

Chapter Thirteen – Self Notes
EMPLOYEE RIGHTS AND DISCIPLINE
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SUMMARY

OUTCOME 1 There are three regimes of employment law. The common law is a body of rules made by judges in the course of interpreting employment contracts. Employment regulation is legislation enacted by governments to regulate the terms of the employment contract and is enforced by an administrative tribunal. Collective bargaining law includes the rules that govern unionized employees. The employment contract for unionized employees is called a collective agreement, and it is interpreted and enforced by labour arbitrators rather than courts.

OUTCOME 2 An employment contract between an employee and an employer may comprise expressed, written terms and a series of “implied terms” imposed by common law judges. Sometimes there are no written terms, in which case the contract is an oral one that includes all of the implied terms judges have created over the years. A written term usually supersedes an implied term provided that the written term does not violate a statutory minimum standard.

OUTCOME 3 A nonunionized employer can dismiss an employee for any reason provided that it gives either the required contractual notice or implied reasonable notice (as long as the reason for the dismissal is not prohibited by a statute). It can also dismiss an employee with no notice if the employee has committed a serious breach of contract. A unionized employer, on the other hand, usually needs to prove it had just cause to dismiss an employee.

OUTCOME 4 The PIPEDA provides employees with some rights regarding the use of their personal information. Employers should

establish policies regarding privacy issues. Employers have the right, under certain conditions, to monitor the work of employees, including their use of email and the Internet.

OUTCOME 5 The HR department, in combination with other managers, should establish disciplinary policies. This will help achieve both acceptance of the policy and its consistent application. To reduce the need for discipline, organizational rules and procedures should be widely known, reviewed on a regular basis, and written and explained to employees. The rules must relate to the safe and efficient operation of the organization. When managers overlook the enforcement of rules, they must reemphasize the rule and its enforcement before disciplining an employee.

OUTCOME 6 In the context of management, discipline does not mean punishment. Rather, discipline is a tool used to correct the practices of employees to help them perform better so that they conform to acceptable standards. Even when it is justified, managers do not generally enjoy disciplining their employees. However, failing to do so generally aggravates a problem that eventually must be resolved. Investigation of employee misconduct begins with proper documentation of wrongdoing. When managers are investigating employee problems, they need to know specifically the infraction of the employee, whether the employee knew of the rule violated, and any extenuating circumstances that might justify the employee’s conduct. When employees are to receive discipline, the rule must be uniformly enforced and the past work record of the employee must be considered.

OUTCOME 7 The two approaches to discipline are progressive discipline and positive discipline. Progressive discipline follows a series of steps based on increasing the degrees of corrective action. The corrective action applied should match the severity of the employee misconduct. Positive discipline, based on reminders, is a cooperative discipline approach in which employees accept responsibility for the desired employee improvement. The focus is on coping with the unsatisfactory performance and dissatisfactions of employees before the problems become major.

OUTCOME 8 ADR procedures present ways by which employees exercise their due process rights. The most common forms of ADR are step-review systems, peer-review systems, the open-door policy, the ombudsperson, mediation, and arbitration.

OUTCOME 9 Ethics in HRM extends beyond the legal requirements of managing employees. Managers engage in ethical behaviour when employees are treated in an objective and fair way and when an employee’s personal and work-related rights are respected and valued.

