Finders, Keepers – Getting and Hanging on to Good People

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Introduction

It may seem odd to start a talk about employee recruitment and retention with a story about an employee termination, but sometimes we can see the beginning better if we already know how it ends.

I was negotiating a termination package on behalf of an employer. We made an offer at the time of dismissal. The employee made a counter-proposal. We made a revised offer that picked up some elements of the counter-proposal. The employee made a further proposal to split the difference between the employee's counter-proposal and our revised offer. I advised my client that we had three choices:

1. we could reject the employee's further proposal and hold to our revised offer

2. we could accept the employee's further proposal with little or no change

3. we could make a further revised proposal that would fall short of the employee's last proposal

I went on to express my concern that to reject the employee's further proposal could encourage the employee to try her luck at litigation, which might eat up the difference in time and money, even if we were successful. My client rightly observed that the employee had the same dilemma, insofar as she might be successful in fighting for a better package, only to discover that the improvement was not worth the cost of achieving it in time and legal fees. I said that it was our move; we either had to hold and hope that the employee would fold, or we had to give the employee something new to think about. Then my client uttered these classic words, "why is it always the employer that has to give something to get the deal?"

The answer to that question is simple, and it is also key. The employer has to give, because we have it all. The employee has nothing to give back to us once we exercise our legal right to dismiss, except a promise that we will not end up in a legal dispute. This is not a balanced relationship – it was not balanced at the beginning and it is certainly not balanced at the end. For the most part, management is in control. If we initiate the termination, it is because we have decided that is in the best interest of the business. Even if the employee initiates the termination, it is often because we made choices along the path of employment that ultimately made a job elsewhere seem more attractive to the employee. Either way, management lives in the driver's seat.

The message that I want you to carry with you is that, right from the beginning, management has it all. Management is in control. Management decides when it needs to hire people, it decides who to hire and, most importantly, it decides what it will do to encourage people to perform at their best and to hang on to the best performers. As we can see from the above example, management decides when it will let people go, who gets chosen, and how far management is prepared to go to settle a case rather than fight.

The question is, what are you going to do? What are you going to do to find people, pick the best people available, train your people to perform at their best, hang on to the good ones and toss out the poor performers and bad apples?

I am an employment lawyer, but I also like to think of myself as a human resources professional. I have taught other human resources professionals for almost 20 years, since I was a baby lawyer. For me, given my background and experience, the best way I can help you in finding and keeping the best people is to tell you something about employment law. Our starting point is with the concept of management rights.

Management Rights and the Four Boundaries

Employment law is concerned with the management of human resources in the workplace. Employment law is built on a good practical understanding of human interactions. Good practices should be built on sound theory. It is important to understand key legal concepts that impact on human resources management, including

managing high-risk departures from the workplace. To be very clear from the outset, the employer will initiate most high-risk departures. In some cases, the departure will be initiated by the employee, but will fall into a high-risk category, either because it is a constructive dismissal or because the employee poses a threat of ongoing damage to the employer after the departure.

In my experience, even without a good knowledge of the law, a sensible and reasonable person will usually manage human resources in a lawful manner. Both common sense and the law require that your human resources decisions be exercised in good faith, and with the kind of respect and concern for your people that you would expect in an advanced democracy like Canada. Naturally, sensible and reasonable people will want to have an understanding of the legal parameters, which is where this book steps in.

The fundamental building block in human resources management is the concept of management rights. By this legal theory, which lies at the root of all Canadian employment law systems, management has the right to do whatever it wants, except as limited by four boundaries. These four restrictions on management rights are found in the common law, statutory law, the collective agreement or its equivalent in a non-union workplace[1], and self-imposed boundaries.

As a general rule, management does not have to seek permission to do whatever it wants. Instead, management has to see if it is restricted or prevented from doing what it wants by one of the boundaries.

To put this in a visual context, imagine that you are constructing a one-room building in an open field. You start with the field, stretching out as far as you can see in every direction. That is management in its original and pure state, free to do whatever it wants - what it thinks is necessary to achieve the business or institutional objectives. As we will soon see, this is not a normal building. The boundaries or walls, that management is forced to put up in a couple of cases, and that management chooses to put up in a couple

[1] In my earliest publication, *Managing Your Union-Free Workforce; A CLV Special Report* (Toronto: Carswell, a Thomson Company, 2002), I have described this as the "phantom" collective agreement. This paper is, to a large extent, excerpted from my first book, hopefully with a few improvements.

of other cases, are not solid or at least not throughout. There are wide-open spaces in each of the walls, such that management maintains considerable freedom in every direction. Looking out from the inside, the open field remains, but not in all places and not for all purposes.

Not only are the four boundaries on management rights not solid throughout, but also they are not entirely fixed. Indeed, all of the boundaries are subject to some adjustment through the intervention of management, even though they all remain to some degree as limitations on management's freedom to act.

If we were to proceed to construct the four walls of our building, the task of those of you who are involved in human resources management would be to find ways to achieve what you need to do within the building itself or to try to modify the limitations created by each boundary so that you can stretch beyond the walls that confine you. You can only learn to live within the boundaries or to transform the walls if you achieve an initial understanding of what they are.

The first part of this paper will focus on the basics of building the first wall, the common law.

Key Concepts of the Common Law of Employment

The first boundary is the common law, which is about 1,000 years old. When you are that old, you are not always easily understood, and that is certainly true of the common law of employment.

The common law is sometimes referred to as judge-made law. In Canada, the common law is derived from our British heritage as a country, and comes to us after almost ten centuries of adjudicating individual disputes. In particular, the common law has taken shape since the invention of the printing press at the end of the 15th century. With increasing ease, the ability to automatically copy text has allowed for the recording and general distribution of decisions. For the most part, the common law that applies to employment relationships is the law of contracts, although there are also elements of the

law of torts that can frame a dispute between an employee, the employer and sometimes individual representatives of the employer as well.

We note from the outset that, except as background, the common law has little or no application to unionized employees. With few exceptions, as soon as a worker is hired into a position that is part of the bargaining unit, the individual contract of employment is completely absorbed by the terms and conditions of employment set out in the collective agreement. The collective agreement then applies for the balance of the period of employment, including the termination of employment. Even as background, there are still important lessons to be learned from principles of the common law.

To the extent that it applies, the boundary created by the common law is that, if the employer does not treat employees in accordance with the centuries-old expectations of the court, then the employer may find itself at the receiving end of a legal action commenced by an employee, typically following the termination of the employment relationship. Such cases are normally referred to as "wrongful dismissals". Naturally, most employers in most cases would rather avoid the time and money associated with a legal action. For that reason, understanding the common law, and acting in a way that will minimize the possibility that a formal legal proceeding will come into play effectively creates a self-imposed boundary or restriction on management rights. In other words, in this context, management can do anything that it wants, but it is prudent to act in a manner that is less likely to motivate a dismissed employee to commence or pursue a legal action.

