ask the difficult questions. Ask for the previous evaluations. If the employee is one of long standing carefully examine his entire employment record. Ask for **all** of the considerations on which the termination is based.

COMMON AREAS OF CONCERN:

Different problems tend to be prevalent at different times. To some extent the publicity which a particular kind of case receives seems to be reflected in an increase in the number of similar cases which arise following the event. To some extent the economy influences the actions of employees and this may be a partial explanation for this observation. It is not

at all uncommon to find an increase in the number of WCB claims arising just before an anticipated downsizing. From the myriad of possible problems you are likely to encounter, I have chosen a few which seem more prevalent in 1995/96.

1. THE CHRONIC ABSENTEE:

I have noticed a marked increase in the number of cases where I am asked advice concerning employees with chronic and variable "health" problems. These cases often involve overlapping jurisdictions - the Workers Compensation Act, The Human Rights Code, provisions of disability plans and the common law.

A common scenario presents as follows: The employee has been employed for a variable period (usually not long term). The employee has probably always been a marginal performer but in better economic days the level of performance, although not great, was tolerated. The Company has gone into leaner times and this person's new supervisor or manager has started to demand higher performance. This demand for higher performance results in episodes of absenteeism.

Sometimes the demands for better performance are a legitimate causative factor. Sometimes the employee is "playing the disability card". Sometimes the absenteeism is entirely legitimate and unrelated to the performance problems. These problems can be very difficult to resolve, in large measure because of the existence of statutory obligations which are often unclear. In appropriate cases, chronic absenteeism can provide just cause for termination

but the hazards of precipitous action by the employer can be very great.

What's a disability and what's not?

The definition of "handicap" under the Human Rights Code is very broad:

> "...any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, including diabetes, mellitus, epilepsy, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, or physical reliance on a guide dog or on a wheelchair or other remedial appliance or device ..."

On it's face the definition could be interpreted as including any kind of illness, regardless of its duration or severity. A series of cases has established that acute disease of the sort most people can expect to suffer from time to time is not intended to be covered by this definition. The cases have found that short term flu is not covered, but a heart condition is. A recent case, under appeal, found that deep vein thrombosis was not a handicap within the meaning of the code even though it caused disability for several months and could have been life threatening. Whether or not a particular period of absenteeism can or cannot be considered part of the record of absenteeism when considering termination is at this stage a very open question. To be on the safe side an employer should only consider absenteeism

caused by periodic un-related short term illness, and other types of absenteeism not related to illness or injury.

In addition the employer needs to be aware of the obligation to re-employ, and to continue to employ an employee who has been off work as a result of an accident or injury compensable under the Workers' Compensation Act. Often an employee is absent, and the issue of whether or not the absenteeism is compensable is under appeal. The right to appeal a decision under the Act does not appear to have any limitation period. Thus a termination can trigger an appeal by the terminated employee. Unlike the provisions under the Human Rights Code, the obligations under the WCB are time definite. In addition the issue as to whether an employee is or is not capable of performing certain work can be and is decided by the WCB. Although that decision can be appealed, a decision from the WCB that an employee is or is not capable of performing certain work provides a bench mark.

The Human Rights Code lacks any bench mark either with regard to the duration of the obligation, or with respect to whether or not an employee can or cannot perform certain duties. In addition, the Human Rights Commission has made it clear that they do not consider themselves bound by the time limits set out in the Workers' Compensation Act, even in the case of an illness or injury covered by that Act.

I would give some general suggestions for dealing with this difficult problem.

1. Always take steps which will later be seen as giving the employee the benefit of the doubt. Ask for medical reports. Don't accept a mere statement of "under my care, unable to work", ask for specific details.
2. Don't let the issue drift for long periods of time. Be in touch with the employee on a regular basis. Ask what is wrong and when the employee expects to be able to return. Keep records of your attempts to contact the employee and of the results when you were successful.
3. Consider obtaining independent medical advice even if it does not involve the employee actually being seen by the doctor in question. You may request the employee be seen by your doctor, but it is not at all clear you have the right to insist. However, if it is clear that the employer behaved reasonably, that will go a long way in protecting you whatever final decision you make.
4. Be aware of your statutory obligations under the Workers' Compensation Act, The Employment Standards Act, The Human Rights Code as well as at Common Law. As indicated, certain absences cannot be considered under the Human Rights Code, even though they would be considered under Common Law (or under Arbitral Jurisprudence under a collective agreement).

In my view the courts are coming close to adopting the test for innocent absenteeism as it has developed under Arbitral Jurisprudence. That test requires several components:

- An attendance record significantly worse than other equivalent employees. (NOTE: Recent court decisions have made it clear that considering absenteeism arising from a Handicap within the meaning of the HRC will vitiate an otherwise valid termination for absenteeism.)
- Evidence that the absenteeism was harmful to the enterprise.
- Evidence that the employee was warned that absenteeism could result in his termination.
- Be aware of the fact that although absenteeism can be just cause for termination in certain cases at common law, it appears that it cannot be just cause under the Employment Standards Act. Thus notice and severance would still be required to be paid. Where a collective agreement is in place it is arguable that the right to re-instatement under the collective agreement is a "better benefit" than the minimums under the ESA, and therefore if the employer has just cause to terminate under the collective agreement, there is no requirement to pay notice and severance even though the reasons would not amount to just cause under the Employment Standards Act.

