

- Discipline should follow the incident as soon as possible
- Discipline should be applied consistently to all employees
- Remember that the purpose of any disciplinary system is to prevent further occurrences of misconduct rather than to administer punishment
- Follow-up on corrective action to ensure that it has been effective
- In the case of more serious discipline, such as suspensions or dismissal, consult with legal counsel before proceeding. An employer who issues a suspension or dismisses where some lesser form of discipline is warranted may find itself defending its decision in the courts or before an adjudicator appointed under the *Code*.

Unjustly Dismissed School Janitor Reinstated

A First Nations school dismissed a janitor for making a ten-minute phone call from school property to a "1-900" service. He challenged the dismissal and the matter was heard before an adjudicator.

The adjudicator concluded that the complainant's breach of his employment responsibilities was serious, but did not warrant dismissal from his employment.

In arriving at this decision, the adjudicator noted that the complainant was a good employee with no previous discipline on his record. The adjudicator also reviewed the circumstances surrounding the phone call and found that the complainant had been going through a separation from his wife and was under stress. The phone call was an attempt to begin dating and it was not a "sex line." Further, the phone call was made in an area where no students or other employees could have overheard him.

The adjudicator found the complainant's good work record and personal stress to be mitigating factors and substituted a six-month suspension without pay for the dismissal.

This decision illustrates that, in many cases, a single incident of misconduct will not justify termination. Instead, employers must take into account the seriousness of the incident, along with the employee's disciplinary history, in formulating the correct approach.

Paul v. St. Mary's First Nation, [2005] C.L.A.D. No. 517

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Employment Law Primer: Progressive Discipline

As described in earlier issues of this newsletter, many First Nations employers are regulated under the *Canada Labour Code* for employment law purposes. Under the *Code*, an employee who is dismissed has the option of filing a complaint of "unjust dismissal." If an adjudicator agrees that the dismissal was unjust, he or she may order the employer to reinstate the employee.

In considering whether a dismissal was unjust, adjudicators often will consider whether the employer applied progressive discipline prior to dismissal. It is important, therefore, that First Nations employers regulated under the *Code* understand the principles of progressive discipline and apply them consistently in the workplace.

With respect to First Nations employers regulated provincially, the courts increasingly have been incorporating principles of progressive discipline into their decisions. The principles of progressive discipline therefore are becoming relevant to these employers as well.

What is Progressive Discipline?

Progressive discipline is the proper response to culpable misconduct (ie conduct that is blameworthy in some way). Unless the conduct is so serious as to justify immediate termination, an employer will be required to establish that it applied principles of progressive discipline prior to dismissing the employee.

The exact discipline appropriate for any given offence will depend on all the circumstances of the particular situation, including the seriousness of the offence, the employee's prior disciplinary record and any mitigating factors or absence of mitigating factors. An employer should apply increasingly serious levels of discipline in an attempt to correct the employee's behaviour prior to taking the final step of dismissal.

Elements of a Progressive Discipline System

Oral Warning

An oral warning may be issued as the first step if the conduct in question amounts to a minor transgression of an employer's expectations. An oral warning may be appropriate, for example, if an employee is late for work or offends a relatively minor policy.

The purpose of an oral warning is to ensure that the employee is made aware of the problems with the behaviour and knows that any repetition will result in greater discipline. In the absence of an oral warning, an employee may be led to believe that his or her conduct is acceptable.

Written Reprimand

A written reprimand may or may not be preceded by an oral warning, depending on the seriousness of the misconduct. For example, a written reprimand may be appropriate if one or more oral warnings have proven ineffective to correct employee misconduct.

Short-Term Suspension

A short-term unpaid suspension of one to three days may be appropriate for more serious offences such as insubordination or where an oral or written reprimand has not succeeded in correcting less serious forms of

misconduct. The purpose of a short-term suspension is to bring home to the employee that the employer has a serious concern about the behaviour in question, which may result in termination if not corrected.

Long-Term Suspension

A long-term suspension of one week or more may be appropriate when lesser forms of discipline have failed to bring about a change in the employee's conduct or where the misconduct is so serious as to justify a very serious suspension (eg, fighting, on-the-job drunkenness, gross negligence). In imposing a long-term suspension, the employer should advise the employee that his or her job with the employer is in jeopardy if the conduct is not corrected.

Discharge

Discharge may be an appropriate employer response where lesser forms of discipline have not corrected an employee's misconduct or where an offence is so serious that it may justify immediate termination (eg, theft or gross insubordination).

Some Useful Tips for Successfully Administering Progressive Discipline

- Ensure that circumstances surrounding the misconduct have been thoroughly investigated before disciplining an employee

Harris & Company – Labour and Employment Lawyers

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Litigation – defending claims for wrongful dismissal and human rights complaints

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Pre-termination Issues – advice to employers on each step in the process of preparing for and conducting an employee dismissal

Severance Packages – advice on the amount of severance or reasonable notice and assistance in preparing letters of termination and designing severance packages

Employment Contracts – advising, designing, writing, negotiating and implementing employment contracts and assistance with interpretation and monitoring of employment contracts

Investigation of Employee Conduct – policy enforcement involving and investigating employee misconduct, substance abuse, fraudulent activities, workplace violence and misuse of property and equipment

Seminars – delivery of specialized seminars for managers of First Nations employers, covering a wide spectrum of employment issues managers face on a regular basis

Should you require advice or assistance regarding any of these matters or wish to learn more about Harris & Company, feel free to contact any of our lawyers from our First Nations practice group:

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