There are three significant components of the common law as it applies to your non-union employees. The first is that each non-union employee is employed under a contract of employment. The second and third components arise out of the expectation that employers should act as good corporate citizens, so that the second concept is that management should be reasonably fair and frank in its representation of the key facts of employment, both at the outset of an employment relationship and whenever significant changes are made; the third concept expects that management should treat employees with reasonable dignity and respect at the time that the employment relationship is

terminated, especially if it is terminated by a unilateral decision of management. In the last several years, this third component has led to a particular kind of claim, called *Wallace* damages, named after the 1997 decision of the Supreme Court of Canada that gave birth to the concept: *Wallace v. United Grain Growers Limited* [1997] 3 S.C.R. 701.

The Law of Contracts

The first and fundamental component of the common law that applies to non-union employees comes from the law of contracts. A contract is typically between two parties. It deals with an exchange, where each party gives to the other party something of value. The contract is formed by a bargain that is initiated by the offer of one party and concluded by the acceptance of the other, so long as each side considers that it has benefited from whatever is exchanged between the parties. There are often significant terms and conditions to ensure that the aspects of the exchange retain value for each party for the duration of the contract.

Every employment relationship that exists in Canada between an individual and an employer, from the part-time clerk at the corner grocer to the president of the largest bank, is a contract. In the bargain that is struck between an employee and his or her employer, the individual person is trading physical and mental attributes (brawn and brains), in varying degrees, in return for the compensation package that comes with a job, as well as some degree of security in employment.

Many people think of a contract as a formal legal document, complete with red seals and signed by quill pens. It does not have to be like that. It does not have to be written or it could be that only part of the contract is in writing. It could be made up of different parts, with one part (such as a letter of hire) specifically addressed to the individual employee and other parts (such as a benefits booklet and employee rules) generally addressed to all employees. Whatever is written to the individual employee could be a letter of hire or something more formal.

For non-union employees, the most contentious part of an employment contract has to do with termination of employment. The standard legal concept is that an employee is hired

for an indefinite period. Unless there is a clear contractual provision, which almost certainly has to be in writing, it will be assumed that an employment relationship has no defined end. Indeed, if there is nothing in writing about termination of employment, and if nothing like that was ever discussed with the employee before hire, then a court would be prepared to imply that the duration of the contract is indefinite.

From what is written above, it will be apparent that it is possible to have a contract for a defined term or task. A defined term means that the employment is for an actual time period and might include a renewal provision. A defined task means that the employment is intended to continue for the duration of a particular event, like the installation of a piece of equipment or the implementation of a computer system, or the opening or closing of a plant. In most cases, written contracts for a defined term or task do not cause legal problems at the end of the contract (the termination of employment) unless the contracts are poorly drafted.

With a contract of indefinite hire, employment will terminate in one of the following ways:

- for cause, in which case the employer typically argues that the employee has engaged in misconduct that is so serious that it constitutes a fundamental breach; typically, this suggests behaviour that is grossly dishonest or disruptive, sometimes to the point of being violent and even criminal; it can also refer to poor performance, especially if that has been documented and the employee has had a chance to improve;

- due to frustration of contract, including death or serious illness or injury, in which case the employee is no longer capable of meeting its side of the employment bargain, to provide physical and mental attributes to the employer on a reasonably regular basis;

- due to business failure, in which case the employees may retain claims in respect of a business that is bankrupt or in receivership, as well as potential claims against directors or other participants in the failed business;

- due to a fundamental change in the employee's duties or in other terms and conditions of employment, including but not limited to compensation - this is typically referred to as constructive dismissal;

- due to the employee's own resignation or retirement;

- in accordance with a retirement policy that is actively enforced, even if the employee would prefer not to retire; or

- as a result of providing reasonable notice or pay in lieu of some or all of that notice.

Legal issues may arise in any case of termination of employment. The most common legal claims have to do with the calculation of reasonable notice. In most cases, this really means a dispute about how much the employer has to pay in lieu of reasonable notice. Other common legal arguments arise when an employer claims cause for immediate termination of employment without compensation, or when an employee claims that s/he has been constructively dismissed.

It is important to understand that in most Canadian jurisdictions, subject to certain statutory claims, an employer is within its rights to terminate the employment of a non-union employee. When we talk of wrongful dismissal claims, it is not the dismissal itself that is wrongful. Rather, the wrong that is at the base of such a claim is that the employer did not give enough notice (or pay in lieu of notice), or, in cases of cause, frustration or constructive dismissal, that the employer did not give any notice.

It should be noted as well that a non-union employee could not make a common law claim and then simply sit back and wait for the money to roll in. The law expects that an employee, once terminated from active employment, will make every reasonable effort to find new employment. This is described as the obligation to mitigate damages. If an employee finds other employment, or if the employee fails to make reasonable efforts, then the employer involved in the termination of employment is entitled to an offset to the extent that the mitigation overlaps with the period of reasonable notice.

Indeed, even in the unionized context, mitigation is an important concept. An employee who has been discharged cannot simply file a grievance and hope for reinstatement with full back pay. A discharged employee has to actively seek alternative employment. It may be several months before an arbitrator can rule on the propriety of the discharge. In the meantime, it is expected that most employees will be able to offset their losses with other earnings.

The Law of Torts

The second applicable component of the common law comes from the law of torts. The law of torts has to do with how people treat each other. Unlike a contract, where two parties make an agreement to deal with each other in a certain way, the law of torts deals with common expectations and understandings that do not need to be part of specific agreements between people. In a civilized society, we expect that people will act in good faith, without violence, and with a proper respect for the property of other people. If these expectations are not met, individual offenders can be criminally prosecuted. They can also be the subjects of a separate civil lawsuit.

A tort is sometimes, but not necessarily, related to a crime. Many torts involve misconduct that could not be the subject of a criminal prosecution, but which is still widely expected to be subject to sanctions if other people are harmed as a direct and foreseeable consequence of the poor behaviour. In employment situations, employees could commence a legal action against the employer and, as we will see, sometimes other employees as well.

The law of torts has not been particularly significant in the employment context to date, but there have been some high profile and noteworthy court decisions, especially in the past twenty years. As a result, claims arising from the manner in which an employee has been treated, as opposed to the law of the employment contract, may become much more prominent in the future. This is certainly likely for non-union employees and there are lessons that all workplaces should take from these concepts of tort law.

