

# Corrective Discipline: Getting on the Path to Positive Change

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Most people work just hard enough  
not to get fired and get paid just  
enough money not to quit.

- *George Carlin*

# Agenda

- Management Rights and Obligations
- Labour Code and Common Law
- Employer Policies
- Culpable vs Non Culpable Behaviour
- Refreshment Break
- William Scott
- Disciplinary Process

# Discipline

Success encourages.

Punishment or discipline discourages.

# Management Rights

- Expect employees to attend work on a regular basis
- Expect employees to be able to perform their duties
- Expect employees to follow directions and rules
- Expect employees will act in the best interest of the employer
- Right to manage (staffing levels, performance, schedules)
- Expect employees to behave appropriately and not harass or discriminate

# Management Obligations

- Adhere to the Collective Agreement
- Ensure employees are aware of what is expected of them
- Ensure policies are clear, distributed and applied universally
- Discipline is corrective, not punitive
- Employer will always be held to the test of just and reasonable



# The Labour Code

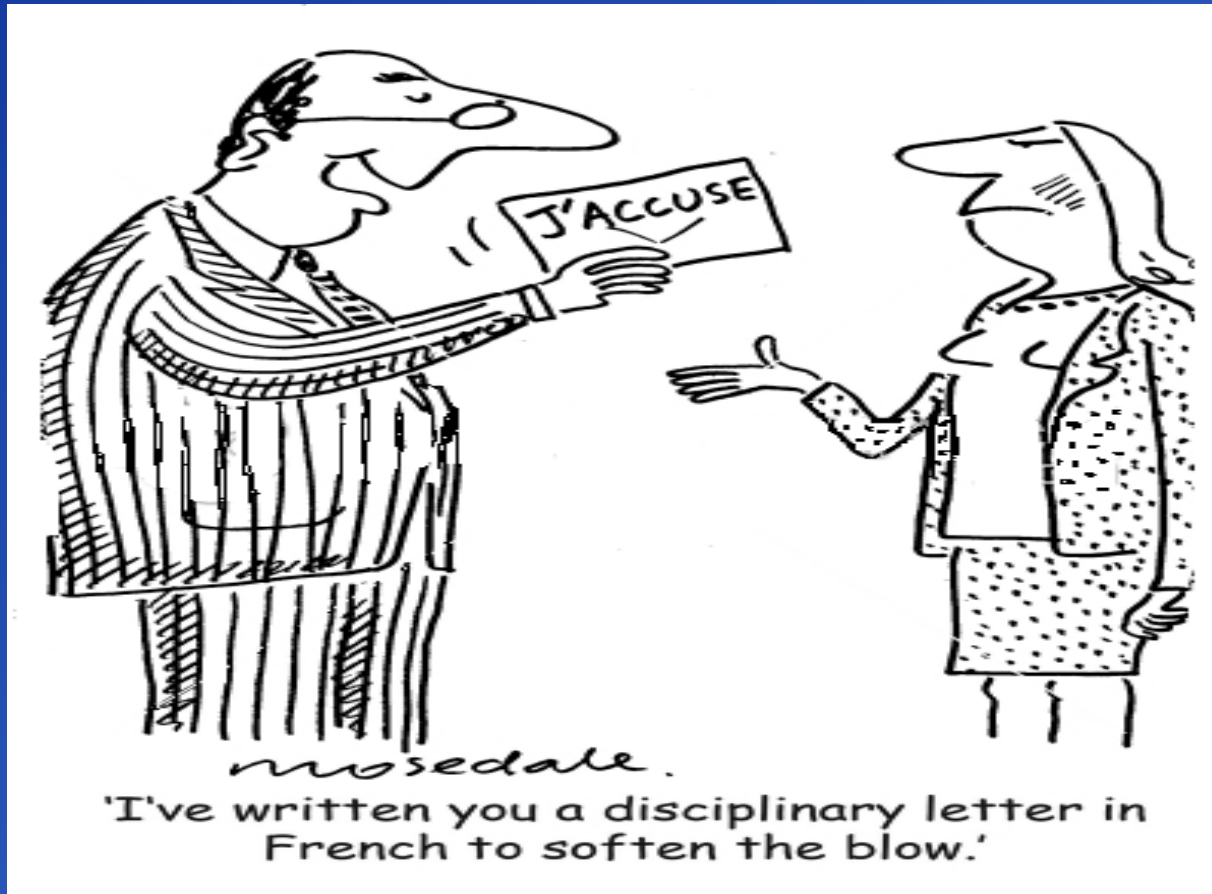
- Requires all Collective Agreements to have a provision requiring “just cause” for discipline
- In cases of discipline and discharge, the employer must prove “just cause” exists
- Proof is based on the balance of probabilities

