Terminating a Mariner for Poor Performance: Beyond the Duty to Simply Warn

A recent B.C. court case involving the termination of a towboat master serves as an important reminder of when, why, and how, an employer may properly terminate a mariner for poor work performance without exposing themselves to significant liability. In this article we discuss why simply warning an employee that their poor performance will result in termination is no longer enough, and why the employer's duty now includes setting time frames for improvement of the employee's performance, and "meaningfully assisting" the employee to improve their performance. Employers and employees interested in protecting their respective rights are well advised to understand the following principles.

The Employer's Right to Terminate Employment: "Just Cause", or Not

The law does not generally require an employer to keep employed a worker the employer believes is not performing their job satisfactorily (exceptions to this general rule relate to cases of human rights or occupational health and safety discrimination). The employer may terminate an employee for performance they view as poor, however, if their reason for doing so does not amount to "just cause", the employer must either provide the worker advance notice of the termination, and allow the worker to work with pay until that notice expires (called "working notice"), or the employer must provide the worker with pay in lieu of that notice (typically called "severance").

It is often the case that an employer will provide severance when terminating an employee, rather than giving working notice, because at the point the employer has decided to terminate the employee the employer/employee relationship will have deteriorated to the point that the worker's continued presence in the workplace is undesirable.

B.C.'s top court has defined "just cause" as "*employee behavior that, viewed in all the circumstances, is seriously incompatible with the employee's duties, conduct that goes to the root of the [employment] contract and fundamentally strikes at the employment relationship" (Panton v. EHCS).* The same court also stated that "*it must be shown that something was done inconsistent with the proper discharge of the employee's duties that reasonably indicates a risk of injury to the employer's interest through continued employment*" *(Chalk v. WEC).*

The Absence of "Just Cause" & an Employee's Right to Notice or Severance

Most employers, when terminating an employee without alleging just cause, attempt to provide the employee with severance based on the requirements in the provincial *Employment Standards Act ("ESA").* The *ESA* sets out minimum requirements for severance pay, beginning

at one week's pay for three months of service, and topping out at eight weeks of severance for any period of service over eight years. However, not only is the legal application of the provincial *ESA* to mariners blurred by constitutional issues, an employee is always free to ignore the complaint mechanisms provided by the *ESA*, and apply to court for potentially a much larger severance award. This is because, unlike the Employment Standards Tribunal which is restricted by the limits of severance established by the *ESA*, the court applies previous judicial decisions to determine what is fair severance pay based on the mariner's length of service, level of responsibility, age, likelihood of re-employment, and other factors. Often the court awards one month or more of severance for every year of service. Therefore, with judicially ordered severance payments running into the tens and hundreds of thousands of dollars, employers often fall victim of the lure of maintaining they have just cause to terminate an employee when they do not. Employers must be very cautious of how, and on what basis they terminate an employee for just cause – a mistake can be very expensive.

Terminating for Poor Performance: the Employer's Duty Goes Beyond One to Warn

Even numerous instances of poor performance by an employee may not be sufficient to give the employer just cause to fire an employee, unless the employer takes proper steps. In the case of the terminated towboat master referred to above, the 55 year old master was an employee of nine years and was terminated following a landing that damaged a customer's dock. Although the employer did not maintain that any one event was sufficient to justify cause for dismissal, they relied on this incident, and eight others in the preceding eight years, in maintaining they had cause to terminate the master for incompetence. The court said that in order to terminate an employee for cause on the basis of poor performance the employer must show:

(a) it has established a reasonable objective standard of performance;

(b) the employee has failed to meet those standards;

(c) the employee has had warnings that he or she has failed to meet those standards and the employee's position will be in jeopardy if he or she continues to fail to meet them; and

(d) the employee has been given reasonable time to correct the situation.

The court said this, "i*n order to dismiss an employee [with just cause], where the employer believes the employee's performance is substandard, the employer must provide the employee with a clear warning which specifically informs the employee that his or her job is in jeopardy. The employer cannot employ [vague] language when warning the employee that his or her employment may be terminated. It is not sufficient for the employer to merely criticize the employee's performance or simply urge improvement*".
Importantly, the court went on to say that warnings that the employee has failed to meet performance requirements, and whether the employee has been given time to correct the situation, will only be considered sufficient if the employer "*meaningfully assists the employee to improve*".

The court found the master's employer kept few records relating to their response to earlier events of alleged poor performance, and that the employer had not made clear that termination would result from the master's continued (alleged) poor performance. The court noted the employer did not appear to offer or require the master to take retraining or other remedial steps, but rather simply told the master they were unhappy and that the master had to be more careful. Ultimately the court determined there was insufficient evidence to find incompetence on the part of the master.

The court concluded "o*n [the employer's] own evidence, the most that can be said is that he told the [master] that his work was unsatisfactory, or inadequate, and threatened dismissal. He never gave the [master] any time frame within which to improve. Instead, he demanded immediate compliance based on his apparent view that the Master of a vessel is always responsible for anything that goes wrong aboard the vessel. Given the bluster to which I have referred and the lack of formal, clearly articulated steps to improve, including the lack of any offer to assist with re-training, I find that the warnings were legally insufficient to lay a foundation for termination without notice or pay in lieu of notice".* In the end, the court awarded the master 10 months of severance pay for his nine years of service, or $105,600 (before deducting $55,000 that the master had earned during the 10 month period following his wrongful dismissal).

This case is significant because it highlights how the employer's duty, if they wish to avoid paying severance and terminate a mariner for just cause, includes not only providing the mariner with a clear written warning that poor performance will result in termination, but also setting clear expectations, time frames for improvement, and making reasonable efforts to assist the mariner in their efforts to improve. Employers who do not comply with these duties are exposed to potentially significant claims for severance.

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