The basic concept is the expectation of reasonable and frank representation of key facts of employment. The court expects truth, or at least the avoidance of deceit, and a certain degree of diligence when it comes to making representations about a job. It is not enough for employer representatives to be honest, they must also be reasonably well informed, so that they do not "honestly" misrepresent key facts because of a lack of knowledge.

Just as a house built on sand is doomed to fall, an employment relationship is fundamentally flawed if it is based on deceit, misstatements, misleading information or recklessness. Indeed, even if there is a written contract of employment in such a situation, it may be voided by the court, entitling the employee to significant remedies under both tort law and contract law without regard to the written document.

If a representative of the employer holds out that s/he has the authority to enter into an employment contract on behalf of the employer, then a special relationship is created with the job applicant in the context of the hiring process. This is also true for existing employees in situations of promotion or re-assignment. Representatives who are decision makers or who act in that manner have to expect that the targets of their representations will act on the basis of the statements made (and perhaps the information concealed) by the representatives. There is a special duty of care to be respected by these employer representatives. In enforcing this special duty, the court takes account of the fact that there is relatively little cost in ensuring that managers who hire or promote are working from a base of carefully prepared and correct information. By contrast, it would be extremely costly, if not impossible in many instances, for employees or prospective hires to verify the accuracy of the representations made by these managers.

A careful representative must not represent material facts to the employee or prospective hire that the representative knows, or ought to know, are wrong or misleading. No person can be expected to know the future; however, if the present reality of a company is materially different from what is represented to an employee or prospective hire, then it may be the foundation for a claim for damages. For example, if an applicant for a position at a plant in Toronto inquires about whether or not the plant is likely to remain stable or in a growth mode, then it could be a negligent misrepresentation to provide such

reassurance when there are in fact active plans to close the plant. The law has little interest in cases where no real harm is done.

To have a valid claim, the applicant in our Toronto plant example must act on the basis of the representation. The applicant must rely on the representation to his or her detriment. The reliance must be reasonable. A clear example or reasonable and detrimental reliance would be if the applicant were to leave secure and long-term employment only to find out six months later that the plant is closing. On the other hand, it likely would not be reasonable for an applicant to rely on information that the applicant knows to be untrue or at least questionable.

Law is dynamic. As this area of the law evolves, it may be that there will not only be a prohibition against deceit and negligent misstatement, but also a requirement to make representations about relevant facts that are within the knowledge of the employer, but would not be obvious to a prospective employee. Using the same example of the doomed Toronto plant, it may be that a job applicant has to be told about the likely future of the plant even if there is no such inquiry initiated by the applicant. Indeed, it may be that representatives of an employer who have recruitment and hiring responsibilities have to engage in ongoing due diligence about their own companies to ensure that current information about the employer that is relevant is communicated to a job applicant in a timely and proactive manner. Naturally, any such legal principle will depend on such particular facts as the position and the legitimate expectations of the prospective employee, as well as the degree of certainty of the information in question. You can imagine how tricky this could become if the decision about the plant is not final, or is not general knowledge. The court is often required to strike a balance. In this case, the balance would be between the interest of the employee or the prospective hire in being able to make rational career decisions and the employer's interest in protecting its confidential information and in keeping the costs of preparing such information within reasonable bounds.

In any event, and subject to the peculiarities that exist with any unique set of facts, the general rule for employers should be that their representatives should conduct themselves

in a manner that is always honest and reasonably frank and complete. This should be so in meetings with employees and prospective employees, and also in terms of the disclosure of material facts and information in situations of hire or promotion. Dishonesty and evasion could lead to exposure, not only for the employer, but also, on an individual basis, for the representative who is the cause of the problem. This could be particularly important in the event that a company has financial problems, as the dishonest or negligent representative could remain directly liable for damages.

The consequences of reckless or dishonest behaviour on behalf of representatives of the employer could be dire. There could be damages for lost income and job search expenses while the employee finds other employment, as well as losses suffered from relocation if the employee moved in order to take the job in the first place or has to move to find new employment. There also could be damages for emotional distress. As far as existing employees are concerned, there could be damages for lost opportunities if an employee chooses to continue employment as a result of statements made by a representative of the employer that are reckless or known by the representative to be untrue. Contractual concepts like probationary periods or specified notice periods or severance payments are irrelevant to these kinds of claims, whether by new hires or existing employees, and would have no limiting effect on the damages that could be claimed.

It is possible to contractually create a disclaimer that takes away the employer's responsibility for the truth of any representations made and puts the burden entirely on the new hire to be satisfied about the soundness of the employment relationship. At the very least, this disclaimer must be clearly and comprehensively drafted, and it should be brought to the new hire's attention before or simultaneously with making the representations, and certainly before employment is actually commenced. Having raised the possibility of such a disclaimer, we must comment that it is a poor start to an employment relationship to tell an employee that s/he should not rely on the representations that are being made by the manager responsible for recruitment and hiring. A court will have little sympathy for the employer in such a situation and would delight in finding flaws in the drafting or hiring process, such that a contractual disclaimer would not invalidate a claim in tort.

It is important for employer representatives to not be unduly fearful as a result of this discussion of the consequences of deceit or negligent misstatements. These are not trivial matters and claims cannot be founded on a base of normal communications. Employer representatives are entitled to be optimistic and opinionated about the employer. Expectations of future growth and prosperity are not deceitful and do not constitute negligent misstatements just because the anticipated or hoped for growth does not materialize, unless the expectations arise from assumptions that have no reasonable basis in fact. The concern is with present-day facts, which have to be honestly represented and reasonably factored into assumptions and future forecasts. The court has no concern with rosy futures that do not come to pass as a result of future events that could not have been foreseen. Representatives can still be enthusiastic salespersons. The court does not expect representatives to be prophets or to have reliable crystal balls.

Although employers are most vulnerable with non-union employees, given that the normal expectation is that unionized employees should pursue their claims through the grievance and arbitration procedure, there are two points worth noting:

1. At least to the extent that claims in tort could be made against individuals, the possibility remains that unionized employees could pursue a legal claim in the courts; and

2. In any event, you can be assured that arbitrators and labour relations boards have at least the same expectation of fair representations and honest dealing; indeed, it is perhaps even more highly developed.

Wallace Damages

The third component is a gloss that has been added to the common law of contracts. As a result of the *Wallace* decision, the conduct of an employer at the point of dismissal may affect a court's assessment of the damages owing to the employee.

As discussed above, in the absence of just cause and in the absence of an express contractual provision dealing with termination of employment, an employee is generally

entitled to receive reasonable notice of dismissal. Absent such notice, there is typically entitlement to damages in lieu of reasonable notice to compensate for the breach.