OUTCOME ONE: THREE REGIMES OF EMPLOYMENT LAW

- **3 legal regimes that govern the employment relationship:**
 1. **The Common Law of Employment**
 - **Common Law of Employment:** The body of case law in which courts interpret employment contracts and the legal principles taken from those cases that guide the interpretation of employment contracts.
 - **Implied Contract Terms:** Terms judges read into employment contracts when the written contract does not expressly deal with the matter.
 - Common law judges have developed a long list of implied contract terms that are incorporated into all employment contracts, unless a written term in the contract overrides the implied term.
 - **Ex.** The requirement for both the employer and the employee to give reasonable notice that they are terminating the employment contract – if the written contract includes a clause specifying how much notice of termination is required, then the implied term requiring reasonable notice will not apply.
 2. **Statutory Employment Regulation**
 - **Employment equity legislation** is intended to address systematic discrimination against women, Aboriginal people, people with disabilities, and visible minorities.
 - **Human rights legislation** prohibits discrimination in employment on certain designated grounds, including sex, age, religion, and skin colour.
 - **Pay equity legislation** address inequities in how men and women are compensated.
 - **Employment standards legislation** regulates the content of employment contracts by imposing minimum contract standards, such as minimum wage, minimum hours of work, and overtime pay.
 - **Occupational health and safety legislation** attempts to ensure safe working conditions.
 - **Labour relations law** give employees the right to form and belong to unions and to bargain for better working conditions and restricts the right of employers to dismiss or discipline employees for exercising rights protected by legislation.
 - **Statutory employment regulation** imposes an obligation on employers to provide notice of termination.
 - The employment standards' notice requirement is considered a "minimum" that must be provided to an employee, and a contract term providing less notice will be unenforceable.
 - An employee may be entitled to 12 months' notice of termination according to the implied contractual requirement to pay reasonable

notice but entitled to only 8 weeks' notice under employment standards legislation.

3. **Collective Bargaining and Arbitration Law**

- **Collective bargaining legislation**, such as the Ontario Labour Relations Act, seeks to improve conditions of work by empowering workers to join together and bargain for a better contract for themselves than is usually possible when an individual employee bargains with his or her employer.
- **Collective Agreement:** An employment contract between an employer and a union that sets out the terms of employment of a group of the employer's employees represented by the union.
- The common law of employment does not apply to a collective agreement. Therefore, for example, the implied term permitting an employer to terminate an employee by giving reasonable notice does not apply when employees are unionized.
 - A non-unionized employer can terminate an employee for any reason or no reason at all by simply giving the proper notice.
 - A unionized employer usually needs just cause to dismiss a worker, unless the dismissal is due to a purely economic reason.
 - In other words, unlike a non-unionized employer, a unionized employer usually needs a valid reason to fire an employee.
- **Labour Arbitrator:** A person assigned to interpret and decide disputes ("grievances") about the meaning, interpretation, and application of a collective agreement governing employees in a unionized workplace.
 - A unionized employee must file a grievance alleging that the collective agreement has been violated, and that grievance, if not settled or resolved, may be referred to a labour arbitrator instead of court.
 - Arbitration is much quicker than a lawsuit, and costs are covered by the union as part of the benefit paid for by employees in the form of union dues.
 - A non-union employee, on the other hand, must sue the employer in a court for breach of the employment contract.

OUTCOME TWO: UNDERSTANDING THE INDIVIDUAL EMPLOYMENT CONTRACT

- **Constructive Dismissal:** When an employer commits a fundamental breach of the contract such as by unilaterally changing a key term of the contract, the employee can treat the breach as a termination.
- To make a change in the terms of an employment contract without breaching the contract, the employer should do either of the following:

1. Obtain the employee's agreement to the change and provide the employee with some new consideration (benefit).
2. Terminate the employment contract in its entirety by giving the required notice of termination and then offer a new contract on the revised terms.

