



Employment Records - Are You Ready to Hire, Review, Discipline or Fire?

By Michael Watt

INTRODUCTION

This paper follows the points set out in the PowerPoint presentation delivered by the author on May 29, 2008. The paper discusses employment records used in the context of hiring, managing and terminating the employment relationship. As employment law has increased in complexity, so has the importance of maintaining effective employment records. The goal of the presentation is to identify those records that are or should be retained by the employer, and the proper process for creating and using these records.

LEARNING OBJECTIVES

The topic intersects with a number of areas in employment law including statutes such as the *Employment Standards Act*, *Human Rights Code* and *Workers Compensation Act*, and privacy and common law employment principles. I have noted recent and leading cases. In particular there are cases in the area of drug testing and probation which have clarified the law. It will be important during the presentation to discuss effective practices both from a legal standpoint as well as from the practical examples given by attendees. The benefit of sharing related experiences and practices is one of the main benefits of the seminar to participants.

HIRING OF EMPLOYEES

Statutory restrictions must be followed in the advertising and hiring of employees. In particular Sections 11 and 13 of the *Human Rights Code* restrict advertisements and employment terms, which are discriminatory as follows:

Discrimination in employment advertisements

11 A person must not publish or cause to be published an advertisement in connection with employment or prospective employment that expresses a limitation, specification or preference as to race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age unless the limitation, specification or preference is based on a bona fide occupational requirement.

Discrimination in employment

13 (1) A person must not
(a) refuse to employ or refuse to continue to employ a person, or
(b) discriminate against a person regarding employment or any term or condition of employment

because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual

orientation or age of that person or be cause that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.

(2) An employment agency must not refuse to refer a person for employment for any reason mentioned in subsection (1).

(3) Subsection (1) does not apply

(a) as it relates to age, to a bona fide scheme based on seniority, or

(b) as it relates to marital status, physical or mental disability, sex or age, to the operation of a bonafide retirement, superannuation or pension plan or to a bonafide group or employee insurance plan.

(4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

Sections 12 and 14 of the *Human Rights Code* also prohibit discrimination in wages and union membership.

Employers must ensure that job advertisements, employee application forms and employee information forms collect only the necessary information and are not in violation of the legislation. For example questions seeking age, race, illnesses and marriage status will, in most cases, be in violation of the *Human Rights Code* unless they relate to specific requests necessary for benefit application forms. However, an employer may seek relevant information not in violation of the legislation through other means including questioning the employee's ability to work by obtaining a social insurance number, obtaining the employee's years of experience, identifying job requirements and any limitations which will need to be accommodated, and confirming an employee's ability to travel and relocate if necessary.

PRE-EMPLOYMENT DRUG TESTING

The law regarding pre-employment drug testing has been significantly affected by both legislation and case law. Historically, employers in certain safety sensitive industries such as trucking, conducted pre-employment drug testing. The results of the tests were often used by employers to terminate the employment of an employee where the test results came back positive. The employer's view was that the pre-employment drug testing was necessary to meet U.S. regulations in particular, those of the U.S. Department of Transportation.

The present law in Canada is that pre-employment and arbitrary drug testing will be found to be illegal in most cases. However, post-incident and for cause testing will be defensible where sufficient grounds exist to require the testing.

The case law regarding pre-employment drug testing was originally established by the Ontario Court of Appeal in *Entrop v. Imperial Oil Ltd. 2000*. This decision held that pre-employment drug testing was discriminatory as employees testing positive were treated as perceived addicts and no accommodation was made for their particular circumstances. The Court found that pre-employment drug testing was unsupported in that case.

In a recent decision of the Alberta Court of Appeal in *Kellog, Brown and Root Company*, the Court found that a policy requiring pre-employment drug testing where an employee was terminated or not hired because of a positive test, was acceptable. The Court declined to follow the decision in *Entrop* and relied upon the evidence that the employee was not treated as having a perceived drug dependency. The employment involved a safety sensitive job situation (working around large industrial equipment at an oil sands project) and the evidence was that drug use would have lingering affects relevant to safety considerations. The Court did not consider the question of accommodation as it found no breach of the Human rights legislation. The Court found that the policy was proper in particular reference to the safety considerations of others.