In the last quarter-century, the court has been encouraged by lawyers for employees to loosen the stranglehold of the traditional contractual notion of reasonable notice. Plaintiffs have sought aggravated damages for mental distress caused by the dismissal. Defendant employers have presented a variety of obstacles to such claims, including causation, remoteness, medical proof of mental distress and limitations in the court's ability to make reasonable inferences as to the intention of the parties in framing the contract. In the result, there were increasingly artificial legal arguments built more on hyperbole than on facts or a logical legal analysis.

With *Wallace*, the Supreme Court of Canada tried to cut through the nonsense while at the same time holding employers accountable for the dismissal process. The Court made it clear that aggravated damages may be awarded to a plaintiff only where the acts of the employer or its representatives that gave rise to the injury were independently actionable. The failure to give reasonable notice is not, itself, likely to be sufficient to cause mental distress that is actionable at law. Courts must be shown something more, such as a verbal or physical assault or a fraudulent misrepresentation.

Having made it more difficult for a plaintiff to claim aggravated damages, the Supreme Court of Canada in *Wallace* then provided plaintiffs with a way around the issue. The employer is probably not required, as a matter of contract to act fairly and in good faith in making dismissal decisions, and the act of dismissal by itself does not likely create a tort. That said, and probably as a matter of public policy more than legal theory, the Court determined that the period of reasonable notice could be extended in situations when the employer demonstrates bad faith or dismisses an employee in an unfair manner that causes mental suffering for the employee. In other words, if the employee can provide compelling evidence of mental suffering on the one hand and bad conduct by the employer on the other, the employee does not have to worry about the legal obstacles that employers have relied on in defence of claims for aggravated damages.

Although it has cleared up much of the mess caused by the push for aggravated damages, *Wallace* has introduced a new element of uncertainty and potential for judicial creativity that has not been welcome news for employers. Absent a clear contractual provision, calculating damages in lieu of reasonable notice always has been more art than science. Now it is more so, as plaintiffs will routinely claim *Wallace* damages, even on the flimsiest facts. A *Wallace* claim creates one more bargaining chip and one more obstacle in the settlement process.

Although the law is not entirely settled in this respect, it is at least arguable that *Wallace* has no application in cases where the notice period is contractually agreed. That is, when the employer has entered into a pre-employment or (less clearly) a pre-promotion contract with a new hire or employee that sets out the notice period or payments to be made in the event of dismissal, then the court should have no role to play in determining the reasonable period of notice. As such, the use of well defined notice periods in written employment contracts should become increasingly popular with employers wishing to prevent the courts from using *Wallace* to increase the period of reasonable notice. Unfortunately for employers, given what we consider to be a rather uncertain legal basis for the policy-driven *Wallace* doctrine, we expect that the court will remain open to invitations to apply *Wallace* even in the face of a clearly drafted written contract.

Limitations on Management Rights: Three Other Walls

As noted near the outset of this paper, the common law is only one of four walls that you have to construct in order to properly understand the exercise of management rights within prescribed and commonly understood limits. The other three walls are employment statutory laws, the private laws of the workplace (including, policies, procedures, rules and practices, and any collective agreements with unions), and the unique character of the workplace (including history, character, products and services, objectives and budgetary constraints).

Whether at the beginning of employment or at the end of employment, the exercise of management rights must take place with a clear view of the four surrounding walls and

an understanding of the limitations and costs imposed by these boundaries. These limitations on management rights are equally applicable throughout the course of employment. The remainder of this paper will examine two significant areas of human resources management that directly address the objectives of getting the most out of your employees and retaining good employees. These two areas are performance management through the use of a corrective action plan (CAP) and attendance management. As we will see, the management tools in each case demonstrate how the management right to enforce good performance and good attendance is limited by the four boundaries described above.

Corrective Action Plan

The implementation and administration of a corrective action plan ("CAP") or system of progressive discipline can be a difficult and unpleasant responsibility. Certainly, it can be the most obvious aspect of the management team's interaction with hourly workers.

The purpose of a CAP is to provide management with a system to help maintain the workplace rules and the standards of behaviour and performance that are considered to be necessary to ensure the orderly and efficient conduct of the employer's business. The rules and standards must be job-related or have a solid operational and business basis. They must be fully communicated to the workforce or generally understood as normal community standards. Normal standards would include treating fellow employees and the employer's property with respect and care. The workforce must also know that failure to conform to the standards or to obey the rules in the workplace will lead to corrective action at a level that will be determined by the employer to be appropriate after consideration of all relevant facts and circumstances, including previous discipline.

At the risk of being obvious, a CAP only works in any particular situation if there is something that can be corrected. If an employee is doing his or her best, but simply lacks the qualifications, skill, ability (including physical ability) or intelligence to perform the job at the required standard, then the best CAP in the world is not going to be much help. There are other actions that can and should be taken in such situations, and we will consider them further below, but they are not in the nature of a disciplinary system.

Whatever the situation, whether there is something to correct or the employee is simply unable to perform at the required standard, it is important that the management team should be committed to take appropriate action and to display reasonable consistency in doing so. If a supervisor is not prepared to enforce adherence to a rule or standard, s/he is condoning its contravention and, as a result, so too is the entire management team. In other words, the actions of each individual member of the management team are, in effect, the actions of the entire team. There is no way for a supervisor to act in isolation.

Discipline is supposed to be corrective in nature, which is why I suggest calling your discipline system a CAP. It is not punitive. Members of the management team are not meant to be the moral conscience of their employees, they are simply meant to take reasonable measures in supervising employees to achieve the performance that management considers to be necessary in order to achieve operational objectives. In essence, the purpose of the CAP is to help create more efficient and more effective employees, for the benefit of the organisation and for the benefit of the employees themselves. Most importantly, CAP is designed to encourage employees to perform at the standards established by management. The primary purpose should not be to create a paper trail to justify a dismissal for cause, although that may be the result if the employee does not improve performance in response to the corrective actions that are taken.

CAP Fundamentals

CAP is based on a fundamental principle of minimum force, which means that the employer should take the least serious corrective thought necessary in order to achieve the objective of appropriate behaviour or improved performance. In this way, corrective action is also progressive. When an employee persists in inappropriate behaviour or poor performance following corrective action, then the original action was not sufficiently strong. As a result, progressively more severe corrective sanctions are imposed in order to reinforce management's concern, as well as to provide the employee with ample opportunity to improve before the final act of dismissal.

Here is what a CAP framework looks like for employees who continue to demonstrated misconduct or poor performance relative to an employer's reasonable expectations:

Step 1: oral counseling

Step 2: Verbal warning with memorandum to file (note; although an oral warning is a step up from oral counseling, this still may be insufficient for such situations as safety violation, threats or violence, or human rights violations)

Step 3: written warning

Step 4: one-day suspension without pay

Step 5: three-day suspension without pay

Step 6: five-day suspension without pay, with a clear and final warning that dismissal is next

Step 7: dismissal for just cause, without notice, payment in lieu of notice or any other kind of termination pay.

