

Progressive Discipline

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Introduction

When faced with problematic workers, employers are expected to progress through a discipline procedure. In other words, firing the employee should be the last resort. Weak performance and undesirable behaviour can be improved by a series of escalating corrections that involve both employee and employer.

Progressive discipline will contribute to a positive work environment. It also will provide a record and legal support for employers who ultimately have to fire a worker.

Examples of Progressive Discipline

If an employee's behaviour or performance falls below an acceptable standard, the employer should discuss it with the employee and get that employee's feedback. If

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conduct is sanctionable, the employer might issue a written warning or reprimand, impose a reasonable period of probation, or suspend, reassign or demote the employee. This is also called “performance management.” The employee receives written reasons for the

discipline, expectations and steps that must be achieved, a statement of consequences in the future if the conduct continues or performance expectations are not met, and this is all placed on the personnel record. Every employee's file is considered on a case-by-case basis.

Performance Management is intended to bring about improved work performance and conduct. It is considered fair to the employee because we all make mistakes and we all have bad days. Firing is sometimes said to be “the capital punishment of employment” and can demoralize and stigmatize workers going forward. It is also thought to be good management on the part of the employer for whom a reformed and rehabilitated employee may be a better business decision than a termination and starting all over again with recruitment and training. Today, it is also a legal requirement that arbitrators and judges expect to see before a firing can be justified.

Incompetence or Misconduct?

Performance management must be able to distinguish between incompetence (which can be remedied by training or re-assignment) and misconduct (which lends itself to second chances in appropriate cases).

Ms. Mardi Dawson was first reprimanded and later dismissed from her job. The problem was incompetence, as she was unfamiliar with how to use a single-point diamond grinder. Her employer offered no additional training to help her succeed in her work. The Ontario Superior Court of Justice awarded Ms. Dawson damages of ten months of salary (*Dawson v. FAG Bearings Ltd.* (2008) <http://canlii.ca/t/21c13>).

Occasional cases of serious misconduct will justify summary dismissal without progressive discipline. Examples include so-called ‘zero tolerance’ policies such as pilots consuming alcohol in the cockpit or employees sexually harassing others (eg. See *Payne v. Bank of Montreal*, 2013 FCA 33 <http://canlii.ca/t/fw1vr>).

In employment law, as in criminal law, the "punishment must fit the misconduct (or crime)."

Cumulative Just Cause

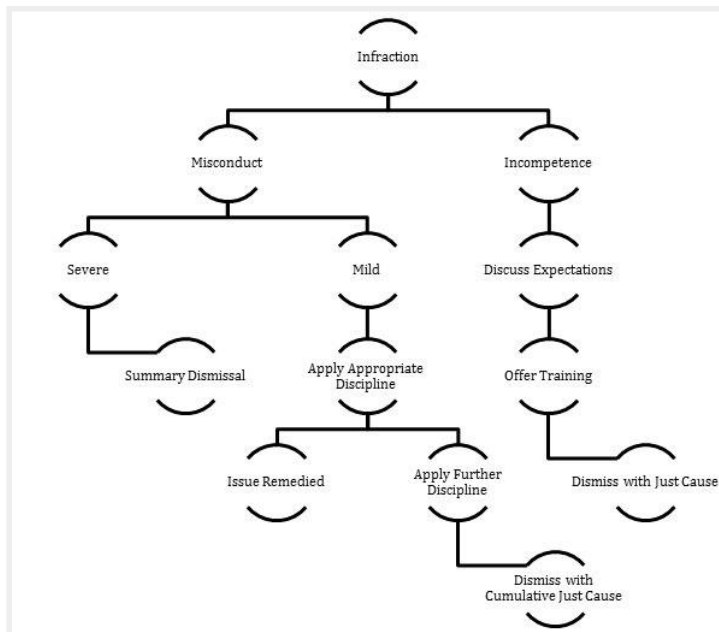
Employers may be able to justify firing on the basis of multiple, cumulative employment transgressions that are not individually serious enough for termination. The time period of employee accountability should be relatively short, probably no longer than a few years.

Gian Daley was fired after nine incidents over the course of two years. The Ontario Superior Court of Justice upheld the termination as reasonable because the employer had acted quickly, took appropriate steps in progressive discipline, and effectively communicated throughout the process by informing Mr. Daley what disciplinary steps would be taken if he failed to improve his performance (*Daley v. Depco International Inc.* (2004) <http://canlii.ca/t/1hchf>).

Conclusion

Ascertaining the nature of the performance concern (whether incompetence or misconduct) is usually easy. The severity of the concern must be assessed, which determines the appropriate level of discipline.

The flowchart below outlines a typical set of progressive discipline options.



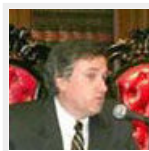
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