OUTCOME THREE: RULES GOVERNMENT DISMISSAL

Dismissal of a Non-Union Employee: Wrongful Dismissal

- **2 factors assessing notice of dismissal:**
 1. Length of service with the employer.
 2. Nature of the job performed by the employee.
 - Generally, the longer an employee has worked for an employer, the longer the period of notice.
- **2 caps on the length of reasonable notice of dismissal:**
 1. Non-managerial employees are usually not entitled to more than 12 months' notice.
 2. Managerial employees can be entitled to as much as 24 months' notice.
- **Summary Dismissal:** When a non-union employer terminates an employee without notice because the employee has committed a serious breach of contract.
 - When a non-union employer dismisses an employee for cause, without notice.
 - Reasons for dismissal: significant dishonesty, gross incompetence, sexual harassment, workplace bullying, or violence.
- **Wrongful Dismissal:** A lawsuit filed in a court by an employee alleging that he or she was dismissed without proper contractual or reasonable notice.
- Human rights legislation prohibits dismissals based on discriminatory reasons.
- Labour relations legislation prohibits an employer from dismissing an employee involved in organizing a union.
- Many types of employment statutes prohibit dismissals and punishment as a reprisal against employees who exercise their statutory rights.
 - **Statutory Rights:** Legal entitlement that derive from government legislation.
 - Ex. Employment standards and occupational health and safety statutes usually prohibit employers from punishing employees in any way as a reprisal (retaliation) for the employee making claims under the statute.
- In Ontario, the amount of notice required in the Employment Standards Act is linked directly to years of service – 1 week's notice per year of service to a maximum of 8 weeks. That amount can go up in the case of mass layoffs to as much as 18 weeks' when 500 or more employees are terminated.
- In addition, the legislation imposes a separate obligation to pay "severance pay" when the employer has an annual payroll of \$2.5 million or more or when 50 or more employees are being terminated in a 6-month period due to the closure of all or part of a business.
 - Severance pay is one week's pay per year of service to a maximum of 26 weeks.

Dismissal of a Unionized Employee: Just Cause

- A unionized employer usually needs a reason to dismiss an employee.
- The reason can then be challenged by the employee and the union through the grievance procedure in the collective agreement rather than in the courts.
- The implied common law right of employers to dismiss employees for any reason by giving them reasonable notice does not apply to unionized employees.
 - Labour arbitrators can (and often do) reinstate employees when they rule that the employer did not have just cause to dismiss the employee.
- It is particularly crucial in a unionized setting that HR managers keep careful records of employee misconduct.
- Non-unionized employers must be able to convince a court that the employee's misconduct was serious enough to forfeit notice of termination.
- Unionized employers need to convince a labour arbitrator that it had just cause to dismiss the employee.

OUTCOME FOUR: EMPLOYEE PRIVACY RIGHTS

- The PIPEDA provides employees with some rights regarding the use of their personal information.
 - Organizations covered by PIPEDA must obtain an individual's consent when they collect, use, or disclose the individual's personal information.
- Employers should establish policies regarding privacy issues.
- Employers have the right, under certain conditions, to monitor the work of employees, including their use of email and the Internet.

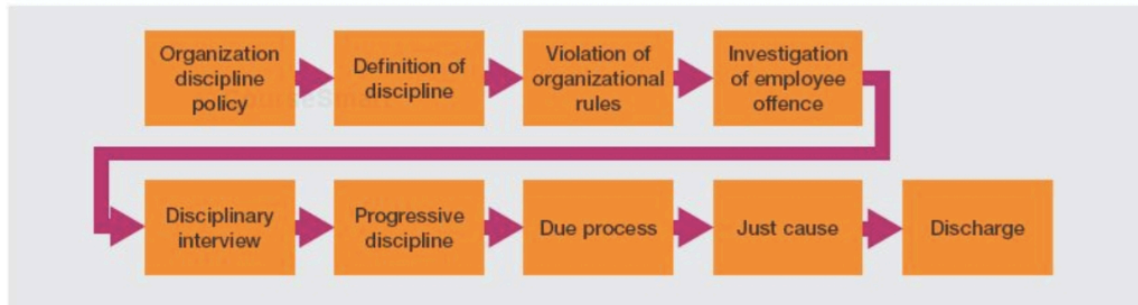
OUTCOME FIVE: DISCIPLINARY POLICIES AND PROCEDURES

- Disciplinary action taken against an employee must be for justifiable reasons, and there must be effective policies and procedures to govern its use.
- The **disciplinary model** illustrates the areas where provisions should be established shows the logical sequence in which disciplinary steps must be carried out to ensure enforceable decisions.
- **2 responsibilities of the HR department in relation to disciplinary policies:**
 1. Develop and have top management approve its disciplinary policies and procedures.
 2. Ensure that disciplinary policies, as well as disciplinary action taken against employees, are consistent with the collective agreement (if one exists) and conform to current laws.
- The primary responsibility for preventing or correcting disciplinary problems rests with an employee's immediate supervisor.