2. INAPPROPRIATE OFF-DUTY CONDUCT:

Off duty conduct can justify termination. The off duty conduct must however have some real connection to on the job duties. Thus, an accountant convicted of fraud could be terminated in appropriate cases where trust of the employee was an essential part of the employment relationship. Recent cases have shown that long service of an employee is not only a factor in determining appropriate notice but can also be a factor in determining whether or not the conduct under review is sufficient to justify termination. A longer term employee is entitled to "additional support" and therefore a long term employee may not necessarily be discharged if he commits an offense which would justify the termination of a more junior employee.

Again, in my view we see the courts adopting the kinds of considerations that Arbitrators under collective agreements have used for many years. In the last ten years the number of wrongful dismissal cases in the courts has increased dramatically. Employees who ten years ago would not have pursued theirs rights in court now do so routinely. Previously, the majority of cases going to court involved relatively senior positions. That is no longer the case. Courts are often called upon to decide cases involving lower level management, or production level employees. It is therefore not surprising that they are examining and giving weight to similar criteria to those which arbitrators consider. This is a trend which in my opinion will continue.

3. THE CHRONIC UNDER-PERFORMER

The employee who is simply unwilling or incapable of performing at an acceptable level can be terminated for just cause. In this case the test at common law is almost identical to that under a collective agreement. The employer must show that the employee failed in a material fashion over an extended period to perform at an acceptable level. The employer must show that this inadequate performance was brought to the attention of the employee and that the employee was specifically warned that failure to improve was required. To be successful the employer should be able to show by documentary evidence that there were both clearly negative evaluations and an explicit warning.

Very often the major problem with performance cases is condonation. Commonly it is a new supervisor who finds the work of an employee unsatisfactory. Some have referred to this as the "new boss syndrome". Often it is the work and not the employee who has changed. In these circumstances, just cause will be extremely difficult to establish.

Common evidentiary problems involve glowing evaluations from a previous supervisor, a complete lack of evaluations over a long period combined with several unsatisfactory ones over a short period, or evaluations that are really not that bad. Many supervisors are reluctant to give a truly frank assessment because they feel it will so demoralize the employee as to make their work even worse. They then compound this problem by producing a rapid series of very negative evaluations over a short period of time. Before advising your management that they have just cause in any case make sure you have seen all

of the relevant documentation, not just the most recent. Remember, you either have just cause or you don't. At this point the doctrine of "near cause" continues to be rejected by Ontario courts.

4. THE SUBSTANCE ABUSER

Substance abuse, in appropriate cases can justify termination without notice at common law. Where ability to operate equipment, or drive, is an essential part of the job, substance abuse clearly creates an intolerable risk for the employer. Other cases are not as simple. Where a long term employee develops alcoholism, the court may tend to treat the matter as a disability requiring support from the employer. Arbitral jurisprudence has in some cases created an obligation on the employer to provide substance abuse assistance and only justified termination where such assistance had been offered and refused, or where such assistance was provided but to no avail.

It is also necessary to consider obligations the employer may have in these circumstances under the Human Rights Code. Substance abuse has been considered a handicap by some adjudicators and as such would require "reasonable accommodation" under the Code. The exact nature of the accommodation required will vary with the employer, and its resources, as well as with the individual employee concerned. In my view there is no easy answer to the question of substance abuse. Each case has to be evaluated on its own merits. The courts will in my experience expect an employer to provide assistance and warnings to an employee before finding the employer to be justified in terminating an employee. Again,

the cornerstone of your strategy should be to act reasonably and be seen to do so.

The case law draws a distinction between "intoxication" and "addiction". Intoxication on the job, not associated with addiction, can in appropriate circumstances, justify summary termination. You will need cogent evidence of intoxication and not merely having had a drink. The employer should fully investigate the situation before making a determination. Where the intoxication is caused by an addiction, the court is more likely to treat the incidence as evidence of a disability requiring accommodation.

5. SEXUAL HARASSMENT

Under the Human Rights Code, an employer has a legal obligation to take appropriate steps to ensure that employees are free from sexual harassment. The employer can be vicariously liable for the improper sexual advances of supervisors or fellow employees. Thus the employer has a real interest in ensuring that sexual harassment does not take place. Where the employer has a stated policy with respect to sexual harassment, and where an employee is in breach of that policy, the employer is justified in disciplining or in appropriate circumstances terminating an employee for even one instance.

However, it is not every case of sexual harassment which will justify termination. A recent case found that a long term male managerial employee was not dismissed for just cause even though he was guilty of sexual harassment. His long service, coupled with the fact that he stopped the offensive behaviour once requested to do so were factors the court

considered. One of the difficulties in this area is the divergence of jurisdiction. Several recent cases have found that a sexual harassment complaint is under the exclusive jurisdiction of the Human Rights Code and that the courts have no jurisdiction to consider a claim for damages arising from sexual harassment.