The future state of the law on this issue is to be determined. In the author's view, we expect that an approach favouring accommodation of individuals who do not pass a drug test will be in line with the purposes of the Human rights

legislation. However, the difficult reasoning in *Entrop* finding that employees testing positive were perceived as having a disability, may not be accepted. Rather, a decision recognizing that safety concerns may have an overriding concern at the start of an employment relationship will be respected.

RESUMES AND REFERENCES

An employer is inundated with personal information regarding prospective employees through the job application process. This will include resumes and application letters. An employer will need to consider the benefit of retaining resumes for future reference. As the resumes contain personal information, the employer will want to obtain the consent of prospective employees to retain the resumes or at least reference this retention in the corporate privacy policy.

Claims may arise from employees who have not been hired. One case dealt with by the author through the Human Rights Tribunal involved a claim that a prospective employee was not hired due to her being “trans-gendered”. The use of the resume and notes made at the time of interviewing were important in defending the claim.

Employers will also need to consider obtaining references at the start of employment and providing references at the end of employment. A form of a consent to use with employees to allow an employer to obtain and provide references is as follows:

“I, **[Employee]**, hereby consent to **[Employer]** and its employees and authorized representatives contacting those references provided by me in my resume or job application and verifying past employment including my skills and abilities, education, credentials, attitude, attendance record and other information concerning my employment for the purpose of determining my suitability for employment with **[Employer]**.

I also consent to and authorize my references, including my current and former employers and others listed in my resume or job application to provide any and all relevant information and opinions, both good and bad, concerning my employment including my skills and abilities, education, credentials, attitude, and attendance record.”

Many corporate employers have policies regarding providing references. These often limit references to simple statements of the employee's position and duties and nothing more. These limitations are largely unnecessary and driven by corporate mandates. The ability to provide an open and honest reference to an employee's skills should not be limited so long as appropriate protection is in place.

PROBATIONARY REVIEWS

It is important for an employer to establish a probationary period where it seeks an opportunity to review and assess an employee before committing to permanent employment. Probationary terms should be in writing and included in the employment contract.

The recent decision in *Pekrul* 2007 BCSC involved an employee induced to join an employer leaving a long-term position. The employment contract was found to include an oral probationary term. The employee was not retained beyond the probationary period and sued for damages seeking twelve (12) months pay. The employer was able to establish the existence of a probationary period and the Court found that so long as the employer conducted a good faith assessment of the employee, the employer was entitled to rely upon the probationary period to terminate the employment without further obligation. The language referred to by the Court as the meaning of the probationary period was:

“implied contractual right to dismiss...without giving reasons provided the employer acts in good faith in the assessment of a probationary employee's suitability for the permanent position.” (*Jadot v. Concert Industries, BCCA 1997*)

The employer was required to establish the reasons for the termination including the various problems exhibited by the employee to support a finding of a good faith assessment having been conducted by the employer.

There will be no difficulty extending a probationary period so long as the parties agree. The agreement should be in writing. There may be an issue regarding consideration for the extended probation period. Further, any obligations pursuant to the *Employment Standards Act* including the requirement to pay one (1) weeks termination pay following three (3) months of employment will need to be complied with by the employer.

PERFORMANCE REVIEWS AND CONSTRUCTIVE FEEDBACK

The process of performing performance reviews will assist employers in maintaining a record of an employee's assessment for use in any future proceedings. The method of performing the performance review and the feedback given through the process will need to be monitored by the employer to ensure that the process is meeting the objectives of correcting and ensuring proper performance. An employer seeking to terminate an employee's employment will find that the use of the performance review process to effect change will be ineffective and any termination relying simply upon poor performance reviews will be near impossible to support as justification for termination without notice.

