Performance Management and Claims of Constructive Dismissal

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Overview

- Definition and purpose of performance management
- How to manage a poor performer
- Implementing a performance improvement plan
- Terminating for poor performance
- Claims of Constructive Dismissal
- Case Review
- Best practices for managing performance
- Takeaways
What is performance management?
Performance Management

• It’s the ongoing process of identifying and improving an employee’s performance goals to meet an organization’s objectives
• It commences from the first day of employment throughout the entire employee-employer relationship
Purpose of Performance Management

• To assist employees to set goals and achieve those goals with the direction of management
• It provides a structured plan for continuously improving the employee’s performance
• Ultimate goal is to promote and improve employee efficiency over reasonable timelines
How are you doing on your unspoken objectives?

My what?

I'm referring to the goals I have in my mind that I've never mentioned.

How are those going?

I'm totally nailing them.
Key Elements in Performance Management

• Employees are made aware of their job functions and understand their expected performance level
• Employer provides feedback to motivate and assist employees to achieve their goals
Key Elements in Performance Management

• Employees are provided with opportunities to receive training and development
• Employees have their performance evaluated
• Employees are acknowledged for achieving goals and meeting and perhaps even exceeding the organization’s standards
Benefits of Performance Management

- Both parties benefit when employees are managed effectively and when performance standards and expectations are outlined.
The Poor Performer

• Your employee may be a poor performer, if:
  • there is a high rate of mistakes being made
  • they consistently make more mistakes than the other employees in similar roles
  • the employee takes up too much of management's time and supervision
  • targets or requirements of the job are consistently not being met
The Poor Performer

- It is important to take steps to support the employee in improving his or her performance before taking the formal step of implementing a Performance Improvement Plan (PIP) or Performance Action Plan.
The Poor Performer

- Employer should evaluate the reasons for poor performance:
  - are there other issues affecting the employee at work or outside of work?
  - has the employee’s workload changed?
  - is the employee suitable for the job?
Performance Improvement Plan
Performance Improvement Plan (PIP)

• A tool that outlines the steps that an employee must take to improve job performance and sets out their goals
• Employers most often use this tool to monitor the performance of under performing employees
• A PIP allows the employer to document: which is important if there is no improvement in performance and if there is need to terminate for cause
Performance Improvement Plan (PIP)

• Employees that do not meet targets or have issues with their behaviour may be put on a PIP
• Legal risk/liability: when managers and employers use a PIP as a way to threaten an employee
Implementing a PIP

• Strategies and goals on moving forward
• Outline the consequences if the employee's performance does not improve
• Timeline for improving performance (reasonable and defensible)
Implementing a PIP

• It is important that the employee be advised on what they need to improve on and they are given strategies on how this can be done.
• If a PIP is used correctly, it will assist the employee in achieving his or her goals.
When can you terminate an employee for poor performance?
Incompetence and Poor Performance

- “Incompetence” is an inability to perform basic work functions as required by the employer
- The onus is on the employer to establish incompetence in order to terminate for just cause
Incompetence and Poor Performance

• *Boulet v. Federated Co-operative Ltd.* sets out principles to establish just cause termination due to incompetence or poor performance:
  • the performance of an employee must be gauged against objective standard;
  • employer must establish that the standard was communicated to the employee;
  • suitable instruction or supervision was given to allow employee to meet the standard;
Incompetence and Poor Performance

- the employee was incapable of meeting the standard;
- the employee was advised that failing to meet the standard would result in dismissal;
- the employee was given appropriate time to improve;
- employers who condone an inadequate level of performance may not later rely on any tolerated behaviour as grounds for dismissal;
- condoned behaviour is relevant if the employee fails to respond after appropriate warnings.
When can performance management lead to a constructive dismissal claim?
Examples

- Holding a specific employee to higher performance standards which may give rise to allegations of discrimination
- Using a PIP as a tool to disguise the planned termination
- “clear and reasonable opportunity” to correct performance
  \(\text{(Esther Brake v. PJ-M2R Restaurant Inc.)}\)
When can you Terminate for Poor Performance?

Two options:

- termination without cause - must provide applicable notice or pay in lieu of notice
- termination with just cause - provide no notice or pay in lieu of notice
Terminating for Poor Performance

- Establishing just cause for a performance based termination can be difficult
- Courts will assess whether the employee was provided the opportunity to improve
- Court will look at length of service, past performance, issues (if any) and selective targets for performance warnings and PIPs
What is Constructive Dismissal?

• When an employee has not been directly terminated from their employment, but they leave their employment due to fundamental changes to terms of their employment or circumstances
• To claim constructive dismissal, a reasonable person has to conclude that the change is made to a material term or condition of the contract in a fundamental way
• Change cannot be minor or trivial
Constructive Dismissal

• Fundamental changes may include:
  • significant decrease in compensation, or commissions
  • demotion in title, responsibilities or reporting relationship
  • hostile or poisoned work environment

• There may be legal consequences for an employer if they change the circumstances of the job without the employee’s consent
Constructive Dismissal

• Some employees may allege that they have been constructively dismissed because they have been subjected to harassment through the employer’s performance management process.

• Workplace harassment, however, does not include:
  • performance reviews
  • performance improvement plans
  • employee discipline
What is not Workplace Harassment Under *Bill 132*

A reasonable action taken by an employer or supervisor relating to the management and direction of workers or the workplace is not harassment.
YOU DECIDE
Esther Brake v. PJ-M2R Restaurant Inc.