There are a few points that bear noting from the above:

- depending on the seriousness of the infraction, you would not have to start at Step 1 and you could skip a step; indeed, the most serious infractions could lead directly to a dismissal;
- in most cases, I believe that suspensions should be without pay in order to have the desired impact; it is preferable if you make this clear in the CAP policy itself, which should be brought to the attention of new employees;
- a non-union employee could sue if dismissed under Step 7, but an employer's defence is made much stronger if it uses a CAP such as the above framework.

Many workplaces would find it helpful to create a CAP form, such as this example:

[Employer logo]

CORRECTIVE ACTION PLAN

Name of employee: _____ *Date:* _____

Description of incident: _____

_____

_____

Applicable standard(s) or rule(s): _____

_____

_____

Date and level of prior corrective action: _____

_____ _____

Corrective action in this case: _____

Date/shift of return to work (if applicable): _____

- **This corrective action will remain on your record for two years and will be removed after that time, provided that no other corrective action is required in the meantime OR This corrective action will remain on your record indefinitely.**
- **Please be advised that further situations that require corrective action could lead to more severe levels of corrective action up to and including dismissal for cause.**
- **Please contact your supervisor if you have any questions.**

Signature of Supervisor/Manager: _____ *Date:* _____

Name and Position of Supervisor/Manager: _____

I have received and read this corrective action: _____

Employee's Signature

CAP Levels

For ease of recollection, the seven steps from the above CAP framework can be compressed into three basic CAP levels:

1. *Warnings: oral counseling, verbal and written warnings:*

- **Oral counseling** is normally used for a first offence or where the facts and circumstances indicate that more severe CAP levels are not warranted, such as when a normally punctual employee arrives late for work.

- Oral counseling is sometimes thought of as a kinder, gentler form of oral warning. It is typically one on one and often very brief. In the best meetings, the worker would be invited to recommend a solution for the problem.

- Verbal warnings are more direct and focused – "this particular activity does not meet our standards, it must be corrected or more serious consequences will follow, let us work together (management and employee) on how to correct the conduct or improve the performance)".

- A cautionary note regarding oral counseling and verbal warnings: supervisors should generally avoid one-on-one meetings with employees behind closed doors, (except perhaps if the office is a windowed office) and especially if the employee is of the other gender. In a verbal warning session, it is good form in any event to have a second member of the management team in attendance.

- Although no official notice of the incident is placed on the employee's file if oral counseling occurs or a verbal warning is given, the supervisor should retain some form of record for future reference in the event the employee does not correct the sub-standard behaviour - a simple note should do, recording the employee's name, the date of the discussion and a brief summary of what took place.

- If the supervisor uses some kind of form or a memorandum to file, especially following a more formal meeting to deliver an verbal warning, then a copy should be provided to the employee (this is sometimes referred to as a "written verbal").

- A written warning is normally issued when the oral counseling or warning has not elicited the improvement required of the employee and another infraction of the rule has occurred. Therefore, reinforcement of the warning is required. It may also be issued for a first offence that warrants a sanction more severe than an oral reprimand, such as breaching a relatively minor safety rule or a heated verbal altercation with a co-worker.

- A written warning should document at least the following five points:

  (i) briefly describe the misconduct (follow the standard tools of reporting – who, what, why, when and where);

  (ii) identify the standard or rule that was breached;

  (iii) list any prior warnings;

  (iii) indicate the corrective action selected (i.e. written warning); and

  (iv) warn of the consequences of continuing or repeating the behaviour: that further corrective action would follow, up to and including dismissal.

- One copy of the warning goes to the employee; a second copy is retained on file.

3. *Suspension without Pay:*

- A suspension without pay is normally imposed when an employee persists in unsatisfactory conduct or behaviour, even after repeated efforts by management to have the employee correct the sub-standard performance. A suspension also may be imposed for a first occurrence of a serious act of misconduct, such as fighting on the job, insubordinate behaviour, and more serious safety infractions. Written

confirmation of the suspension should be provided to the employee in much the same form as a written warning; a second copy is retained on file.

- I suggest using odd-numbered suspensions of one day, three days or five days. That way, if the employee complains about the severity of the suspension and additional mitigating facts are identified, then you could roll-back the corrective action without having to return to the prior level of corrective action taken. A progressive CAP could repeat a level, but it should never go backward and it should generally go forward, especially once you are at the level of suspension.

- I see little point in a suspension that is longer than five days. Unless there are special circumstances, or you are agreeing to reinstate an employee, subject to time served, five days should be plenty as the most serious corrective action short of dismissal, especially when combined with a clear final warning.

4. *Dismissal:*

The following discussion about dismissal is entirely within the context of the CAP. As such, it contemplates two kinds of situations:

- The first kind of CAP situation arises from progressive discipline, in which a final incident, combined with a record of prior discipline, is justification for dismissal of an unsatisfactory employee.

- The second kind of CAP situation is a single incident discharge arising from a particularly serious act of misconduct.

Earlier in the paper, we explored different aspects of claims for wrongful dismissal, which arise from terminations of employment that are not for cause. There was also reference to a frustration of contract, when an employee is unable to continue in employment, usually due to a disabling condition. We will summarize these various kinds of dismissal situations below, following the review of the CAP.

Here are the key points that deal with dismissal under the CAP:

- The dismissal of an employee will normally take place after all efforts at correcting poor behaviour or sub-standard performance have failed. In some cases, the act of misconduct is of such a serious nature that management feels that it is left with no other option. In those cases, a dismissal for cause may issue, even though it is a first offence; examples include, a serious breach of trust, such as theft or fraud, significant sexual or racial harassment, or an employee who physically assaults a manager or attacks another employee with a tool or weapon.

- In a non-union workplace, there is a very small risk that an employee could try to argue that an unpaid suspension amounts to a constructive dismissal and a somewhat larger risk that there could be a statutory breach (such as a reprisal complaint) somewhere along the line. Those risks aside, for the most part, the only real likelihood of a legal claim is at the point of dismissal. As a result, until the very end, a non-union employer is almost unfettered in its use of a CAP.

- With freedom comes responsibility. To avoid alienating the workforce, the employer should administer the CAP in a consistent and reasonable manner. Individual decisions to correct behaviour or improve performance should not be arbitrary or discriminatory and should be executed in good faith, with proper regard for the individual employee. Because perception is so important to an effective disciplinary system, an employer should strive to appear fair and balanced in its approach.