# Common law

- Master Servant Relationship  
versus
- Collective Agreement

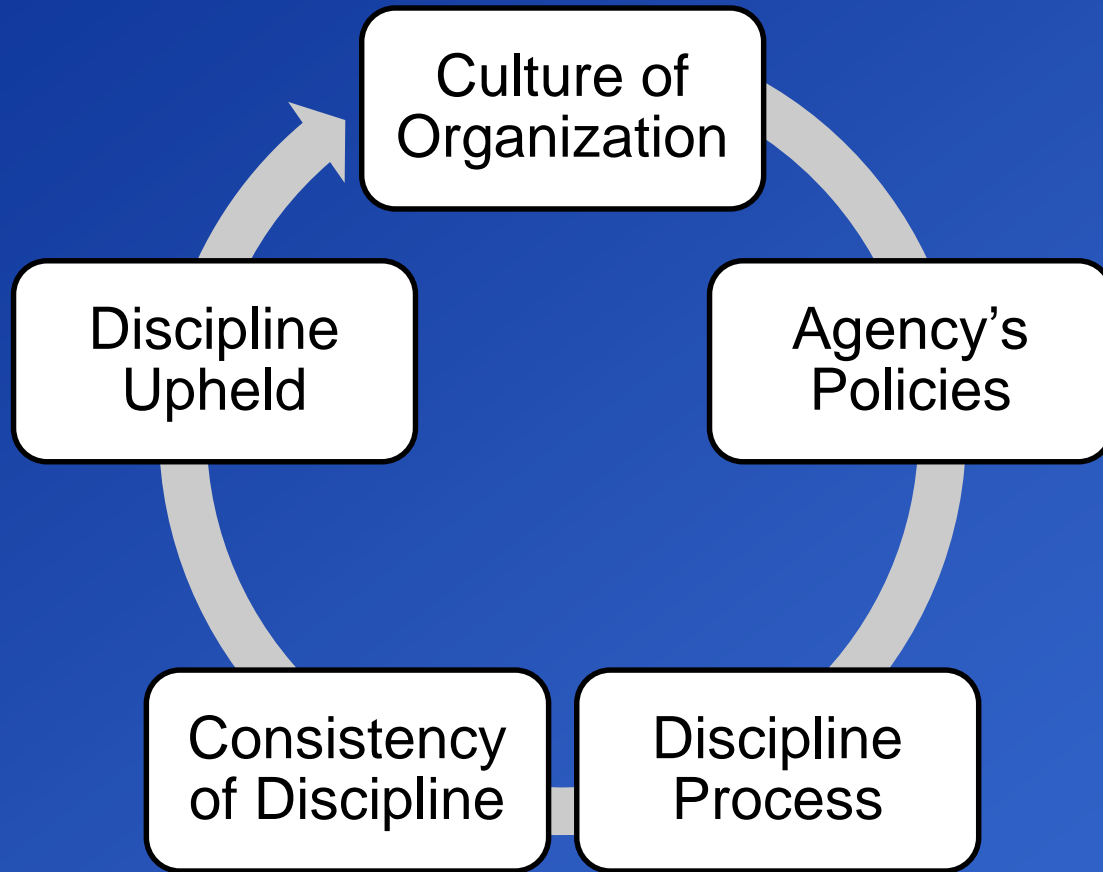


# Progressive Discipline



# Role of Discipline

- Employer determines workplace culture
- Policies enshrine that culture
- Discipline enforces the policies
- Consistency and fairness upholds the discipline
- Progressive discipline corrects the behaviour
- The culture in the workplace is maintained



# The Six Musts of Policies

- Cannot be inconsistent with the Collective Agreement or legislation
- Must be reasonable
- Must be clear and unequivocal
- Must be enforced consistently
- Employees must be aware of policies
- Employees must be told that a breach of such rule could result in discipline

# What is the first step in dealing with employee discipline?

**Step 1:  
Establishing and  
Reviewing Your  
Rules and Policies**

# Culpable Behaviour

- Culpable behaviour is blameworthy conduct
- It is behaviour over which the employee has some responsibility or control and therefore can change