The performance review process has grown to include such terms as "180°" and "360°" reviews. The involvement of co-workers in the review process leads to issues of confidentiality as well as concerns of the effect on workplace relationships. The information provided by co-workers may not be able to be kept confidential where a request for disclosure is made pursuant to PIPA or through a court process. The risk of disclosure may also cause fellow employees to be less willing to provide open and honest input regarding an employee. The human resources representative will need to manage these concerns while still carrying out and conducting a proper evaluation.

Employees should be made aware of the process for feedback and what information will be shared with the worker and co-workers. Employees may then consent to providing this information and the disclosure of this information. Any statutorily requested disclosure of information must adhere to the legislation including protecting the identity of individuals and ensuring that an individual's safety is not at risk.

As a lawyer I am regularly contacted by employees upset with performance reviews. These often lead employees to writing response letters to the review to ensure that the employee's position is put on the record in the event of an employment dispute at a later date. Human Resources professionals should be prepared to defend performance reviews and ensure both positive outcomes and acceptance by the employee.

PROGRESSIVE DISCIPLINE

The progressive discipline approach will require proper documentation and notice to an employee to be effective. The goal of the progressive discipline approach is to satisfy the duty of an employer to warn an employee of any substandard performance and to provide the employee with an opportunity to correct the performance. An employer will be required to provide the employee with notice of the wrongdoing, the correct standard to be met and an opportunity to correct the standard along with any support, such as training, that will be necessary to meet the goal.

The first stage of progressive discipline is often a verbal or written warning. An employer's policies or contract of employment, such as a collective agreement in the unionized setting, may include specific obligations regarding discipline. These should be complied with by the employer. The difference between a verbal and written warning will depend upon the employer's policy but otherwise simply documents the level of concern of the employer.

The existence of workplace rules and policies will be important in carrying out effective progressive discipline. An employee's conduct which is in breach of a policy made known to the employee will be an important aspect in determining the correct form of discipline. In cases where discipline is followed through with by the employer, any rules violated by the employee should be specifically referenced in any documentation as should prior warnings. It will also be important to have an employee acknowledge receipt of the discipline and provide any feedback where appropriate.

An employee in a unionized setting will also need to be provided with union representation both during any discipline investigation as well as at the time the employee has been notified of the discipline.

Determining what will amount to culminating events sufficient to justify termination of employment without notice is difficult. Obviously the severity of the conduct will be an important issue, as will the existence of repeat wrongdoing. However, the case law does not support termination for cause unless the conduct can be said to lead the employer to have lost trust in the employee to carry out the employment relationship.

RIGHT TO SUSPEND

The right to suspend will be very different in union and non-union situations. In a union setting an employer will have the right to suspend as part of the discipline process. However, in a non-union relationship where the employment is governed by common law principles and the terms of the individual employment contract, the existence of a right to suspend will not normally exist.

This issue has arisen recently in the Ontario Court of Appeal decision in *Carscallen v. FRI Corporation*. In that case, a fourteen (14) year employee was caught in an exchange of emails with her superior concerning a trade show in Spain. As a result of concerns raised by the CEO, the employee was told that she was suspended indefinitely. There was no entitlement to suspend the employment set out in her employment contract and it was not clear whether the suspension was with or without pay. The language used in the email was: "We are hereby notifying you that you are suspended immediately until further notice."

At the time of the suspension the employee was not told of the duration of the suspension nor whether her salary would be continued. Her understanding was that she was being suspended as a result of the exchange of emails and that her superior was not happy with its content. The dispute had arisen out of the trade show booth and materials not arriving on time. The Court stated that: "The issue was whether an implied term authorizing unpaid suspensions should be read into the employment relationship between the parties." The Court found that no such term existed and the language used amounted to termination of employment entitling the employee to twelve (12) months pay totalling \$140,000.

The case law does allow for the right to suspend to be included in an individual employment contract. However, the right to suspend will need to be expressed and clear.

In situations involving investigation of improper conduct, a suspension may be warranted however the employee will need to be informed that the suspension is with pay and the purpose of the suspension is to investigate wrongdoing. In such circumstances, the suspension should not be found to amount to a termination of employment.