- As would be usual for any earlier step of the CAP, when imposing dismissal, the decision-maker and another member of the management team should meet with the employee to deliver the bad news and the reasons for it. Written confirmation also should be delivered to the employee either at the meeting or promptly afterwards, using the format first described above for a written warning; a copy of the letter should be placed on the employee's file.

- As an alternative to dismissal, or as a possible settlement, you may consider continuing employment or reinstating an employee subject to conditions, which always should include a monitoring period and pre-scheduled review meetings.

When Corrective Action is Appropriate

As noted above, there is no point in taking corrective action at all unless there is something to correct. As subsequently discussed, if there is a decision to take corrective action, then there are three basic levels that could apply and at least a couple of different steps at the first level of warnings and the second level of unpaid suspensions. The employer's response to a first offence may vary according to the seriousness of the misconduct. Similarly, if an employee has previously received corrective action, the facts and circumstances of a current incident may indicate that it is warranted for the employer to jump to more serious corrective action rather than simply proceeding to the next step.

Unless penalties for breaches of established rules and standards are specified by the employer's policies, procedures or rules, decisions regarding the appropriate level of corrective action always will involve a degree of subjectivity. In the pursuit of consistency, you will want to minimize this inevitable subjectivity through a suitable investigation of the facts and circumstances of each case. Keep in mind that we are not talking about anything like a criminal investigation, except in those situations where there has been a serious event like theft or assault, in which case the police may become involved in any event. Those exceptions aside, we are usually talking about simple workplace misconduct – poor performance or a failure to meet standards. For the most part, the processes of investigation and decision-making should be straightforward and prompt – perhaps taking only a few hours or, more usually, a few days.

As well as any policies, procedures or rules you may have regarding appropriate levels of discipline, there is one particular situation where the level of corrective action may be pre-determined. If an employee is subject to a serious suspension or is given another chance through reinstatement to the workplace following a dismissal, that last chance should be accompanied by a formal settlement, which should include detailed terms and conditions for reinstatement or continued employment. This is often the case with non-disciplinary absenteeism situations (further considered below), as well as in situations that involve substance abuse. Each set of terms and conditions will be based on individual facts, but plans for ongoing employment should have at least these features:

- A threshold requirement to go through rehabilitation in substance abuse cases.
- A requirement for ongoing medical treatment and reporting and, in substance abuse cases, post-rehabilitation care (such as group meetings, like AA).
- A requirement to avoid the originating problem (such as drinking, failing to take prescribed medication to control a permanent condition, or compulsive gambling).
- A requirement to follow applicable attendance procedures.
- A minimum time period, typically two years and subject to extension.

Failure to follow the above features could result in dismissal for cause without further notice. In this way, an alcoholic who goes through a rehabilitation program would be subject to termination, not for the alcoholism (which is a disability covered by human rights provisions), but for choosing – after rehabilitation and reintegration - to violate the terms and conditions of ongoing employment, which is misconduct.

There are three basic stages in making a decision about corrective action. All three stages are derived from the expectation that management will be responsible for establishing the facts of the case and, if there is a legal proceeding, then management will have the onus of proof, either as a matter of law or as a matter of evidence, depending on the proceeding. Here are the questions management should ask at each stage:

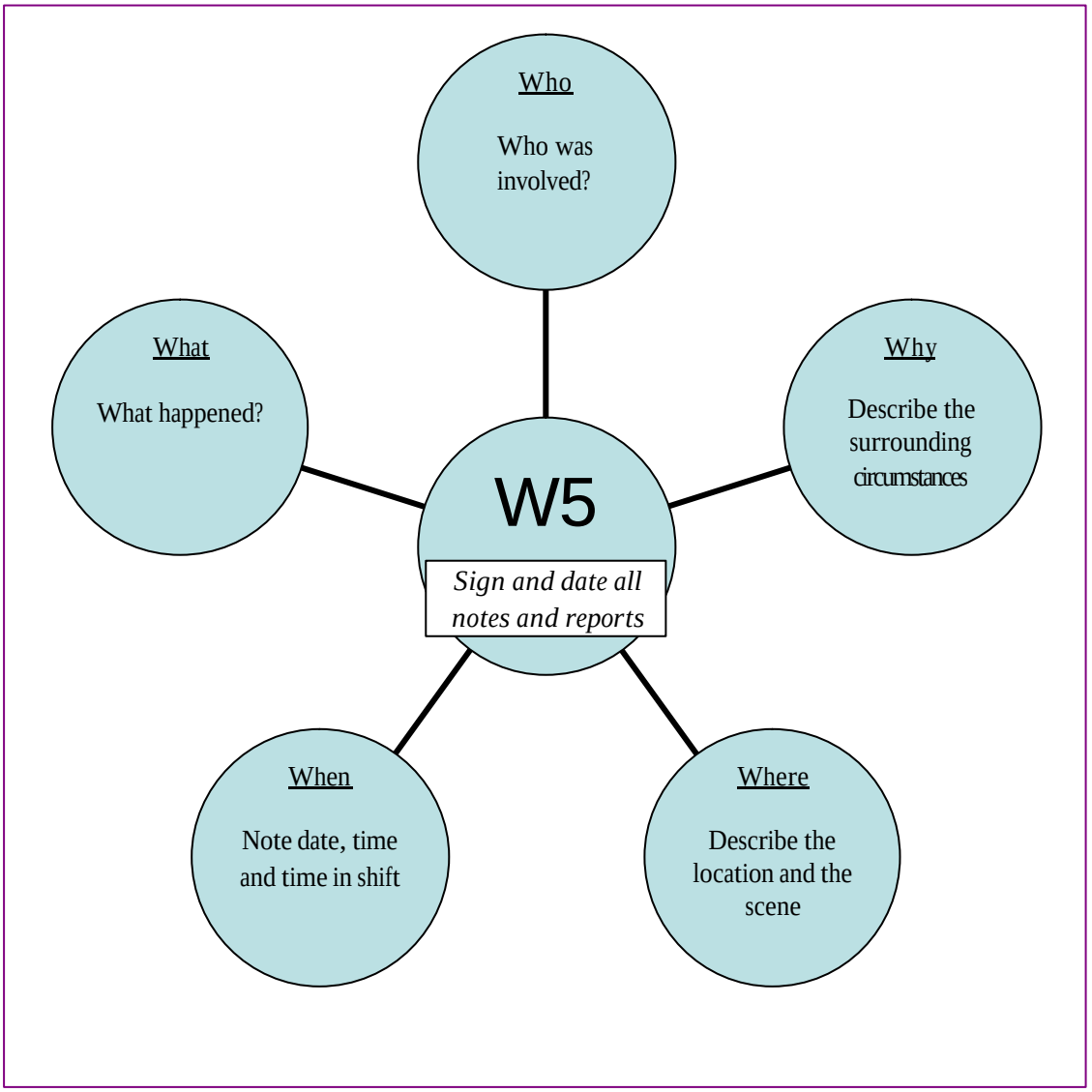
1. Has the employer been able to establish what happened, as a matter of fact? If so, is the employer in a position to identify the employee who may be at fault?

