
Performance Management vs. Progressive Discipline... The Wisdom to Know the Difference

Jock Climie
Paul Lalonde

www.emondharnden.com

June 8, 2011

What Motivates Us

- 3 elements:
 1. Autonomy
 2. Mastery
 3. Purpose

- “Command-and-control” management methods are ineffective as motivators
 - Daniel Pink, *Drive, The Surprising Truth About What Motivates Us* (2009)

How to Fulfill the Drives that Motivate Employees

Harvard Business Review – Employee Motivation A Powerful New Model

DRIVE	PRIMARY LEVER	ACTIONS
① Acquire	Reward System	<ul style="list-style-type: none"> Sharply differentiate good performers from average and poor performers Tie rewards clearly to performance Pay as well as your competitors
② Bond	Culture	<ul style="list-style-type: none"> Foster mutual reliance and friendship among coworkers Value collaboration and teamwork Encourage sharing of best practices
③ Comprehend	Job Design	<ul style="list-style-type: none"> Design jobs that have distinct and important roles in the organization Design jobs that are meaningful and foster a sense of contribution to the organization
④ Defend	Performance-Management and Resource-Allocation Processes	<ul style="list-style-type: none"> Increase the transparency of all processes Emphasize their fairness Build trust by being just and transparent in granting rewards, assignments, and other forms of recognition

3

The Problem Employee

Discipline v. Performance Management

- Culpable (blameworthy) conduct
 - Employee **unwilling** to meet the required standard of job performance
 - Progressive discipline

- Non-culpable (innocent) conduct
 - Employee **unable** to meet the required standard of job performance
 - Corrective measures

4

Performance Management

- More than a once-per-year evaluation
- Comprehensive, ongoing process
- Communicating expectations
- Monitoring performance
- Providing feedback

5

Performance Management

- Performance Improvement Plans (PIPs)
- Labour intensive exercise
- Identifies areas of required improvement
- Provides employee with a reasonable time frame to correct
- Termination for cause is more likely to be upheld by a court where a well-documented PIP is used and exhausted

6

Sample Performance Improvement Plan

- Action Plan
 - Current performance, expected performance
 - Feedback, management and resource support actions
- Discussion Documentation
- Management Accessibility
- Performance Objectives
- Employee Acknowledgement

Sample Performance Improvement Plan

<input checked="" type="checkbox"/> New <input type="checkbox"/> Revised <small>Reference Number: Version: 1.0</small>	APPENDIX A: PERFORMANCE IMPROVEMENT PLAN (PIP) FORM	<small>Effective Date: Most Recent Amendment Date:</small>
---	--	--

Employee Name:		Location: <small>If Other specify:</small>
Manager Name:		
Next Level Manager:		

SECTION A: ACTION PLAN						
Areas to Improve	Current Performance <small>(include examples)</small>	Expected Performance	First Review Feedback Date:	Second Review Feedback Date:	Third Review Feedback Date:	Management and Resource Support Actions
1.						
2.						
3.						
4.						
5.						

Sample Performance Improvement Plan

SECTION B: DISCUSSION DOCUMENTATION	
1. Training: Sufficient training has been provided to meet the responsibilities related to the areas outlined in Section A.	Management Response <input type="checkbox"/> Yes <input type="checkbox"/> No Employee Response <input type="checkbox"/> Yes <input type="checkbox"/> No
Management Comments: Employee Comments:	
2. Management Accessibility: Opportunities to communicate with Management have been sufficient in regard to areas outlined in Section A.	Management Response <input type="checkbox"/> Yes <input type="checkbox"/> No Employee Response <input type="checkbox"/> Yes <input type="checkbox"/> No
Management Comments: Employee Comments:	
3. Performance Objectives: Performance expectations are realistic and attainable, and have been communicated to the employee prior to the commencement of this Performance Improvement Plan.	Management Response <input type="checkbox"/> Yes <input type="checkbox"/> No Employee Response <input type="checkbox"/> Yes <input type="checkbox"/> No
Management Comments: Employee Comments:	
SECTION C: ADDITIONAL COMMENTS	
Management Comments:	
Employee Comments:	

Sample Performance Improvement Plan

I, _____, acknowledge my obligation and responsibility to improve my performance in the focus areas identified in Section A above. I understand that I am required to participate in regular review meetings with my Manager on the dates outlined in Section A above, and that during these meeting the action plan and corresponding results for each focus area will be discussed. I further understand that if my performance does not meet the expected levels outlined in Section A above, and if it is not sustained, my employment will be terminated.