On the other hand, an employee terminated for engaging in sexual harassment will be restricted to the courts in most instances if he wishes to claim unjust dismissal. Sexual harassment claims before the Human Rights Commission are often settled without a finding of fact by an adjudicator. Cases that go the distance can take years to resolve. Meanwhile, the court action of the terminated employee is proceeding separately through the courts. Often the settlement of a serious complaint involves the termination of the perpetrator. Sometimes the termination of the perpetrator will satisfy the complainant thus avoiding the matter being referred to the HRC.

In these circumstances, several issues must be considered contemporaneously. When the existence of a complaint or possible complaint becomes known, ensure that a thorough investigation is conducted. Complaints of this kind are usually investigated as confidentially as possible but be aware that the fact of the complaint may become common knowledge sooner or later. It is necessary to balance the rights of the complainant with those of the accused.

I am aware of some employers who merely suspend an employee with pay at the instigation of such a complaint, and do not re-instate until the matter is concluded one way or another. While that may be a methodology available to public and large private employers, for most this option is simply too expensive. A short term suspension with pay while an expedited investigation takes place may be a good idea in many cases. However, the employer will have to make some determination as to the validity of the complaint, and the consequences to the perpetrator if the claim is established. Where the employer is simply unable to make a determination, you may be forced to allow the Human Rights process to proceed to completion before taking any positive steps.

It is clear that serious sexual harassment will justify the termination of the offending employee. I am aware of one case where an assistant deputy minister was summarily dismissed without notice, and with significant consequences with respect to pension entitlement. As in all cases the facts are crucial. The recent case referred to earlier indicates that not every instance of sexual harassment will justify termination without notice. It might be appropriate to issue discipline, or to ensure that the offending employee does not come into contact with the complainants. Some action on the part of the offending employee such as an apology coupled with some monetary compensation and appropriate discipline should be considered.

If dismissal is contemplated, it is important to ensure that the alleged offending employee has his procedural rights protected. Summary dismissal without an appropriate

investigation, and without the opportunity to defend himself may not only expose the employer to wrongful dismissal damages, but also punitive damages. In some instances the employer may wish to consult with the Human Rights Commission. This is one area where I would advise you to get professional assistance before proceeding.

6. PERSONALITY CLASH OR FAILURE TO FIT THE CORPORATE CULTURE

Courts have approved termination for cause based on a personality clash with fellow employees or with management. To succeed the employer must establish that there was a serious detrimental effect on the business. It is important, as with other performance issues, to establish that the employee was warned his job was in jeopardy and instructed as to what improvement was required. The employer will be required to give specific examples. It is not sufficient to call evidence concerning the employee's general attitude. In addition, actual evidence of business harm will be needed. Where an employee's actions are directed towards customers, the harm will be more easily established.

As in other performance related cases the employer will need to establish real misconduct or incompetence and not just mere dissatisfaction with the employee's performance. The employer should establish that the employee was warned, given specific instructions as to what was required, and what would not be tolerated, and given a timetable by which time improvement would be forthcoming. A specific warning that failure to improve will necessitate termination together with evidence of such failure will go a long way to establish cause at trial.

SOME OBSERVATIONS AND TENTATIVE CONCLUSIONS:

A review of recent articles indicates that some authors detect an increase in the number of successful defences in wrongful dismissal actions during the nineties. It is difficult to establish whether or not this indicates a true judicial trend, or merely an indication that employees are becoming more strident in their law suits. A clear trend that started in the mid eighties appears to be continuing in the nineties. More and more lower level employees with shorter service are prepared to resort to litigation to enforce their rights.

It was very common ten years ago to meet a new client who had no concept of "just cause", or "reasonable notice". It is the rare business today that has not experienced at least the threat of a wrongful dismissal suit.

Not all employers learn from previous mistakes, but many do. In part the increase in successful defences may stem from the fact that employers are becoming more sophisticated in their approach to problem employees.

The courts have also developed their expertise. A large percentage of all cases proceeding through the courts today are employment related. Most judges are now exposed on a regular basis to employment disputes. In my view this experience, coupled with the increase in litigation by lower management and production employees, has developed jurisprudence in directions similar to approaches taken by Arbitrators appointed under

collective agreements. The obligation to warn, the approach to longer service employees, and the requirement to provide assistance to employees in appropriate circumstances are all concepts well developed in the Arbitral Jurisprudence.

I expect this trend will continue. The underlying principles which guide Arbitrators when dealing with a grievance are not dissimilar to those which should concern a court. As the number of employment related actions proceeding through the courts increases, I would expect the jurisprudence of the courts to mirror, where appropriate, the developed Arbitral Jurisprudence. If you are in doubt as to how to proceed with a particular matter, and you can find no case law on point, I would suggest reference to the texts and case reports of Arbitrators. The variety of circumstances reported over the years is considerable and may be of real assistance in establishing an appropriate strategy for your particular circumstances.