

# BRIEFING NOTE

## Performance Management Pitfalls and How To Avoid Them

While it is trite to say that an employer is able to terminate an employee's employment, it can only do so either on a "without cause" basis with reasonable notice or on a "with cause" basis (i.e. just cause). One of the "with cause" bases that is often discussed in the authorities and literature is an employee's failure to meet employer expectations or performance standards, despite the employer's feedback by way of performance reviews and communication of expectations.

In *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2017 BCSC 704, the BC Supreme Court recently reviewed the legal principles and considerations when terminating "with cause" based on a failure to meet performance standards. This case demonstrates the risk of liability to an employer who prematurely terminates an employee on the basis of poor performance, without taking all of the proper steps and actions to establish each of the following requirements:

1. the employer has established reasonable, objective standards of performance;
2. the employee has failed to meet those standards;
3. the employee has had warning that his or her employment is in jeopardy if he or she does not meet the standards; and
4. the employee was provided with reasonable time to correct the situation.

In *Cottrill*, the plaintiff had worked for 11 years as an esthetician prior to her dismissal. During her employment, the supervisor met with the plaintiff on a regular basis to review her performance in services, retail sales (or home care), request rate and her overall performance related to procedures and protocols, punctuality, team work, and related duties.

In or around March 2015 (after 11 years of employment), the defendant noted that the plaintiff was underperforming in a number of areas, and met with her to discuss the need for her improvement. In March 2015, the plaintiff was told that she must demonstrate her commitment and effort to meet goals/expectations over the following three months or her position would be terminated.

To assist her in meeting the performance expectations, the defendant provided monthly (for 3 months) 1 hour coaching sessions to assist her in developing an action plan and set goals. Over the next two months, the plaintiff met the criteria and had improved in certain respects; however, she allegedly did not meet expectations on the third month and the defendant decided to terminate her employment, without severance, and relied on the previous March letter as the termination letter.

In considering whether the plaintiff had been wrongfully dismissed, the Court reaffirmed the need to apply a contextual approach when examining if there was cause for termination. The purpose of this contextual analysis is to determine if there is misconduct such that it had led to a breakdown in the employment relationship or is otherwise irreconcilable with the continuation of that relationship.

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In applying the four requirements for termination on the basis of poor performance, noted above, the Court held that to terminate an employment based on performance is a high threshold. The performance issues must be “serious or gross incompetence” so as to amount to a repudiation of the employment contract. Mere dissatisfaction with an employee's job performance does not justify dismissal on a with cause basis.

This case is particularly instructive in relation to the third factor (warning). As noted above, an employer must provide the employee with a clear warning, which specifically informs the employee that his or her job is in jeopardy. The Court held that the employer cannot employ oblique language when warning the employee that his or her employment *may* be terminated. It is also not sufficient for the employer to merely criticize the employee's performance, urge improvement, or to state that the employee's job is at stake. Rather, a warning will only be considered sufficient if the employer also *meaningfully* assists the employee to improve.

In this case, the Court found that the defendant failed to establish that the plaintiff had serious performance issues that would justify dismissal. The Court accepted the plaintiff's evidence that prior to the March letter, she believed she had been doing a “great” job. The Court further found that the defendant had not given her a fair and reasonable opportunity to meet the expectations set out in the March letter, which was fatal to the defendant's case. The Court found that the March letter provided to the plaintiff was ambiguous, set an unreasonable and unfair standard, and required the plaintiff to meet performance requirements that she had not been held to previously. Also the defendant's evidence indicated it had already determined it had cause to terminate the plaintiff's employment when it sent the March letter. The Court also was not convinced that the mentoring assistance given provided any *meaningful* assistance to the plaintiff, on the basis that her performance management meetings were substantially similar to the goal setting meetings she had previously engaged in, and left the plaintiff to establish her own goals.

Ultimately, the Court held that the defendant had wrongfully terminated the plaintiff's employment and awarded 8 weeks' severance as well as \$15,000 in aggravated damages for the defendant's breach of duty of good faith in the manner it dismissed the plaintiff. In this regard, the Court found that the defendant had acted callously and unfairly in accepting her performance for 11 years only to arbitrarily change the standard to which she was required to perform, and to then dismiss her in three months without a dismissal letter when she failed to meet those standards, even though she had demonstrated a marked improvement in two out of the three months and there was a lack of documentation of her performance for that third month.

### **Practice Tips:**

- Documentation is crucial to track performance management reviews. The employer should document its established reasonable, objective standards of performance; what the performance issue of the employee is; how that issue will be addressed by the employee; what meaningful assistance the employer will provide to assist the employee meet those standards; a reasonable time frame in which to remediate the performance issue; and a clear warning that failure to meet the standards will jeopardize the employee's employment.
- The documentation should be signed by the employee so as to acknowledge that the employee understood all that was discussed and the standards expected of him/her.
- The goals set out in the documentation should be revisited in a follow up meeting and the employer should check in to see how the employee is doing in his/her actions to meet those standards and what further meaningful assistance the employer can provide to the employee to assist him/her to meet expectations. The Court will look more favourably on an employer who takes meaningful actions to support an employee to succeed versus an employer who, by effect, sets up the employee for failure.

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