TODAY’S TOPICS

• Writing an enforceable “last chance” agreement

• Performing surveillance on a “sick” employee

• Implementing a “deemed quit” provision

• Providing incentives for excellent attendance

“LAST CHANCE” AGREEMENT

• What is it?

• It’s a Performance Improvement Plan (PIP) on steroids

• Or crack
“LAST CHANCE” AGREEMENT

Example:

WHEREAS the Employer has issued discipline and terminated the employment of the Employee;
AND WHEREAS the Union has grieved the discipline and the termination of the Employee's employment;
AND WHEREAS the grievances have been referred to arbitration before [Arbitrator];
AND WHEREAS the Employer, the Employee and the Union are desirous of resolving all matters relating to the employment of the Employee by the Employer;

THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, it is agreed as follows:

1. The Employee will be reinstated to employment as a [position] without compensation but without loss of seniority on [date]. Upon returning, the Employee will be provided with the necessary orientation and training.
2. The Employee and the Union agree that any conduct of the Employee in his employment following his reinstatement which represents significant misconduct will be a violation of this Agreement.
3. The Employer, Union and the Employee hereby specifically agree that in the event of violation of this Agreement, the Employer shall be immediately terminated. The Employee and the Union specifically agree that no grievance or other proceeding will be commenced upon discharge of the Employee for violation of this Agreement other than a dispute as to whether the violation occurred. Furthermore, and in the alternative, the Employer, Union, and the Employee agree that discharge is the specific penalty for the subject matter of violation of this Agreement as contemplated by section 48(17) of the Labour Relations Act and that the arbitrator shall be without jurisdiction to substitute for the penalty of discharge.

“LAST CHANCE” AGREEMENT

Why do you want one?

– Bolsters an employer’s argument that termination is appropriate for repeated misconduct
  • Don’t need to prove “just cause”
  • Only have to show the conduct took place and that it breached the LCA
  • Arbitrator will not have the power to reduce the discipline
– Can salvage an employment relationship worth trying to save
  • Saves time and money on training new employee
  • Improves morale

“LAST CHANCE” AGREEMENT

Without a LCA, employers face an uphill battle justifying termination

The onus is on the employer to prove:

1. The alleged misconduct actually happened
2. The misconduct was culpable (blameworthy)
3. The punishment fit the crime

With a LCA, the employer only has to prove #1
“LAST CHANCE” AGREEMENT

- When would you attempt to implement a LCA?
  - You are uneasy about your chances of winning at arbitration (proving 1-3 in the above slide)
  - The terminated employee’s record of discipline isn’t very lengthy
  - The misconduct wasn’t particularly egregious
  - Can be used, and can be very effective, for employees with substance abuse problems (“one more fall off the wagon” agreements)

MAKE YOUR LCA ENFORCEABLE

- Get legal advice
  - Each situation is unique
- Valid consideration
  - Some benefit being exchanged from one party to the other
- Make it a negotiated process
- Clear and precise as to length or term of the agreement and as to the standards for compliance
- Provide accommodation and/or training where necessary
  - Where an alcoholic needs time off to get the necessary treatment
- Can’t contract out of human rights legislation

“LAST CHANCE” EXAMPLE

- GE Hitachi Nuclear Energy Canada and CAW, Local 252 (S. (K.))
  - The grievor worked for Hitachi, was a “very hard worker” and had “significant seniority”
  - In June 2012 his employment was terminated but he was reinstated pursuant to a LCA that stated his absenteeism must not exceed the average absenteeism level in his department (legitimate STD, LTD and WSIB absences would not be included in calculating his absenteeism)
  - In March 2013, after giving him a six-month period to correct his behaviour, the employer terminated him for breaching the LCA since his absenteeism was 9.17% whereas the department average was 2.63%
“LAST CHANCE” EXAMPLE

• GE Hitachi Nuclear Energy Canada and CAW, Local 252 (S., K.)
  – The parties agreed that this pattern of absences took place
  – Since this was the only issue the arbitrator had jurisdiction to decide on, the conclusion that termination was reasonable was easily made
  