- Should discipline become necessary, the employee's immediate supervisor is the logical person to apply the company's disciplinary procedure and monitor employee improvement.

FIGURE 13.5

A DISCIPLINARY MODEL



The Results of Inaction

- If disciplinary action is eventually taken, the delay will make it more difficult to justify the action if challenge by the employee.
- A union employee can "grieve" the discipline.
- A non-union employee can treat the discipline as a breach of contract, and perhaps even a constructive dismissal, and sue the employer in a court of wrongful dismissal.
- **5 reasons why supervisors fail to impose a disciplinary penalty:**
 1. Supervisor failed to document earlier actions, so no record existed on which to base subsequent disciplinary action.
 2. Supervisor believed that they would receive little or no support from higher management for the disciplinary action.
 3. Supervisor was uncertain of the facts underlying the situation requiring disciplinary action.
 4. Supervisor failed to discipline employees in the past for a certain infraction causing the supervisor to forgo (omit) current disciplinary action to appear consistent.
 5. Supervisor wanted to be seen as a likeable person.

FIGURE 13.6

COMMON DISCIPLINARY PROBLEMS

Attendance Problems <ul style="list-style-type: none">• Unexcused absence• Chronic absenteeism• Unexcused/excessive tardiness• Leaving without permission	On-the-Job Behaviour Problems <ul style="list-style-type: none">• Intoxication at work• Insubordination• Horseplay• Smoking in unauthorized places
Dishonesty and Related Problems <ul style="list-style-type: none">• Theft• Falsifying employment application• Willfully damaging organizational property• Punching another employee's time card• Falsifying work records	<ul style="list-style-type: none">• Fighting• Gambling• Failure to use safety devices• Failure to report injuries• Carelessness• Sleeping on the job
Work Performance Problems <ul style="list-style-type: none">• Failure to complete work assignments• Producing substandard products or services• Failure to meet established production requirements	<ul style="list-style-type: none">• Using abusive or threatening language with supervisors• Possession of narcotics or alcohol• Possession of firearms or other weapons• Sexual harassment

Setting Organizational Rules

- The setting of organizational rules is the foundation for an effective disciplinary system – these rules govern the type of behaviour expected of employees.
- **7 importation suggestions to consider when setting organizational rules:**
 1. Rules should be **widely disseminated and known to all employees.**
 2. Rules should be **reviewed periodically** – perhaps annually – especially those rules critical to work success.
 3. **Reasons should be explain** as to why the rule exist.
 4. Rules should always be **written** to avoid ambiguity.
 5. Rules must be **reasonable and relate to safe and efficient operation** of the organization.
 6. If management failed to previously enforce a rule, the rule must be **restated with the consequences for its violation**, before any disciplinary action can begin.
 7. **Employees should sign a document** stating that they have read and understand the organizational rules.
- It is important that supervisors give their employees careful and thorough orientation in the rules and regulations relating to their jobs before disciplinary action can be taken.
 - Proper communication of organizational rules and regulations is so important that arbitrators cite neglect in communicating rules as a major reason for reversing the disciplinary action taken against an employee by unionized employers.

OUTCOME SIX: INVESTIGATING THE DISCIPLINARY PROBLEM

- In conducting an employee investigation, it is important to be objective and to avoid the assumptions, suppositions, and biases that often surround discipline cases.
- Figure 13.7 lists 7 questions to consider in investigating an employee offence.