TERMINATION STRATEGIES AND MEETING JUST CAUSE TEST

Employers proceeding with termination of employment will initially need to decide whether the termination will be for cause or not for cause. Restrictions on not for cause terminations will include illegal grounds found in the *Human Rights Code*, terminations of fixed term contracts and terminations in violation of the policies of the company. These policies may include requirements for obtaining corporate approval from senior executives to effect a termination.

Terminations for cause will need to be supported by documentation establishing the basis for the cause for termination. This may include a progressive discipline approach or an investigation of one single incident. In each case the basis for cause and the existence of cause must be carefully assessed including a review of relevant documentation by the employer prior to electing to terminate for cause. The risk of unfounded allegations of cause will include increased damage awards for breach of a duty of good faith and fair dealing, and extended unemployment, increasing the likelihood that the matter will not easily be resolved.

The level of conduct which is required to support termination for cause was referred to in *McKinley v. BC Tel* by the Supreme Court of Canada in 2001 as conduct which "was of a degree that was incompatible with the employment relationship." The consideration of whether the employment relationship has been fundamentally breached will require a consideration of all relevant factors including the employee's disciplinary record, length of employment and the significance of the wrongful conduct.

The benefit of a properly conducted investigation will be the attempt to determine the facts of the situation including any culpable or non-culpable conduct on the part of the employee. Further, the benefit will be that an employee's input may be obtained in order to determine the employee's position with respect to the conduct. An employee has continuing obligations to assist the employer in an investigation during their employment.

LAST CHANCE AGREEMENTS

The statutory limitations on an employer's ability to terminate a disabled employee will include obligations to accommodate the disability to the point of undue hardship. This will include employees subject to an addiction such as to drugs or alcohol. Although these situations may be viewed both as culpable and non-culpable behaviour, an employer will be required to recognize that an employee suffering from an addiction is suffering from a disability requiring accommodation. This may involve cases where an employee has stolen from the employer or caused damage to the employer's business, both situations where an employer's initial response may be to terminate the employee's employment for cause.

Employers may enter into last chance agreements in order to satisfy their duty to accommodate and to ensure that an employee is placed under strict guidelines and does not impose a risk to the business or fellow employees. A form of a Last Chance Agreement can be found in Appendix A.

SEPARATION RECORDS

At the time of termination there will be documentation to be completed. An employer will need to consider an appropriate method of completing the documentation in particular where the reason for termination may be subject to a dispute or the employer is terminating either for cause or not for cause.

The government required Record of Employment has both a "reason for issuance" requirement as well as an opportunity to explain the reasons for termination. These reasons should be used to support the employer's position regarding termination. This may include completing the Record of Employment based on dismissal, despite the fact that an amount of money is being offered to the employee in satisfaction of any claims. Understanding the reasons for issuance described in the Record of Employment will be important to proper completion. In the end result the Record of Employment must not contradict the employer's position regarding termination and must be true and correct as required by the form.

The termination letter cannot be written without prejudice and must provide clear and inequitable notice of termination. A termination letter may include an offer of settlement of any claims. The offer of settlement on its own may be stated to be without prejudice.

The termination letter must also provide notice of any benefit of termination or conversion privileges. An employer should recognize an obligation to provide notice of these rights.

The termination letter should also state the payments to be made to the employee to avoid any confusion. This will include payment of termination pay, statutory deductions, payment of overtime or time in lieu, and any commissions.

The employer may wish to issue both an internal and external announcement following termination. These announcements should accord with the basis upon which the employee's employment has been terminated. Where the reason for termination is not disclosed or agreed upon, the employer may simply state that the employee's employment has ended. The parties may agree upon the form of the announcement although the announcement should represent the truth and the employer should keep a record of the employee's agreement to the form of announcement.

Employers may seek Releases from employees as part of the termination process. The form of Release may range from a statement at the bottom of the termination letter to a multi-page document releasing the parties from all claims.