# Some Examples of Misconduct

- Excessive tardiness
- Failure to notify of an absence
- Insubordination
- Rude or abusive language in the workplace
- Leaving work without approval
- Failure to follow departmental rules or policies
- Dishonesty
- Theft

# Non-Culpable Behaviour

- Non-culpable behaviour is conduct over which the employee has little or no control
- Examples of non-culpable behaviours include absenteeism for legitimate illnesses
- Because the behaviour is beyond the control of the employee, progressive discipline (corrective) is not appropriate



# Progressive Discipline



- Progressive discipline is intended to correct unacceptable behaviour and substandard work performance
- There are four basic levels of discipline, each increasing in severity: Verbal Warning, Written Warning, Suspension, and Termination
- Employer must provide warning of increasing severity and of the consequences of continued unacceptable behaviour/performance
- Only applicable when dealing with culpable behaviour.

## Wm Scott Case

- Arbitrators must ask three distinct questions when hearing a discipline/discharge case:
  - Has the employee given just cause for some form of discipline?
  - Was the penalty excessive, given all of the circumstances of the case?
  - If penalty is excessive, what is fair, given the circumstance?

# Progressive Discipline (Mitigating/Aggravating Factors)



- Seriousness of the offense in terms of Employer policy and Employer obligations
- Long service of the employee
- Record of the employee
- Whether the offense was an isolated incident in the employment history of the employee
- Provocation
- Evidence that Employer rules of conduct have not been consistently enforced, thus constituting a form of discrimination

# Progressive Discipline (Mitigating/Aggravating Factors)



- Offense was spur-of-the-moment misconduct
- Offense was systematic and repetitive
- Offense was premeditated, planned and deliberate
- Misconduct involved a breach of trust
- Failure of the employee to apologize and settle the matter after being given an opportunity to do so
- Failure of the Employer to permit the employee to explain or deny the alleged offense

# Progressive Discipline (Mitigating/Aggravating Factors)



- Bona fide confusion or mistake by the employee as to whether he/she was entitled to do the act for which he/she was disciplined
- Employee's inability, due to drunkenness or emotional problems, to appreciate the wrongfulness of his act
- Relatively trivial nature of the harm done
- Employee's future prospects for likely good behaviour
- Extraordinary economic hardship

# Discipline

- What if an incident of unacceptable employee conduct occurs?

# GROUP EXERCISE

- The individuals at your table will form your group
- You are allowed 20 minutes for this exercise
- Your task is to determine what discipline an arbitrator might hand down
- You will consider the questions of Wm Scott:
  - (1) Did an incident occur that warrants discipline?
  - (2) If the answer to number one is yes, what severity of discipline is appropriate?
  - (3) What decision do you think the arbitrator will hand down?



# The Employee's Record

- Kept in chronological order
- All records of discipline
- All letters of expectation
- Notes confirming coaching, counselling
- Record of training courses, seminars, workshops taken
- Record of employee signing off employer policies
- Performance reviews/appraisals



# Sunset Clause Article 11.4 (d)

- Sunset or cleansing clause (18 months)
- Will only be removed if no further infraction occurs
- Discipline will be removed but not destroyed

# Essential Elements to Justify Dismissal of a Probationary Employee on the Basis of Unsuitability

- The employee was clearly advised that he/she must complete a probation period as a term of their employment
- The employee was clearly advised of the performance expectations he/she would have to meet in order to satisfy the probationary review
- The performance expectations are reasonable
- The employee was advised of his/her performance shortcomings **\*before\*** the probation period expired and instructed on how to improve
- The employee was warned that a failure to improve will lead to dismissal
- The employee was given a fair opportunity to demonstrate improvement and in fact failed to do so

# Essential Elements of Insubordination

- It is widely accepted that employees are required to follow orders made by the employer
- Three essential elements must be proven to establish that an employee engaged in insubordination:
  - (1) There must be a clear order understood by the employee;
  - (2) The order must have been given by a person in authority; and
  - (3) The order must have been disobeyed.
- An additional type of insubordination arises where the employee communicates in an insolent/defiant/rebellious manner to a person in authority.

# Essential Elements of Non-Culpable Poor Work Performance

- An employer who seeks to dismiss an employee for non-culpable deficiencies in job performance must satisfy the following criteria:
  - The employer defined the level of job performance required
  - The standard expected was communicated to the employee
  - Reasonable supervision and instruction was given to the employee and he/she was afforded a reasonable opportunity to meet the standard
  - The employee was unable to meet the requisite standard to an extent that rendered him/her incapable of performing the job and that reasonable efforts were made to find alternate employment within the competence of the employee
  - Reasonable warnings were given to the employee that a failure to meet the standard could result in dismissal

# Avoiding Common Discipline Mistakes in the Unionized Workplace

Assuming off-duty conduct is never subject to discipline: When does misconduct away from work justify discipline?