FIGURE 13.7

CONSIDERATIONS IN DISCIPLINARY INVESTIGATIONS

<ol style="list-style-type: none">1. In very specific terms, what is the offence charged?<ul style="list-style-type: none">• Is management sure it fully understands the charge against the employee?• Was the employee terminated for insubordination, or did the employee merely refuse a request by management?2. Did the employee know he or she was doing something wrong?<ul style="list-style-type: none">• What rule or provision was violated?• How would the employee know of the existence of the rule?• Was the employee warned of the consequence?3. Is the employee guilty?<ul style="list-style-type: none">• What are the sources of facts?• Is there direct or only indirect evidence of guilt?• Has anyone talked to the employee to hear his or her side of the situation?4. Are there extenuating circumstances?<ul style="list-style-type: none">• Were conflicting orders given by different supervisors?	<ul style="list-style-type: none">• Does anybody have reason to want to “get” this employee?• Was the employee provoked by a manager or another employee? <ol style="list-style-type: none">5. Has the rule been uniformly enforced?<ul style="list-style-type: none">• Have all managers applied this rule consistently?• What punishment have previous offenders received?• Were any other employees involved in this offence?6. Is the offence related to the workplace?<ul style="list-style-type: none">• Is there evidence that the offence hurt the organization?• Is management making a moral judgment or a business judgment?7. What is the employee’s past work record?<ul style="list-style-type: none">• How many years of service has the employee given the organization?• How many years or months has the employee held the present job?• What is the employee’s personnel record as a whole, especially his or her disciplinary record?
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Documenting Misconduct

- The maintenance of accurate and complete work records is an essential part of an effective disciplinary system.
- The most significant cause of inadequate documentation is that managers have no idea what constitutes good documentation.
- The failure of managers to record employee misconduct accurately can result in the reversal of any subsequent disciplinary action.
- **8 items to include in the documentation of misconduct:**
 1. Date, time, and location of the incident(s).
 2. Behaviour exhibited by the employee (the problem).
 3. Consequences of that action or behaviour on the employee’s overall work performance and/or the operation of the employee’s work unit.
 4. Prior discussion(s) with the employee about the problem.
 5. Disciplinary action to be taken and specific improvement expected.
 6. Consequences if improvement is not made and a follow-up date.
 7. Employee’s reaction to the supervisor’s attempt to change behaviour.
 8. Names of witnesses to the incident (if appropriate).

- When preparing documentation, it is important for a manager to record the incident immediately after the infraction takes place, when the memory of it is still fresh, and to ensure that the record is complete and accurate.

The Investigative Interview

- Before any disciplinary action is initiated, an investigation interview should be conducted to make sure employees are fully aware of the offence.
- The interview should concentrate on how the offence violated the performance and behaviour standards of the job.
- Most important, the employee must be given a full opportunity to explain his or her side of the issue so that any deficiencies for which the organization may be responsible are revealed.

OUTCOME SEVEN: APPROACHES TO DISCIPLINARY ACTION

- **2 approaches to disciplinary action:**
 1. **Progressive Discipline**
 - **Progressive Discipline:** Application of corrective measures by increasing degrees.
 - The corrective action applied should match the severity of the employee misconduct.
 - Designed to motivate an employee to correct his or her misconduct voluntarily.
 - Some HR professionals believe that progressive discipline has certain flaws, including its intimidating and adversarial nature, that prevent it from achieving the intended purpose.
 2. **Positive Discipline**
 - **Positive, or Non-Punitive, Discipline:** A system of discipline that focuses on early correction of employee misconduct, with the employee taking total responsibility for correcting the problem.
 - Requires a cooperative environment in which the employee and the supervisor engage in joint discussion and problem solving to resolve incidents of employee irresponsibility.
 - Replaces threats and punishment with encouragement.
- Regardless of the reasons for a discharge, it should be done with personal consideration of the employee affected. The employee must be informed honestly, yet tactfully of the exact reasons for the action.
 - **8 guidelines that will help a termination discussion be more effective:**
 1. Come to the point within the first 2 to 3 minutes and list in a logical order all the reasons for the termination.

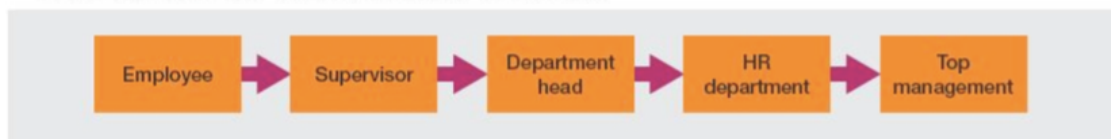
2. Be straightforward and firm, yet tactful, and remain resolute in your decision.
3. Make the discussion private, businesslike, and fairly brief.
4. Do not mix the good with the bad.
5. Avoid making accusations against the employee and injecting personal feelings into the discussion.
6. Avoid bringing up any personality differences between you and the employee.
7. Provide any information concerning severance pay and the status of benefits and coverage.
8. Explain how you will handle employment inquiries from future employers.