  “This is the absolute last chance for the Grievor to maintain his employment. Should the termination be granted, it shall be referred to the Arbitrator who is exclusively tasked with any such grievance, and the scope of the Arbitrator’s review shall be limited solely to a determination of whether or not the alleged non-compliance with the terms and conditions of the Last Chance Agreement actually in fact occurred. The Arbitrator shall have no jurisdiction or authority, notwithstanding any legislated or other authority, to overturn or vary such termination if such non-compliance with the terms and conditions of the Last Chance Agreement is found to have occurred.”
  – He was terminated despite the fact that the Arbitrator explicitly states that he was a very sympathetic grievor

“TOO MANY CHANCES” EXAMPLE

• Compare GE Hitachi with Federated Co-Operatives Ltd. v. UFCW, Local 649
  – The grievor worked at the employer’s warehouse as a Loader
  – In November 2008, the grievor was placed in the employer’s Absentee Control Program (“ACP”) as he was flagged as having an absenteeism rate above the warehouse average
  – He progressed through the ACP over the course of the next 3 years as his absenteeism rate continued to exceed the average rate
  – On February 16, 2012 he was terminated after missing over 122 hours of work in a year
  
  At the hearing, the arbitrator looked at mitigating factors to assess whether the punishment fit the crime
  • Employer hadn’t inquired into the nature of the absences enough
  • Employer failed to have due regard to the significant improvement in the grievor’s attendance after given a stern warning
  
  Ultimately the grievor was reinstated
  – The Arbitrator would not have got the opportunity to look at these factors if there was a well-drafted LCA
  – Importantly, the parties DID execute a LCA earlier but the Arbitrator ruled it unenforceable as the union was not made a party to it, and it was therefore not a negotiated process
SURVEILLANCE OF "SICK" EMPLOYEES

- You have an employee who requests vacation on the Friday before a long weekend
- His request is denied for valid business reasons
- On the Friday morning, he calls in sick, saying he cannot get out of bed, and will use one of his ESA Emergency Leave days
- You know he has a cottage in the Muskokas and likes to spend as much time as possible up there, often taking Fridays and Mondays off to get longer weekends and to beat the traffic on the 400
- Can you go to his house/cottage to determine the validity of his illness?

SURVEILLANCE OF "SICK" EMPLOYEES

- It has been recognized on many occasions that the abuse of sick leave can be just cause for termination
- But will surveillance evidence be admissible at arbitration or in court?
- The cases have been inconsistent on what needs to be established for the surveillance evidence to be admissible
- Two tests:
  - 1. Relevance test
  - 2. Reasonableness test

SURVEILLANCE OF "SICK" EMPLOYEES

- Relevance test:
  - The fundamental principle of "natural justice" requires that a decision-maker consider all relevant evidence.
  - So the only question is: Is the surveillance video relevant to the issue(s) being decided?
  - Easier of the two tests for the employer to meet

- Reasonableness test:
  - Analysis that involves the weighing of the employer's interests against the grievor's privacy interests (two-part test):
    1. Was it reasonable, in all of the circumstances, to request surveillance of the employee's off-duty activity?
    2. Was the surveillance conducted in a reasonable manner which is not unduly intrusive and which corresponds fairly with acquiring information pertinent to the employer's legitimate interest?
SURVEILLANCE OF “SICK” EMPLOYEES

Northstar Aerospace v. CAW-Canada, Local 444 (2012, Ontario arbitrator)
Ellis Don Ltd. v. LIUNA, Local 506 (2012, Ontario Labour Board)

- Arbitrator and Labour Board use the relevance test to determine that the surveillance evidence is admissible
- But they appear to say the reasonableness test should be used when determining the final outcome, to take into account what might be improper employer conduct
- In jurisdictions with privacy legislation (Alberta, BC, Quebec, Federal) the test for admissibility is reasonableness (e.g. Re Crown Packaging Ltd. and Unifor, Local 433, 2014, BC)

