

Disciplinary Action Complaints: A Primer for Alberta Employers

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Many employers are aware that documenting employee performance concerns is crucial to supporting termination of employment for cause relating to performance issues, along with documenting progressive discipline, any coaching provided, and indication that the employee was given a reasonable time to correct performance concerns. However, employers may *not* be aware that documenting performance concerns can have important uses outside of supporting dismissal for cause. An important example of the importance of performance documentation occurs when a terminated employee brings a “disciplinary action complaint” under Alberta’s *Occupational Health and Safety Act* (the Act).

Disciplinary Action Complaints

Disciplinary action complaints may be brought by a non-unionized employee against their employer under section 19 of the Act where the employee has reasonable cause to believe that the employer breached section 18 of the Act. Section 18 provides that “No person shall take any disciplinary action against a worker by reason of that worker acting in compliance with this Act, the regulations, the OHS Code or an order issued under this Act.”

The essential elements of a disciplinary action complaint are:

- The complainant must have been acting in compliance with the OHS Act, OHS Regulation, OHS Code, or an order issued under the OHS Act (together, OHS Legislation);
- The complainant was subjected to disciplinary action (defined in the Act as “any action or threat of action by a person that does or would adversely affect a worker with respect to any terms or conditions of employment.”); and
- The disciplinary action was linked to the complainant’s actions in compliance with OHS Legislation.

A number of employee actions are protected by this section, reporting of a workplace safety hazard, a refusal of unsafe work, or a complaint of harassment or workplace violence made to the employer. Where an employee has exercised a right under the OHS legislation and an employer subsequently terminates, lays off, suspends, or warns an employee, there is the potential risk that the employee could bring a disciplinary action complaint (regardless of whether the employer believed it was acting in good faith, for legitimate and unrelated reasons).

Where the employee is successful in their complaint, they may be entitled to one or more of the following remedies:

- An order requiring the employer to cease the disciplinary action;
- An order reinstating the employee to their former employment under the same terms and conditions under which they were formerly employed;
- An order requiring the employer to pay the employee the equivalent of wages and benefits that the employee would have earned if they had not been subjected to disciplinary action; and
- An order requiring the employer to remove any reprimand or other reference to the matter from the employee's employment records.

OHS Officers have an additional broad catch-all power allowing them to "take any other measure to prevent reoccurrence."

Reverse Onus and Procedural Challenges

Employers are placed in a difficult position when a disciplinary action complaint is brought against them. Where the first two elements of the complaint are satisfied, the employer must satisfy a reverse onus to prove that the reason for the disciplinary action was for a purpose unrelated to the employee's protected actions under OHS Legislation. The presumption is that the disciplinary action was linked or motivated, in whole or in part, to the employee's actions under the OHS Legislation. Accordingly, employers are best positioned to respond to these complaints where they can rely on information in the employee file supporting the disciplinary steps they may take (including where they are proceeding with a termination, whether it is with or without cause).

The procedure for disciplinary action complaints also presents challenges for employers. An OHS Officer will be assigned to the matter after acceptance of the complaint. The Officer will generally only deal with the employer representative and will not recognize counsel for the employer – unless employer counsel agrees to take personal responsibility for the representations of the employer. This generally means that the employer is responsible for directly filing documents and corresponding with the Officer, notwithstanding the fact that counsel may be assisting with written submissions and gathering and assessing relevant evidence behind the scenes.

The Officer may choose to schedule a voluntary resolution meeting. If the matter is not settled at this time, the Officer will require the employee and employer parties to file evidence in support of their position shortly after the resolution meeting. Officers will generally accept statements of the parties' positions at this time as well. Once the parties have provided these documents, the Officer will provide each party with the counter-party's documents, after which point each party has only five days to provide a response. Due to the tight timelines, it is highly recommended that employers involve their legal representation at an early stage, to

explain the process, to get ahead of the disclosure deadlines, and to formulate the employer's position in advance of the voluntary resolution meeting.

Key Takeaways

Key takeaways for employers:

- Document and retain records regarding all performance concerns, performance management efforts, and progressive discipline.
- Employers are responsible for corresponding with OHS Officers in a disciplinary action complaint – external counsel generally cannot take on this role.
- Employers should involve external counsel at an early stage to provide support and prepare for the unique legal and procedural challenges these complaints involve.
- Employers may be subject to a reverse onus under these complaints and should be prepared to justify termination of employment, regardless of whether they terminated for cause.
- Carefully consider the timing of termination where an employee has made a harassment or workplace violence complaint, engaged in a work refusal due to safety concerns, or has taken any other step under the OHS Legislation.

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.