Employee Signature:	Date:
Manager Signature:	Date:
Human Resources Signature:	Date:

Incompetence/Poor Performance Establishing Just Cause

- Clearly defined level of job performance
- Level required was communicated to employee
- Employee provided reasonable supervision, instruction to comply
- Established employee unable to meet performance standard
- Reasonable efforts made to find alternate employment within competence of employee (arbitral)
- Issued reasonable warnings to employee that failure to meet standard would result in termination

11

***Bomford v. Wayden Transportation* (2010 – BCSC)**

Facts:

- 55-year old tugboat captain, 8 years and 2 months service, terminated for incompetence
- Employer suspended plaintiff after a landing incident
- Plaintiff was later terminated
- Employer raised earlier incidents which taken together justified termination for cause based on plaintiff's failure to respond appropriately to warnings

12

Bomford v. Wayden Transportation (2010 – BCSC)

Findings:

- Warnings were legally insufficient to lay a foundation for termination with cause
- What the employer did wrong:
 - Failed to maintain contemporaneous personnel records documenting management response to earlier events
 - Failed to provide formal, clearly articulated steps to improve
 - Failed to provide employee with time frame to improve, instead demanded immediate compliance
 - Failed to offer to assist with re-training or other remedial steps
- Court awarded 10 months reasonable notice

13

George Brown College and OPSEU (2010 – Bendel)

Facts:

- Grievor, program analyst for 27 years
- Employer dissatisfied with quality, quantity and timeliness of grievor's work since 2006
- Only modest improvement was noted since 2006
- Terminated for incompetence

14

George Brown College and OPSEU (2010 – Bendel)

Findings:

- Employer was justified to monitor grievor's performance
- Employer failed to comply with *Edith Cavell* criteria
- Failed to define expected performance standards
- To terminate an employee with 27 years service, required to:
 - State in objective terms what standard grievor had to meet
 - Prove that she failed to meet it
- Termination grievance was allowed

15

Yellowknife (City) v. PSAC (2010 – Power)

Facts:

- Grievor, lifeguard/instructor, terminated after 8 months of service for lacking essential lifeguarding skills
- During 8 months of employment – grievor passed Building Standards Test (BST) 3 times, but failed 5 times

16

Yellowknife (City) v. PSAC (2010 – Power)

Findings:

- Non-disciplinary termination upheld
- BST in place since 2005, reasonable job requirement
- Standard was communicated to grievor
- Grievor was provided with many opportunities to pass the test
- Worked with Pool Supervisor on required skills
- No other available work
- Provided with several written warnings
 - Advised twice that his job was on the line

17

Progressive Discipline

- Counselling/verbal warning
- Written warning
- Suspension (with or without pay)
- Termination
- Demotion
- Transfer

18

Can an Employer Suspend in a Non-Unionized Setting?

- May trigger a claim of constructive dismissal in certain circumstances
- Right to suspend
 - Expressed term in employment contract
 - In a policy/procedure manual properly accepted and incorporated by reference into terms and conditions of employment
- Where cause to dismiss, suspension may be permissible, particularly if part of a progressive discipline plan
- Unpaid suspension – more likely to result in constructive dismissal

19

Discipline Should Be

- Based on clear workplace rules and standards
- Timely – balanced with need for a fair investigation
- Supported by thorough and unbiased investigation
- Responsive to the circumstances
 - Severity of misconduct
 - Aggravating factors, i.e. prior record, premeditation, denial
 - Mitigating factors, i.e. length of service, isolated incident, remorse, rehabilitative potential

20

What is Just Cause?