FACTS:

• Esther Brake worked at McDonald’s (PJ-M2R Restaurant Inc.) for over 20 years
• From 1999 to 2004 she worked for PJ-M2R in various capacities
• In 2004 she was promoted to store manager and transferred to a McDonald’s location in Kanata, Ontario
• As part of her duties, she also managed a nearby McDonald’s located within a Walmart
Esther Brake v. PJ-M2R Restaurant Inc.

• From 2000 to 2010, Esther received an overall rating of “excellent” in all of her evaluations
• In November 2011, Esther received her first negative performance review and was told that she was being transferred exclusively to the Walmart location
• This location was a significantly smaller, under-performing store with fewer sales and staff
Esther Brake v. PJ-M2R Restaurant Inc.

• On April 16, 2012, Esther had a three-month review meeting and was informed that she was being put on a progressive discipline program known as Goals Achievement Process (“GAP”)
• She was advised that she had 90 days to achieve the goals established by McDonald’s
• Esther was not informed of her performance while on the GAP program in a timely way
• Although Esther should have received a 30-day review, she was only evaluated halfway through her 60-day period
Esther Brake v. PJ-M2R Restaurant Inc.

- On August 2, 2012 she was told that she failed the GAP program and that they needed to discuss her future
- Esther insisted she remain the manager, but was advised that she was being demoted and was offered the position of first assistant
- Esther’s salary would remain the same but her benefits would be inferior
Esther Brake v. PJ-M2R Restaurant Inc.

- Esther would also be expected to report to someone whom she had previously trained and supervised
- Esther refused the demotion and left
- She was then sent notice of her termination “for cause” in writing
- Esther claimed she was constructively dismissed
- The employer claimed she was terminated because she failed to meet the standards expected of her, despite their efforts to assist her in meeting those standards
You Decide

• Was Esther a poor performer?

• Was Esther constructively dismissed?

• What would be the most relevant factors in coming to your conclusion?
Decision

- The Court ruled that the GAP program was not properly implemented and was arbitrary and unfair.
- There was no objective basis for the goals set and they were in excess of those set by McDonald’s generally.
- The expectations were extraordinary and were unjustified and impossible to meet.
Decision

• Esther was not kept informed of her performance under the GAP program in the way the program stipulates.
• The Judge looked at the length of her employment and her loyal history of contributions to the company and held that she was entitled to expect more assistance in overcoming her shortcomings.
Decision

• The Judge also stated the following:
  • Esther was set up to fail from the beginning of the GAP program
  • The evidence of Esther having difficulty in 2011 and 2012 could not be looked at in isolation
  • The difficulties at the Walmart location preceded her arrival as manager and involved circumstances outside of her exclusive control
  • She was transferred to a failing branch and expected to turn it around and perform there in excess of the standards that had been accepted of her in the past
Decision

“I find the GAP program as implemented by the Defendant was less an instrument of help than it was a way to record Ms. Brake’s anticipated inability to meet the Defendant’s shifting expectations in order to justify a decision that had effectively already been made.”

- The Court ruled that Esther was constructively dismissed and was awarded damages representing 20 months’ compensation in lieu of notice, inclusive of statutory severance under the ESA.
Takeaways

• This case demonstrates the importance of ensuring that your performance improvement plan include standards that are objective, and that expectations are communicated to the employee and are possible to meet.

• A performance improvement plan should be used as a way to assist the employee with improving their performance, and not with the sole purpose of using it as a way to terminate the employee.
Best Practices for Managing Performance
EMPLOYEES WANT TO KNOW.....

WHAT AM I SUPPOSED TO BE DOING?

HOW WELL AM I REQUIRED TO DO IT?

WHAT DO YOU THINK OF MY PERFORMANCE?

HOW WILL I BE Rewarded?

HOW CAN I IMPROVE MY PERFORMANCE?
Best Practices for Managing Performance

• It is important to define the standard of performance required of employees
• Defined standards should be reasonable and should be clearly communicated
• Performance management processes are meant to be constructive
• Include your performance evaluating process clearly in your company policies so that all managers and employees are aware
Best Practices for Managing Performance

• Performance management, including evaluations, must be performed on a regular basis and employees should be provided with regular feedback on their progress.
• Failing to conduct regular performance reviews can leave the employee with the impression that their performance is acceptable and that it is condoned by the employer.
Progressive Discipline

• When an employee is not meeting their expected standards, a form of progressive discipline is recommended
• Discipline shouldn’t be looked at as a way to punish the employee but as a chance to allow them to improve
• The discipline process or performance management process must hold all employees to the same expectations and consequences, otherwise the employer could be liable for damages
Best Practices for Managing Performance

- Communicate concerns regarding performance as soon as they arise
- Keep concerns and warnings in writing
- Have warnings signed by employees
- Determine if there are outside causes affecting performance and assist employee, if possible
Best Practices for Managing Performance

• Implement a performance improvement plan where employees commit in writing to changes they intend to make
• Provide employee with the resources and opportunity to improve
• Keep discipline process confidential from other employees
Final Takeaways

- If the employee has been given the opportunity (reasonable time frames) and means to improve, but they do not do so, termination with cause can be defensible.
- A well implemented performance management system can help refute constructive dismissal claims.
- Ensure that employees with similar performance concerns are subjected to similar types of discipline.
Final Takeaways

• When employers do not have systems put in place for regular objective performance evaluations, they leave themselves open to possible constructive dismissal claims or allegations of discrimination

• Ask yourself, is this a performance improvement plan or performance management strategy to help an employee get better? or is it to create a paper trail to defend your intention to set up a termination?
Questions?