2. Is any corrective action warranted? Did the employee engage in misconduct? Could the employee have engaged in different conduct or performed better had s/he wanted to or had a better choice been made, when such choice was readily available to the employee?

3. If some corrective action is warranted, what is the most appropriate consequence, in consideration of the principles of minimum force and progressive action?

Conducting a Disciplinary Investigation

Each employee is responsible for his or her own actions and behaviour. Employers must be committed to determining responsibility. Employees cannot be randomly disciplined. You should never punish the entire workforce simply because you are unable to identify the culprit(s). Responsibility is determined by the facts identified in the disciplinary investigation. In gathering facts, always follow the W5 rule, as shown in this diagram:



Here are key sources for the facts you should gather during your investigation:

1. Statements of witnesses with direct knowledge of the incident or misconduct, whether as participants or spectators.

2. Statements of persons who were not witnesses, but who have reliable second-hand information. This would be called "hearsay" in a legal proceeding, but is quite useful in a workplace investigation, provided that you remember to treat it as "second-best" information.

3. Documentation pertaining to the misconduct, whether pre-existing or created in the normal course of business at the time of, or shortly following, the incident.

4. Other kinds of evidence, including photographs, videotape, diagrams, and objects.

5. Indirect or circumstantial evidence that should stand up to the following tests:

   - it should point to the employee as having committed the offence or misconduct; and

   - it should exclude any other reasonable explanation, such as a determination that another employee could have committed the offence as easily.

6. At the end of every investigation, the employee who has been identified as the target for corrective action should be interviewed, even if s/he has been interviewed earlier in the process. Two points are key:

   - the point of the interview is to provide the employee with an opportunity to tell his or her side of the story; this is not a cross-examination, but a final chance for the employee to give an explanation for what appears to be poor behaviour or unsatisfactory performance; and

   - the investigation interview should be separated from the subsequent disciplinary interview, when the employee is advised of the corrective action –

there should be at least a ten minute break, time to get a coffee or some other kind of pause; sometimes the break will be longer, but it should not be any longer than a couple of days.

7. In some cases, it is appropriate to suspend an employee pending investigation. If you determine that an employee should not be present in the workplace because of a serious incident, but you have not had time to complete a suitable investigation, you may tell an employee not to attend work in the meantime. Depending on the circumstances, this suspension could be with or without pay. In most cases, it should be for a period of only a few days. Some cases have featured much longer suspensions pending investigation, especially if there is a serious incident that involves public trust.

8. In most cases, you should aim to complete your investigation and determine the extent of corrective action, if any, within a week of the incident or circumstances giving rise to the investigation.

Mitigating Circumstances: Fitting Corrective Action to the Misconduct

The severity of the misconduct, misbehaviour or poor performance of an employee will have a significant impact on the level of corrective action that is assessed. Breaching safety rules, assault or the intentional destruction of the employer's property are considered to be more serious acts of misconduct than lateness, and, for that reason alone, would tend to result in more severe corrective action. Several other mitigating or extenuating factors should be considered before settling on appropriate corrective action, such as:

- seniority or length of service;
- problems away from the workplace;
- the potential for rehabilitation, which may be largely established by the employee's reaction to the investigation process and his or her willingness to accept responsibility;

- provocation by other employees or other circumstances that contributed to the situation;

- an apparent need for additional training;

- concerns about flaws in the investigation process itself; and

- most important, the prior record of corrective action that has been taken in respect of this employee; on this final point, there are at least four points to keep in mind:

  (i) although you may decide to separate out certain performance issues and deal with them on their own – attendance management being the most obvious – there is no need in general to have different streams of corrective action to deal with different categories of misconduct; you should have one main stream of corrective action in which past misconduct of any category is relevant to the present determination;

  (ii) as a counter-balance to the point above, the more recent and the more similar the prior corrective action, the more significant should be its impact on the current situation;

  (iii) at some point, prior corrective action should become stale, unless it deals with the most serious of offences; generally speaking, two years is a suitable time frame, so that if an employee does not engage in misconduct during that period, then prior corrective action should be removed from the record or at least declared to be stale;

  (iv) one of the important aspects of corrective action that is progressive is that even relatively minor misconduct could lead to a dismissal if there is a significant record of prior and reasonably current corrective action; in common parlance, this is know as the straw that broke the camel's back or the brick that bent the axle; in labour relations, this is referred to as dismissal based on a culminating incident.

Once you have taken corrective action, you should not take other or more severe corrective action for the same incident of misconduct. You should be sure to explain this clearly to your front-line supervisors. If, for example, they are faced with a disruptive or inebriated employee on an afternoon or night shift, the proper action is to send the employee home without pay pending investigation. Many supervisors have made the mistake of telling the employee that s/he is suspended for the balance of the shift, which fixes the corrective action. If it is subsequently determined that the employee has a record of corrective action and should have been dismissed, the argument of cause for dismissal may have been compromised by the supervisor's initial announcement. This trap for unwary employers sometimes takes on the name of the equivalent concept in criminal law: "double jeopardy".

Sometimes new or additional facts are obtained after the imposition of the discipline, which may lead to having the penalty reassessed. In such cases, if you hope to succeed in court with an argument of cause for dismissal and avoid a claim of double jeopardy, then you should be able to show that the new or additional facts could not have been determined in the course of a reasonable investigation prior to the original corrective action.

Summary of an Effective CAP

1. Ensure that your employees are informed of the rules and standards to which they must conform.

1. Enforce these rules and standards in a consistent and equitable fashion.

2. React in a timely manner to all breaches of the rules and standards.

3. Thoroughly investigate incidents of misconduct and ensure that the employee who is alleged to have engaged in the misconduct receives a full and fair opportunity to provide you with an explanation.

4. Act promptly, especially in serious cases and/or if you have suspended an employee pending investigation.

5. Base your decision as to the appropriate corrective action on all the facts and circumstances of the current situation. Remember to give careful consideration to possible mitigating or extenuating circumstances and to the record.

6. Discuss with the employee the action that you are taking in the privacy of your office, preferably with another management witness in attendance.

7. Create a written record, except for cases of preliminary oral counseling, where it may suffice for you to write a note to yourself.

8. Follow-up on corrective action. Take further action if it is warranted or let an employee know that his/her performance is improving.

9. Make sure that supervisors and managers consult with the HRP to review the proposed corrective action and to comment on the letter or form; also ensure that the decision-maker has the required authority to take action.