- Contextual approach
- Assessing just cause, court considers:
 1. Nature and extent of misconduct;
 2. Surrounding circumstances; and
 3. Whether in the circumstances, dismissal is appropriate (proportional) result

21

The Steps in Establishing Just Cause

- Progressive discipline
 - Employee aware of concerns and expectations
 - Chance to correct their behaviour
 - Discipline as a method of correcting behaviour, not as a form of punishment
 - Follow your progressive discipline policy

22

Jzarevic v. Schaeffler Canada Inc. **(2010 – Ont. SCJ)**

Facts:

- 43 year old machine operator with 9 years service terminated for cause pursuant to progressive discipline policy
 - 4 step process – any 4 infractions within any 12 month period = termination
- Employee had only 1 discipline notice prior to his wife dying and becoming a single parent of 5 children
- Committed various infractions – absences, lateness, lapses in attention to quality control – 4 warnings in 12 months

23

Jzarevic v. Schaeffler Canada Inc. **(2010 – Ont. SCJ)**

Findings:

- No cause
- Mechanical application of 4-step process
- Important part of progressive discipline policy provided all suspensions and dismissals were subject to review by management and employees' committee
- No review occurred
- Principle of proportionality
- Several mitigating factors
- Court awarded 7 months notice

24

Standard of Cause ESA Adjudicators

- Exemption to ESA termination notice/pay
- Guilty of wilful misconduct, disobedience or wilful neglect of duty
 - Conduct is not trivial
 - Conduct has not been condoned by the employer
 - Onus is on the employer
 - *Reg. 288/01*
- Higher standard than just cause at common law

25

Just Cause v. Wilful Misconduct

Oosterbosch and FAG Aerospace Inc. (March 14, 2011 – Ont. SCJ)

- **Facts:**
 - Employee terminated pursuant to progressive discipline policy
 - Culminating incident, unsatisfactory work performance and falsification of records
 - Filed claim for wrongful dismissal damages and ESA termination pay and severance pay

26

Just Cause v. Wilful Misconduct

Oosterbosch and FAG Aerospace Inc. (March 14, 2011 – Ont. SCJ)

▪ **Findings:**

- Court found just cause for termination – persistent misconduct despite ongoing coaching and warnings
- Not entitled to common law reasonable notice
- Behaviour was not “wilful misconduct, disobedience or wilful neglect of duty”
- Entitled to ESA notice of termination and severance pay – \$25,000

27

Documenting Employee Poor Performance or Misconduct

- Documenting employee's performance over time is crucial
- Good documentation will support claim of culminating incident

28

Importance of the Disciplinary Investigation

- Conduct a thorough and unbiased investigation
- Documentation is important
- Legal consequences of a flawed investigation

Pate v. Township of Galway-Cavendish (2009 – Ont. SCJ)

Facts:

- Senior building inspector terminated – suspected of pocketing permit fees
- Town turned over the results of its internal investigation to the police. Did not give police evidence it found later clarifying that the inspector was guilty not of corruption but of doing a poor job with his fees paperwork
- Criminal charges filed. After a criminal trial, Pate was found not guilty on all charges

Pate v. Township of Galway-Cavendish **(2009 – Ont. SCJ)**

Facts:

- Town later admitted that the termination was wrongful and offered Pate 12 months' notice to settle his lawsuit
- Pate sued the Township for wrongful dismissal and malicious prosecution

31

Pate v. Township of Galway-Cavendish **(2009 – Ont. SCJ)**

Findings:

- Trial judge dismissed malicious prosecution claim
- Found employer's investigation flawed:
 - No advance notice of allegations or particulars provided
 - Employee told "discrepancies existed"
 - No opportunity to respond to allegations
 - Employer failed to disclose information to police
 - Would have resulted in no charges being laid
- Awarded \$279,000 in damages which included \$25,000 in punitive damages
 - In addition to 12 months notice previously settled between parties

32

Pate v. Township of Galway-Cavendish **(2011 – Ont. CA)**

- Pate appealed the dismissal of his malicious prosecution claim and assessment of punitive damages
- Court of Appeal allowed the appeal
 - Trial judge set threshold for proving malice too high
 - \$25,000 punitive damage award was too low
 - Ordered new trial on both issues

33

Bill 168 and Assessing Penalties for Workplace Violence

H.J. Heinz Co. and UFCW (2011 – Marcotte)

- Grievors dismissed for fighting in workplace
- Company had not been consistent in disciplining for fighting, physical assault
- Arbitrator noted Bill 168 reflects a “societal concern about violence in the workplace”
- Found appropriate that discipline be greater than had been imposed by the Company prior to Bill 168
- 6-month suspension

34