OUTCOME EIGHT: ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

- **Alternative Dispute Resolution (ADR):** A term applied to different types of employee complaint or dispute resolution procedures.
 - Presents ways by which employees exercise their due process rights.
- **6 forms of ADR:**
 1. **Step-Review Systems**
 - **Step-Review System:** A system for reviewing employee complaints and disputes by successively higher levels of management.
 - Managers at each step are required to provide a full response to the complaint within a specified time period, perhaps 3 to 5 working days.
 - Management must take special precautions to ensure that the systems work and provide the benefits intended.

FIGURE 13.8

CONVENTIONAL STEP-REVIEW APPEAL PROCEDURE



2. **Peer-Review Systems**
 - **Peer-Review System:** A system of reviewing employee complaints that utilizes a group composed of equal numbers of employee representatives and management appointees, which functions as a jury because its members weigh evidence, consider arguments, and, after deliberation, vote independently to render a final decision.
 - One of the benefits with this system is the sense of justice that it creates among employees.

3. **Open-Door Policy**

- **Open-Door Policy:** A policy of settling grievances that identifies various levels of management above the immediate supervisors for the employee to contact.
- This policy is often successful when it is supported by all levels of management and when management works to maintain a reputation for being fair and open-minded.

4. **Ombudsperson System**

- **Ombudsperson:** A designated individual from whom employees may seek counsel for the resolution of their complaints.
- The ombudsperson listens to an employee's complaint and attempts to resolve it by seeking an equitable solution between the employee and the supervisor.
- To function successfully, ombudspeople must be able to operate in an atmosphere of confidentiality that does not threaten the security of the managers or subordinates who are involved in a complaint.
- It is recommended that ombudspeople have access to high levels of management to ensure that employee complaints receive fair treatment.

5. **Mediation**

- **Mediation:** The use of an impartial third-party neutral to reach a compromise decision in employment disputes.
- **Mediator:** A third party in an employment dispute who meets with one party and then the other to suggest compromise solutions or to recommend concessions from each side that will lead to an agreement.
- The mediator acts as a fact finder and to open up a channel of communication between the parties.
- They must use their communication skills and the power of persuasion to help the parties resolve their differences.

6. **Arbitration**

- The employee and the employer present their cases/arguments to an arbiter, who is typically a retired judge.
- The arbiter makes a decision that the parties have agreed to be bound by.
- Arbitration can save litigation costs and avoid time delays and unfavourable publicity.
- **5 requirements to ensure that the employer's arbitration policies are legal:**
 - I. Have a clear, well-defined, and widely communicated arbitration policy.
 - II. Specify those topics subject to arbitration.

- III. Inform employees of the rights they are relinquishing by signing an arbitration agreement.
- IV. Provide a procedurally fair arbitration system.
- V. Allow for the non-biased selection of an arbitrator or arbitration panel.

OUTCOME NINE: MANAGERIAL ETHICS IN EMPLOYEE RELATIONS

- Laws, agency rulings, and court decisions impact all aspects of the employment process – recruitment, selection, performance appraisal, safety and health, labour relations, and testing.
- **Ethics:** A set of standards of conduct and moral judgements that help determine right and wrong behaviour.
- Ethics provides culture guidelines – organizational or societal – that help us decide between proper or improper conduct.
- How employees are treated largely distinguishes the ethical organization from the unethical one.
- HR departments have been given a great role in communicating the organization's values and standards, monitoring compliance with its code of ethics, and enforcing standards throughout the organization.
- The ultimate goal of ethics training is to avoid unethical behaviour and adverse publicity, to gain a strategic advantage, and, most of all, to treat employees in a fair and equitable manner, recognizing them as productive members of the organization.