The Final Break from Employment - A Review of Dismissal Scenarios

It is increasingly rare that people retire from the company or organization where they first had full-time employment. For employees at all levels, and especially at higher levels, it is normal to change jobs, perhaps many times over the 40 or 50 years that is a typical adult work span. There are many reasons why an employee would leave employment, and these were summarized in section 3.a.i above, which dealt with the common law of contracts as it applies to employment. This review will focus on the three key types of employer-initiated dismissals in which work performance is the issue.

Disciplinary Discharge or Dismissal for Cause

Whether or not you use the CAP, or something similar to it, you may have a situation in which an employee's misconduct (either a single incident or a series of incidents of sub-standard behaviour) is so significant that it shatters any prospect for a viable employment relationship. Trust is gone. Workplace relationships are poisoned. The very presence of the employee in the workplace is worse than neutral, it is detrimental to the performance of other employees, and of the overall group.

Sometimes old words perfectly capture the sense of a situation. Here, the word is moribund. By the action or actions of the employee, the employee relationship is essentially dead. The problem is proving cause, especially if you have not used a CAP, or if the facts of the single or final incident are in dispute, or if the significance of the misconduct is challenged.

Dismissal for Poor Performance, but Not for Cause

Cause is very difficult to prove, although effective use of a CAP will greatly help. With the danger of *Wallace* damages lurking behind every case in which cause is put into play by the employer (see section 3.a.iii above), and with the increased time and expense that would accompany any case in which cause is disputed, many employers opt to simply pay off an employee who has sub-standard performance. As well, many employers do not have the time or patience to fully implement a CAP or other progressive system.

Subject to statutory restrictions, like human rights considerations, an employer can terminate any employee at any time. The usual question is not whether it can be done, but how much will it cost? In other words, it is not the dismissal that is wrongful - the dispute in a wrongful dismissal case is all about the amount that is paid in lieu of notice. When terminating employment due to poor performance, but not for cause, there are at least three points to keep in focus:

- Once you have made the decision to dismiss the employee, it should be all business. Especially in view of *Wallace*, you should be sensible, sensitive, and civilized in handling the termination interview, the settlement offer, as well as the physical exit from the workplace premises. This is not the time for parting shots.

- While you should be as diplomatic and professional as possible, you should continue to be upfront about the reason for dismissal, especially in cases where a human rights complaint is a realistic possibility. If poor performance is the issue, you should say so, and make any settlement offer without prejudice to that view. The danger otherwise is that you could find yourself on the wrong side of a case in which the employee claims that the dismissal was due to the exercise of

statutory rights (such as making a complaint under human rights or health and safety legislation). If you have already given some banal, feel-good reason for the termination, it is likely too late to argue that the real reason was, after all, performance.

- Once you have made the decision to not terminate for cause, subject to legal wrangling that may follow the rejection of an offer of settlement that is made without prejudice, performance is no longer a factor in determining the amount that is owing to an employee. Whether terminated due to economic circumstances or his or her own performance, if the employer is not prepared to assert cause, then the employee is entitled to the full range of damages for the dismissal.

Dismissal for Non-Performance: Non-Disciplinary Absenteeism

The issue of absenteeism and its consequences for an employment relationship was introduced in section 4.c above. This section will provide further details about how to proceed with a dismissal in those kinds of situations. If done correctly, such dismissals stand a reasonable chance of succeeding without giving rise to a legitimate claim for damages. As with many employment situations, but especially because these are dismissals that have human rights and possibly other statutory implications, you should probably get legal advice from the outset, or at least before taking the final action.

If an employee is ill or injured and absent from the workplace for an indefinite period, there comes a time when the employer can fairly conclude that there is no reasonable expectation that the employee will be able to resume employment, even if the work is modified to accommodate medical restrictions. It is typical to wait two years before making such a determination. The period of time may vary according to disability plans and workers' compensation situations if you are dealing with a compensable situation.

For most cases, there is a two-step dismissal process:

1. Make sure that you get current medical information. Let the employee know, by letter, what medical information you have on file, and that the information indicates that the employee is unable to return to work. Invite the employee to provide further or different medical information. Make clear to the employee that, unless there is information that indicates the realistic possibility of a return in the foreseeable future, then employment will be terminated. Clarify the status of any disability coverage. Provide the employee with a timeframe for response, typically two weeks and indicate that, if no response, you will assume that your information is correct.

2. Act promptly on whatever response you get, including a failure to respond within the timeframe. If the information suggests that employment may resume in the near future, then you should become very active on the file, to ensure that you are not simply being placed into an indefinite holding pattern. Insist on dates for further medical reports, within weeks, not months, and consider getting an independent medical review or even an independent medical examination if you have concerns about the quality of the medical reporting.

The other kind of non-performance due to absenteeism is when an employee is frequently absent for short periods. Dealing with this kind of absenteeism becomes complicated if some of the absences are due to workplace injuries or illnesses. As well, Ontario's emergency leave provisions, introduced in September 2001, effectively provide employees with a free ride for up to ten days per year. That said, for most cases, there is a three-step dismissal process, with each step featuring a meeting and a follow-up letter:

1. Introduce the problem, with statistics going back a year or two. You will need good attendance records, and you should relate the employee to his or her own group (such as a production unit or an office unit). Indicate that the employee's attendance is below the norm. Clarify that this is not disciplinary - you are not challenging the reasons for absence. Recommend that the employee get medical assistance to deal with any underlying problems. Provide the employee with a timeframe for improvement, typically two or three months. Warn that failure to improve attendance could lead to dismissal. Follow up with the employee at the end of that period or in the meantime, if the problem continues to be serious.

2. Follow-up. If the problem is the same or worse, then you should provide a final monitoring period of the same length (two or three months). Make it as clear as possible that a failure to improve attendance will likely result in dismissal.

3. Dismiss or follow-up for the final time at the end of the second monitoring period. In some cases, you might give one last chance to an employee. A proper exercise of managerial discretion requires that each case be considered on its own merits. If an employee appears to be making a real effort to improve attendance, then you should be patient. As with progressive discipline, when you are dealing with a situation of frequent short-term absenteeism, the goal is to improve the employee's attendance, not to terminate employment.

Conclusion

An employment relationship is a bargain between the employee and the employer. If the employer is no longer getting the full benefit of the bargain, then the employer should take action. Ideally, the action taken by the employer will encourage the employee to improve attendance and return to some kind of gainful employment. Whatever action is taken will depend on a careful and patient analysis of the underlying problem. There is usually something that the employer can do to counteract an unsatisfactory employment situation, whether the underlying problem is one of attitude, ability or absenteeism.