

# Corrective Discipline: Getting on the Path to Positive Change

*Anne Campbell, HRLR Consultant*



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



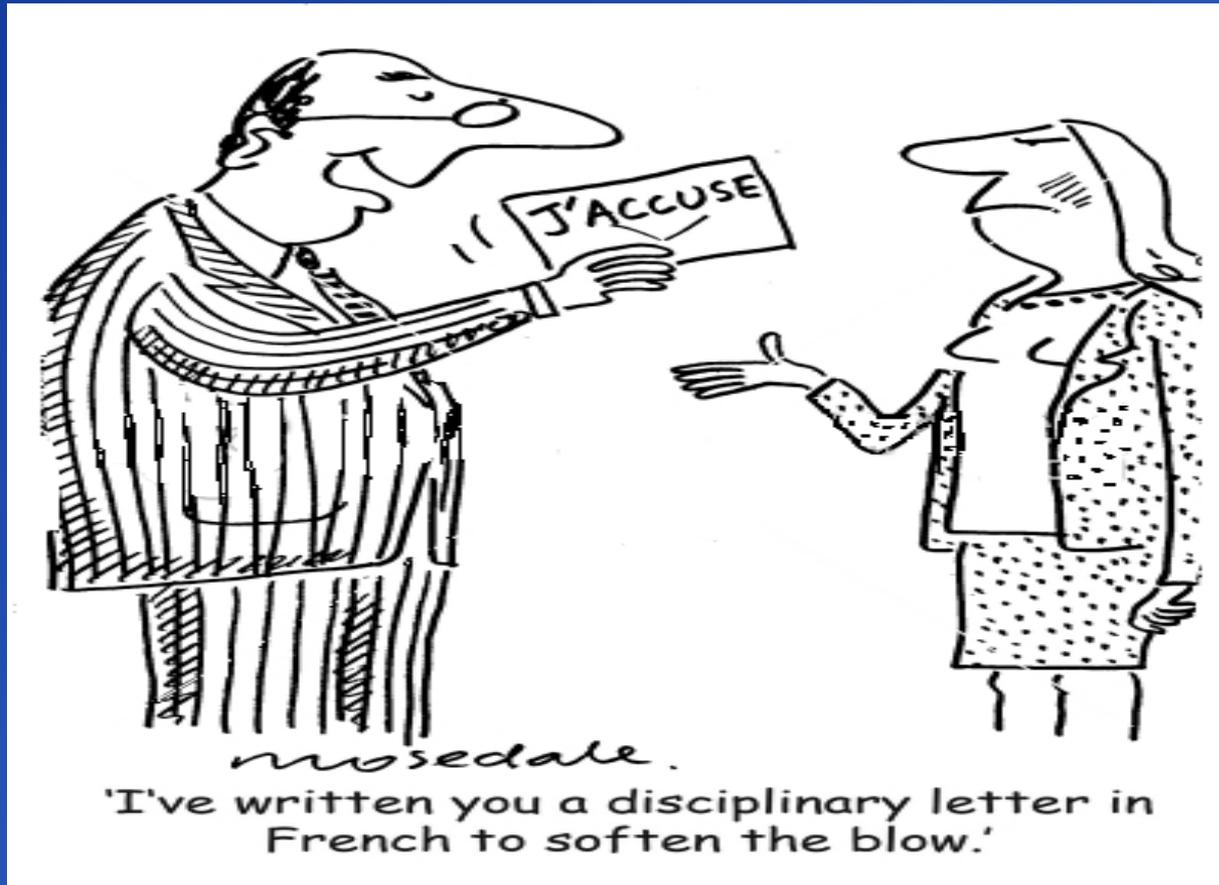
# The Labour Code

- 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

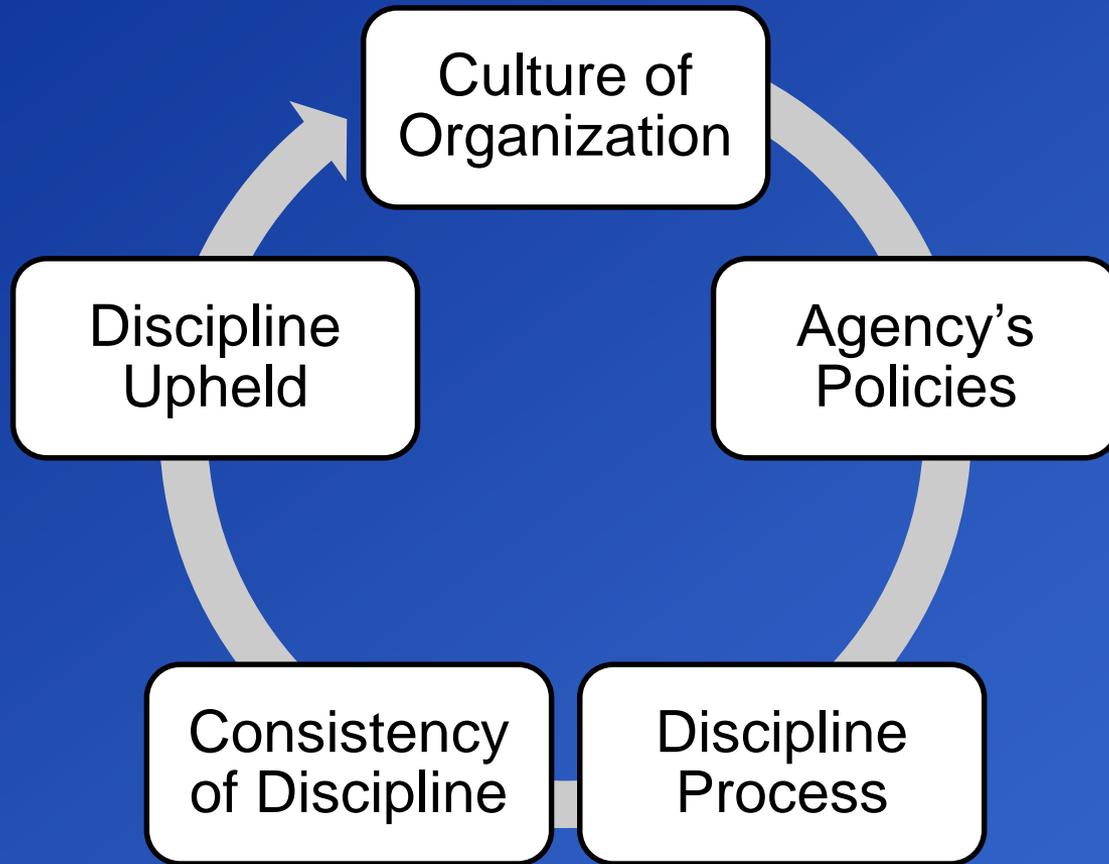
- Master Servant Relationship  
versus
- Collective Agreement

# 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



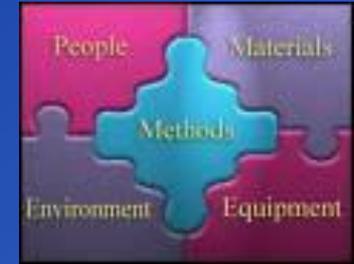
# Some Examples of Misconduct

- 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

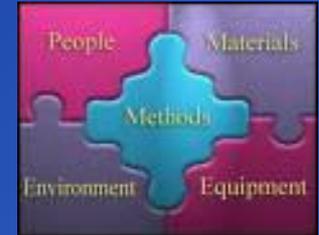


- Progressive discipline is intended to correct unacceptable behaviour and substandard work performance
- There are four basic levels of discipline, each increasing in severity: Verbal Warning, Written Warning, Suspension, and Termination
- Employer must provide warning of increasing severity and of 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)



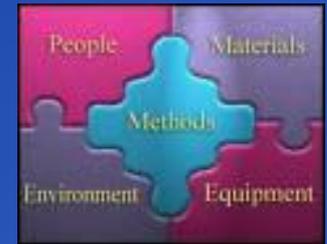
- Seriousness of the offense in terms of Employer policy and Employer obligations
- Long service of the employee
- Record of the employee
- Whether the offense was an isolated incident in the employment history of the employee
- Provocation
- Evidence that Employer rules of conduct have not been consistently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