Reasonableness Test – Step #1

- “With respect to the first question – whether it was reasonable to undertake the surveillance in the first place – I agree that there must be some basis for the employer to initiate this method of investigation. Typically, it will be suspicion that an employee is being less than honest in claiming sickness or injury. In my view, an arbitrator ought to allow an employer significant leeway in deciding whether it is reasonable to undertake surveillance where the issue is the honesty of a claim for benefits.”
  – Johnson Matthey Ltd. v. USWA, Local 9046 (2004, Ontario)

Reasonableness Test – Step #2

- In assessing the reasonableness of the surveillance, arbitrators will typically consider a number of factors:
  - The level of privacy an individual can expect depends on the individual’s location, conduct and actions;
  - Have other less intrusive ways to collect the evidence been used, before resorting to surveillance;
  - Was the surveillance used in such a way as to obtain the information or evidence sought, but not other unnecessary information?
SURVEILLANCE OF “SICK” EMPLOYEES

• In our imaginary scenario, the employer would definitely pass the “relevance test” if the surveillance showed activities inconsistent with an illness.

• Looking to the “reasonableness test”, the answer is not so clear:

  Step #1: Was it reasonable to undertake surveillance?
  – The employer had a suspicion that the grievor was being less than honest in claiming sickness to get a day off.
  – This suspicion arose from the employer’s awareness of the grievor’s habit of taking off early to the cottage and his denied vacation request, and so undertaking surveillance is likely reasonable here.

• Step #2: Was the surveillance conducted in a reasonable manner?

  Arbitrators have accepted that in public places, the employee does not have a reasonable expectation of privacy (Goodrich Turbomachinery Products and USWA, Local 4970, 2002, Ontario).

  Therefore surveillance at the following places is usually deemed reasonable:
  – Parking lots (Johnson Matthey Ltd. v. USWA, Local 9046, 2004, Ontario)
  – Hockey rinks (Johnson Matthey)
  – Street in front of employee’s house (Johnson Matthey)
  – Baseball parks (Telus Communications Inc. and TWU (Underwood), 2014, ABCA)

  But can an employer follow an employee to his secluded cottage, where he may go specifically to get some “peace and quiet”?

DEEMED QUIT PROVISIONS

• Some employment relationships, invariably those in the unionized sector, are governed by a “deemed quit” provision.

  “No show, no call = deemed quit.”

  Example: “An employee shall lose all seniority and shall be deemed to have quit if he/she is absent from work without permission for three (3) consecutive days unless it is established to the satisfaction of the employer that such absence was beyond the employee’s control.”
DEEMED QUIT PROVISIONS

- These provisions have been found to be enforceable and effective.
- Invoking a “deemed quit” provision is a non-disciplinary matter.
- Arbitrators cannot vary the contractually stipulated consequences as their role is simply to interpret the collective agreement and decide whether the provisions (specifically the “deemed quit” provisions) apply to the facts.

DEEMED QUIT PROVISIONS

- However, because of their harsh consequences, arbitrators will construe them strictly and narrowly (so they must be drafted well).
- And these provisions are subject to the Ontario Human Rights Code.
- Let’s look and compare two cases:
  - Meyers Transport Ltd. and CAW, Local 4268 (2012, Federal)
  - Chicopee Manufacturing Ltd. and CMEA (2012, Ontario)

DEEMED QUIT PROVISIONS

MYERS TRANSPORT CASE

- “Seniority shall be lost and the employee shall be deemed terminated for any of the following reasons: (g) Failure to report to work or contact the Company for three (3) consecutive days on which the employee would normally be expected to report for duty.”
- Grievor (24 years service) terminated by operation of the above provision.
- He was off work with an illness starting February 2011 and was receiving benefits.
- On January 5th, 2012, insurer informed him that according to the medical information he was no longer disabled nor eligible for income insurance benefits as of February 1, 2012.
- Grievor then contacted Meyers on March 15 and told them he was fit to return to work and they asked him to provide a satisfactory justification for his absence since February 1.
- When he was unable to do so, Myers informed him he was no longer one of its employees under the collective agreement.
DEEMED QUIT PROVISIONS

