

# First Nations Employment Law

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September 2006

Issue 5

## First Nations Centre's Failure to Follow Internal Disciplinary Policy Results in Unjust Dismissal

A former curriculum development specialist filed an unjust dismissal complaint under the *Canada Labour Code* against the Manitoba First Nations Education Resource Centre after she was dismissed with two weeks' severance pay.

The complainant, Ms. Starr, had been employed by the Centre for three and one-half years. During her employment, Ms. Starr had received various verbal and written warnings regarding excessive absenteeism and her failure to provide regular activity reports in a timely fashion. The Centre dismissed her after she allegedly missed a number of meetings she was required to attend in relation to two specific projects.

The adjudicator found that the Centre failed to provide Ms. Starr with a proper warning and the opportunity to improve her performance. Although the warnings Ms. Starr did receive indicated the seriousness of the matter, they did not specifically warn her that she was at risk of being discharged.

The adjudicator was especially concerned with the Centre's failure to follow its own written policy on disciplinary action, which called for progressive discipline. The policy required the Centre to provide their employees opportunity to improve. The policy required a verbal or written warning followed by probation, a suspension, and after that, dismissal as a last resort. The only ground for immediate termination under the manual was conduct considered to be extraordinarily serious, such as criminal behaviour.

Ms. Starr's conduct was not so extraordinarily serious as to warrant immediate dismissal on the grounds set out in the policy manual. Therefore, the Centre should have followed the designated steps of its own progressive disciplinary policy.

The adjudicator found that the Centre did not have just cause to dismiss Ms. Starr and awarded her four months' salary, calculated at her rate of pay at the time of her dismissal, less the two weeks of severance pay that she had already received.

*Starr v. Manitoba First Nations Education Resource Centre* [2006] C.L.A.D. No. 226

## Employment Law Primer: Just Cause for Dismissal of Employees by First Nations Employers

Band councils and other First Nations employers in British Columbia from time to time will be faced with the unpleasant task of dismissing employees. When planning for a dismissal, it is important to determine whether the dismissal is "for cause" or without cause.

### What is "Just Cause" for Dismissal?

An employee's conduct provides just cause for dismissal when it breaches the employee's fundamental obligations to the employer and fractures the employment relationship. In general, the Supreme Court of Canada has stated that an employer has the right to dismiss an employee "guilty of serious misconduct, habitual neglect of duty, incompetence or conduct incompatible with his duties, or prejudicial to the employer's business." The burden of proving just cause rests on the employer.

### Why is Just Cause Significant?

An employer has the legal right to dismiss an employee without notice and without compensation if it has just cause for the dismissal. If the employer does not have just cause, the dismissal is "without cause" and the employer must give the employee reasonable notice or provide pay in lieu of reasonable notice (see *First Nations Employment Law Issue 1, September 2005*). If

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the employer does not have just cause and fails to provide the employee with adequate notice of dismissal, the dismissal is deemed "wrongful."

## What Type of Misconduct Constitutes Just Cause?

There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Just cause may arise from a single instance of serious misconduct or it may arise from ongoing performance and competency issues.

### Serious Misconduct

In general, a single instance of misconduct on an otherwise clean employment record is not sufficient to warrant dismissal without notice. For a single instance of misconduct to warrant dismissal, the employee's actions must be so serious that they fundamentally breach the employment contract or make it impossible for the employee to fulfill his or her employment obligations.

Serious misconduct may include dishonesty, theft, conflict of interest, wilful disobedience, intoxication, sexual harassment, misrepresentation during the hiring process or off-duty behaviour which interferes with the employee's ability to perform his or her job.

## Performance Issues

Performance issues may constitute just cause for dismissal provided that the employer i) warns the employee that his or her job is in jeopardy, and ii) provides the employee with the opportunity to improve his or her performance. The warning must be clear and unambiguous, and must state that the employee is at risk of being dismissed unless he or she corrects the deficiencies in question. The employer must then provide sufficient time for the employee to correct his or her performance after the warning. If, despite an opportunity to improve, the performance issues persist, the employer may have just cause for dismissal.

This category of just cause includes chronic absenteeism and lateness, repeated carelessness, failure to meet productivity standards, failure to cooperate with other employees, breach of the employer's policies or work rules and the failure to perform tasks in accordance with the employer's demands.

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