# Avoiding Common Discipline Mistakes in the Unionized Workplace

Improper use of the employee's work record: How should an employee's record be used to determine the appropriate level of discipline?

# Role of the Shop Steward

- Employee has the right to have a Shop Steward present during a disciplinary meeting
- Prior to the discipline meeting, inform the employee he/she has a right to have a Shop Steward present
- If employee declines, get it in writing
- A Shop Steward can be helpful in counselling an uncooperative employee

# Sample Form

Date \_\_\_\_\_

I \_\_\_\_\_ was made aware that I was being asked to attend a meeting with my employer that would be disciplinary in nature. I was informed of my right to have “union representation present” at this meeting. I elected not to afford myself of this right. I made this election of my own free will and was not intimidated or coerced in any fashion.

\_\_\_\_\_  
(Employee’s signature)





# The Investigation



1. Interview the employee
2. Interview witnesses
3. Identify the standards of conduct
4. Review policies and procedures
5. Assess the consequences of the incident
6. Establish “Just Cause”, not “just because”



# The Discipline Meeting

- Provide employee with a summary of investigation - - just the facts
- Ask for the employee's perspective of the incident
- Provides reason(s) why the behaviour is considered unacceptable.

# The Discipline Meeting

- Review employee's past performance/ discipline
- Outline specific changes to be initiated by the employee, to correct the problem
- Describe assistance available from you or others, to correct the problem
- Explain the discipline to be imposed

# Process

- Employee does not have to offer an explanation; however, the Employer's decision will be based on what information is provided
- Have employee put statement in writing and sign
- If statements of witnesses and employee are contradictory, you may have to go back and re-interview
- Onus is always on the Employer in cases of discipline

# Keeping Proper Perspective

- Avoid significant time lapse for response
- Have facts in a form easily communicated
- Decide what you want to accomplish
- Do not allow distractions during meeting
- Ensure a Shop Steward is available if the interview may form the basis for discipline

# Documentation Checklist

- Extremely important to document disciplinary events
- You will need this when the employee grieves the discipline
- Record date and time of misconduct, employee(s) involved, location, witnesses, your actions



# Documentation Checklist

- You should also note when the employee had been warned or instructed previously
- Relevant company policies and procedures
- How and why employee should have known behaviour was unacceptable
- How your actions conform to previous discipline measure taken with other employees

# Gathering Evidence Preparation

- What conduct is **alleged**?
- Characterize the misconduct and possible lesser offences
- **Identify** possible aggravating and mitigating circumstances
- **Organize relevant documents** in your possession
- Prepare a **list of potential witnesses**
- Identify the logical order of interviews
- **Safeguard evidence**
- With your advisor, **obtain and review** all relevant statutes, regulations, policies, personnel files, and collective agreement provisions

# Gathering Evidence Preparation

- **Ensure consistency**
- **Opportunity for Shop steward representation**
- **Consider whether it is appropriate to suspend the alleged wrongdoer pending the outcome of the investigation**
- **An effective investigator must remain objective and neutral**
- **He or she must not present any real or perceived bias in the situation**

# Role of the Steward

- During investigation and discipline meeting, employee has right to union steward representation
- Steward is silent observer and should not be running the meeting
- Steward should not engage in debate
- Steward should not interfere with employer process
- Steward entitled to advise employee and can caucus to do so
- The steward is not entitled to end the meeting

# Interview Process

- Introduce the **witness** to the investigative process
- Explain that the **interview is for fact gathering purposes only**
- Advise the witness that no conclusions will be reached until all of the evidence is obtained and reviewed
- **Explain the importance** of the matter at issue
- Emphasize that you are **relying on the employee's honesty** in the investigation process
- Do not make judgments or conclusions at this stage
- **Outline the factual allegations** against the employee and emphasize that the purpose of the interview is to obtain factual information and the employee's version of events



# Note Taking

- Ensure that another manager is present
- **Record** the date, time, location, the note taker and all persons present at the interview
- **Confine remarks to the facts**
- At the conclusion of the interview, **read notes to witness**
- In your notes **prepare space for additional questions** that arise