MYERS TRANSPORT CASE

- Arbitrator was convinced the grievor was away on sick leave from February 2011 – January 2012 and that the employer never questioned this absence or its justifications
- However, once the insurer determined he was no longer eligible for benefits as of February 1, 2012, the employer had reason to expect the grievor to report back to work from this point on (since it lacked any other information from the employee to the contrary)
- Having found the conditions in the “deemed quit” clause to be met, and that the grievor did not have a valid reason not to communicate with Meyers, the arbitrator had no choice, even with this long term employee, but to dismiss the grievance and uphold the deemed quit

CHICOPEE MANUFACTURING CASE

- “An employee shall lose all seniority and shall be deemed to have quit if he/she... (c) is absent from work without permission for three (3) consecutive days unless it is established to the satisfaction of the Company that such absence was beyond the Employee’s control”
- Grievor (15 years service) terminated by operation of the above provision
- Grievor did not work from June 29, 2011 to September 8, 2011 and was initially calling in to report that he would be absent
- However, on August 18-19, 22-26, 29, 31 and September 1-2, 6-8 there were no calls or any communication from the grievor
- His employment was terminated September 8
- The union submitted two defences to the normal application of the deemed quit provision

CHICOPEE MANUFACTURING CASE

- First, that the provision itself should be construed narrowly and the arbitrator should find that the absence “was beyond the Employee’s control”
- The arbitrator appears to want to accept this defence considering the employee was communicating his absences for the better part of a month, however the arbitrator states he didn’t have the necessary evidence to draw this conclusion
  “There is a tendency in a case such as this to think that if an ill employee, such as the grievor, stops calling and obtaining permission for his absence then that change is due to the illness. It may have been the reason in this case. But I cannot find on the evidence that the grievor’s failure to obtain permission, at the simplest his failure to call his Employer, was beyond the grievor’s control. As a result I conclude that the exception expressed in the Article does not apply.”
DEEMED QUIT PROVISIONS
CHICOPEE MANUFACTURING CASE

- Second, the union says the grievor ran afoul of the deemed quit provision because he was disabled and therefore enforcing the provision was a breach of the Human Rights Code.
- The arbitrator agrees with this second argument and orders reinstatement.
- While he found that it was not "beyond the control" of the grievor to call in (first argument), he found that the reason the grievor did not call was because of his disability.
- The grievor had a major depressive disorder, and the arbitrator concluded that, despite the lack of evidence on this point, disabled employees such as the grievor, and those who abuse drugs and alcohol, are more likely to fail to notify their employer of an absence.
- This he found to be discrimination, contrary to the Human Rights Code, as it had an adverse impact on those employees with disabilities.
- "These disabled individuals show up more often, as has this grievor, in deemed quit cases."

DEEMED QUIT PROVISIONS

- What are the lessons to be learned from these cases?
- First and foremost, the analysis in Chicopee could change the way we look at deemed quit clauses, at least with respect to those with mental health problems and alcohol and drug dependency.
  - Perhaps this makes the argument for a last-chance agreement in this situation even stronger.
  - This last-chance agreement would have to expressly say that the parties agree that further accommodation of unauthorized absences would cause undue hardship.
- Second, if you can prove the necessary elements of the deemed quit provision, arbitrators cannot substitute a different penalty as it is a non-disciplinary termination.

ATTENDANCE INCENTIVES

- The punishment or dismissal of an employee for absenteeism is not a simple matter.
- Many employers believe that it is easier to try and manage the problem, rather than eliminate it.
- So, many employers have instead attempted to reward excellent attendance.
- While some of these programs can be effective in motivating employees, if they are not designed carefully, they can easily run afoul of the provisions of the Human Rights Code and the ESA.
ATTENDANCE INCENTIVES

A program of positive incentives cannot unduly punish those employees who must take time off work through no fault of their own owing to illness or disability.