For more information about this article, please contact Michael A. Watt at 604.484.1733 or mwatt@ahbl.ca

Appendix A

[COMPANY LETTERHEAD]

[NAME]
[ADDRESS]
[ADDRESS]

Dear [NAME]

RE: **FUTURE EMPLOYMENT WITH [COMPANY]**

I am writing further to recent medical information with prepared by Dr. [NAME OF DOCTOR] stating that you have an active addiction to [drugs / alcohol]. I want to outline for you what I perceive to be the available alternatives regarding your future employment with this Company.

Medical Assessment

*** [DESCRIBE MEDICAL INFORMATION RECEIVED, INCLUDING ANY RECOMMENDATION FROM DOCTORS IN TERMS OF RETURN TO WORK]**

Recent Employment Difficulties

*** [DESCRIBE ANY PROBLEMS YOU HAVE OBSERVED THAT YOU CONSIDER TO BE RELATED TO EMPLOYEE'S SUBSTANCE ABUSE]**

Terms and Conditions of Continued Employment

The Company must clearly establish conditions for your continued employment that ensure you are able to work free from adverse effects on your performance.

You may indicate your acceptance of continued employment on the basis outlined below by signing the enclosed duplicate copy of this letter and returning it to me no later than the close of business on **[DATE]**. If I have not received a signed copy of the letter indicating your agreement by that time, it will indicate that you have chosen not to take the steps necessary to continue your employment with the Company and I anticipate that the Company will proceed to terminate your employment on **[DATE]**.

The conditions upon which the Company is prepared to continue your employment are set out in the following commitment: (for example)

1. You will be placed on leave of absence without pay commencing immediately. While you are undergoing treatment, you will likely be entitled to weekly indemnity benefits. You will be responsible for making the necessary application for such benefits.
2. Your leave of absence will continue and you will not be permitted to return to work until all of the following conditions set out below have been satisfied AND you have been reassessed by a qualified medical practitioner to the satisfaction of the Company, who will confirm that the conditions have been satisfied and that you are fit to return to work:
 - (a) You must successfully complete a recognized alcohol dependence treatment program.
 - (b) You must establish and maintain contact with an outpatient support program in the community, including 12 step recovery group meetings and alcohol program counselling;
 - (c) You must commence attendance at AA meetings at least three times per week, including a home group;
 - (d) You must establish meaningful contact with a male sponsor in AA, and have provided the name and contact information of your sponsor to the Company.

3. You must complete the requirements of Paragraph 2 within three (3) months of the date of this letter. Your failure to do so will constitute a breach of this Agreement.
4. The Company is prepared to assist you with the per diem cost of a recognized rehabilitation and treatment program by offering a reimbursement of 50% of the program cost to you upon successful completion. You will be required to provide certification to the Company showing the full cost of your program and the per diem cost of the program to qualify for this reimbursement. The required information may be submitted to the undersigned upon your successful return to work.
5. The Company is prepared to assist you in paying the cost of a recognized rehabilitation and treatment program (up to a maximum of \$ [amount]) by paying the full cost of the program up front. The Company requires you to repay half the cost of the program and is prepared to arrange for this to be done by payroll deduction spread out over twelve (12) months following the date you return to duty. By signing this letter you consent to these payroll deductions.
6. Upon the completion of a recognized rehabilitation and treatment program, you agree to abstain completely from consuming alcohol (as well as all other mood-altering drugs, including prescription and over-the-counter sedatives and narcotics) indefinitely (meaning forever).
7. Upon the completion of a recognized rehabilitation and treatment program, you will provide to the Company satisfactory proof that you have successfully completed the rehabilitation program. Such proof will include a letter from the persons responsible for running the program in which you are participating and/or a letter from a qualified medical practitioner providing details of your rehabilitation, as the Company may require. You will also authorize your family physician or another a qualified medical practitioner selected by the Company to provide the Company with a written report concerning your current medical status, the likelihood of a recurrence of impairment or dependency, your medical ability to perform your job, and your willingness to comply with the monitoring, relapse prevention and support program required. Your signature on this letter is your authorization to the Doctor to provide such a report.
8. Upon completion of a recognized rehabilitation and treatment program, you will immediately begin participation in the monitoring, relapse prevention and support program as recommended and supervised by a qualified medical practitioner, for a two year period. The program will include the following:
 - a. Attendance at no less than three AA meetings per week, including a home group;
 - b. Regular meaningful contact with a male sponsor in AA;
 - c. One-on-one and/or group counselling as directed by your family physician;
 - d. Attendance at the office of a monitoring physician (an addictionologist) every two weeks for the first* months and at least monthly thereafter (as directed by the monitoring physician) for account ability purposes;
 - e. Provision of urine and/or blood specimens within 24 hours as requested by your monitoring physician and/or the Company for testing for the presence of alcohol or other mood-altering drugs or elevation of your liver enzymes (at the Employer's expense)
9. You will agree to continue to be reassessed by your family physician throughout the monitoring, relapse prevention and support program and will authorize your family physician to make regular reports to the Company regarding your ongoing compliance with the monitoring, relapse prevention or support program and the requirements of this Agreement. Again, your signature on this letter is your authorization to the Doctor to provide such ongoing reports.
10. By signing this letter, you undertake and agree that you will not at any time report to work with alcohol present in your body, and you further undertake and agree that you will not at any time report to work under the influence of, or impaired by any other prescription or non-prescription drug or other illicit drugs, over the counter medications and prescription drugs such as sedatives, hypnotics, or mood altering prescription drugs (unless approved by and under the supervision of a qualified medical practitioner).