Two main principles to keep in mind in creating a valid attendance incentive program:

1. Employees cannot be disqualified simply because they take a medical or other valid form of leave (under the ESA or WSIA).
2. However, the benefit can be tied to actual work performed to determine the quantum that an employee will be entitled to.

ATTENDANCE INCENTIVES

_Fleetwood Canada v. UNITE-HERE, Local 1381 (2005, Ontario)_

- In this case, the employer provided an attendance bonus to employees payable on a weekly basis; a so-called "positive reinforcement plan".

- Specific absences are listed which do not disentitle an employee to the bonus (bereavement leave, vacation, jury duty, medical emergency etc.), but otherwise perfect attendance is necessary in order to be paid the bonus for that week.

- The bonus payment is calculated as a percentage of an employee’s weekly wage and is paid based on actual hours worked.

ATTENDANCE INCENTIVES

_Fleetwood Canada v. UNITE-HERE, Local 1381 (2005, Ontario)_

- Employer did not include ESA Personal Emergency Leave as one of the listed absences, which meant that if an employee took such a leave, he or she was not entitled to the bonus for that week.

- Importantly, the union was not asking for a bonus to be paid for hours/day not actually worked, but were asking for relief from disentitlement to the bonus for taking an Personal Emergency Leave day.

  "In the case at hand, the question is not discrimination or unequal treatment. The affected employees are not claiming that they are being discriminated against because they are taking Emergency Leave. Nor are they claiming for a work-driven benefit. In this grievance, the Union is claiming that employees are losing an entitlement to participate in the weekly Bonus Plan and thereby penalized because they take Emergency Leave Days. Therefore, the sole question is whether a penalty is being imposed within the meaning of the ESA when the employee takes an Emergency Leave Day. The answer must be ‘yes’. "
ATTENDANCE INCENTIVES

Fleetwood Canada v. UNITE-HERE, Local 1381 (2005, Ontario)

• “The purpose of the Bonus Plan is to promote attendance. It is a positive reinforcement device. It is designed to discourage absences for any reasons other than the list of exceptions. Looked at from the other perspective, it must also be seen as a scheme designed to discourage employees from being absent due to Emergency Leave Days under the Act. However, Emergency Leave Days are a statutory right under the Act.

• ESA section 74(1) exists to ensure that employees taking Emergency Leave Days will not suffer a reprisal so they are not discouraged from exercising their statutory rights.

• However, employees in this bargaining unit do suffer a penalty – they lose their entitlement to the weekly attendance bonus.

• Therefore, the Bonus Plan operates as a disincentive to employees to exercise their statutory rights – this is illegal.

SUMMARY

• Last Chance Agreements
  - Don’t need to prove “just cause” which makes the argument that termination is appropriate much easier to defend
  - Can reduce the impact of a sympathetic employee
  - Can be used effectively for employees with substance abuse problems
  - Need to be drafted properly if reliance is going to be placed on them.

• Performing surveillance on “sick employees”
  - Two tests: relevance and reasonableness
  - 1. Reasonable suspicion in the circumstances of abuse of sick leave
  - 2. Reasonable method of surveillance (public places)
  - Should not be an employer’s first option

SUMMARY

• “Deemed Quit” provisions
  - Enforceable and effective
  - However, narrowly construed and subject to the Human Rights Code
  - Arbitrators cannot vary the contractually stipulated consequences as it is a non-disciplinary termination
  - Chicopee case may leave “deemed-quit” provisions open to attack in cases involving those with substance abuse, or mental health problems

• Incentives for excellent attendance
  - Effective, but can easily run afoul of Human Rights Code or ESA if not drafted properly
  - 1. Employees cannot be disqualified for taking a valid form of leave
  - 2. However, the quantum of the benefit can be tied to actual work performed.
Thank you!

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