11. By signing this letter you agree that, in addition to any other remedies available to the Company, the Company has the right to require you to submit to random drug and alcohol tests not more often than twice per week, at times of the Company's choosing, during the period of two years immediately following the successful completion of your treatment and/or rehabilitation program. It is agreed that the Company and you will have full access to the results of each such test.
12. Your signature on this letter is your written consent to put this drug and alcohol testing agreement into effect.
13. You understand and agree that Paragraph 11 above shall not prevent the Company from requiring you to submit to a drug/alcohol test at any time (even after the two year random testing period) in the event that you are involved in a workplace incident or where the Company otherwise has reasonable and probable grounds to suspect that you have violated Paragraph 10 above.
14. You agree that if the a qualified medical practitioner reports to the Company that you have failed to comply with the monitoring, relapse prevention and support program and the requirements of this Agreement or the results of any test under this Agreement disclose the presence of alcohol in any amount, that result will be treated by the Company and by you as just cause for summary dismissal. Your employment will be terminated immediately without notice or pay in lieu of notice.
15. You agree that any instance of a breach by you of any of the above-stated conditions of continued employment will be treated by all parties as just cause for summary dismissal. Your employment will be terminated immediately without notice or pay in lieu of notice.
16. By signing this letter you understand and agree that no delay, omission or forbearance on the part of the Company with respect to the enforcement of any of the provisions of this Agreement in relation to any act or omission by you shall constitute a waiver of the right of the Company to enforce such provisions, including but not limited to the right to terminate your employment without notice or pay in lieu thereof.
17. You agree that the continuation of your employment under the terms of this Agreement satisfies any and all of the Company's duty to accommodate to the point of undue hardship that may have existed in relation to you under any relevant human rights legislation. You further agree that any breaches of this Agreement by you will constitute undue hardship for the Company in light of your past history and the impact of your conduct on the Company's operations.

[EMPLOYEE NAME], please indicate your commitment to continued employment with the Company by signing the enclosed duplicate copy of this letter and returning it to me by **[TIME]** o'clock p.m. on **[DATE]**.

Yours truly,

[COMPANY]

Per:

[AUTHORIZED SIGNATORY]

I have read, understood, and agree to the above conditions of my continued employment, _____

[EMPLOYEE NAME]

An employee will be required to provide information necessary to establish the last chance agreement. This may include information from the employee's doctor or attending another medical practitioner to assist with establishing the parameters for the last chance agreement. This will include a necessary period off work for rehabilitation, a return to work program and ongoing monitoring. These costs may be paid for by the employee or shared by the employee with the employer, union or insurance company.