

5 Performance Review Legal Traps to Avoid



How performance reviews can affect your wrongful dismissal liability risks.

Performance reviews don't simply provide employees the feedback they need to do their job better; they protect your organization from liability by documenting decisions to terminate employees on the basis of poor performance. At least that's the theory. In actual lawsuits, the performance review often works to the employee's advantage. Here's why and what you should do to ensure that your own employees don't use their performance reviews as Exhibit A in a wrongful dismissal case against your organization.

The Problems with Performance Reviews

An employee's failure to perform up to standard is clearly just cause for termination. But once you move beyond principles, you face the formidable task of persuading a skeptical judge that you were justified to fire one of your own employees for poor performance. A 2001 Manitoba case called *Boulet v. Federated Co-operatives* ([2001] M.J. 306), establishes the 4 things you must prove to show poor performance as just cause to terminate:

1. You established a reasonable and objective performance standard and clearly communicated it to the employee;
2. You gave the employee a fair chance to meet the standard;
3. The employee was incapable of meeting the standard; and
4. You provided clear warning that failure to meet the standard would result in dismissal.

The performance review is documentation that can help you prove compliance with the *Boulet* factors. It can also help show that termination was based on merit rather than age, sex or other personal characteristic protected by discrimination laws. But does it work? There's an emerging school of thought that performance reviews actually *increase* employer liability risks. To test the theory, the *Insider* did a broad sweep of court cases from Canada in the past 20 years in which performance reviews were cited as evidence in a wrongful termination suit. Findings:

- Total cases: 206;
- Cases where performance review helped **employer** win: 77;
- Cases where performance review helped **employee** win: 129.

Although this "study" is hardly scientific and doesn't include arbitration or labour

boards, it supports the view that performance reviews are doing more to hurt than help employers' efforts to justify termination for poor performance.

5 Performance Review Traps to Avoid

Based on the cases, we were able to detect 5 kinds of common performance review traps that employers fall into:

Trap 1. Inconsistent Use of Performance Reviews

As with other HR management practices, inconsistent use of performance reviews is a lightning rod for liability.

Example: No just cause to fire an accountant for performance where the decision was made before her highly negative performance review. Suggesting that performance was a pretext, the Ontario court noted that it was the accountant's first review in 13 years on the job and took place just before a scheduled salary raise was about to kick in [*Black v. Robinson Group Ltd.*].

Example: By contrast, a federal court ruled that denying promotion to border guard with excellent performance reviews was legit because the agency followed a consistent and transparent process of filling positions based on merit via open competition where internal performance reviews weren't considered so as not to give agency employees an unfair advantage over outside applicants [*Hughes v. Canada (Attorney General)*].

Trap 2: Not Giving Underperforming Employee Clear Enough Warning

A negative performance review isn't enough to prove the fair warning of termination required by *Boulet*; you need to spell out that termination will be the consequence of continued poor performance.

Example: Negative performance review telling collection agent to be careful and that company will be watching him wasn't fair warning because it didn't expressly say his job was in jeopardy and that he'd be fired immediately if he didn't improve, ruled an Ontario court [*Fanous v. Total Credit Recovery Ltd.*].

Even an explicit warning may be compromised if it's accompanied by a positive or blame-deflecting message that creates a mixed signal.

Example: Performance review expressly listing radio station manager's shortcomings—lack of attention to detail, low energy and poor people management—and warning him to get it together or else wasn't fair warning because it also contained statements praising his performance and absolving him of blame for station's problems [*Schutte v. Radio CJVR Ltd.*, [2007] S.J. No. 714, Dec. 19, 2007 (case overturned by Sask. Court of Appeal on other grounds 2 years later, [2009] S.J. No. 496)].

Trap 3: Abusive or Unfair Review Processes

Getting a lousy performance review is upsetting. But holding employers liable for delivering a negative performance review seems a bit much. Still, it's been tried. There are 2 theories you need to be aware of:

Constructive Dismissal: One theory is that negative performance reviews poison the work environment and constitute grounds for constructive dismissal. The leading case comes from Ontario and stands for the rule that negative performance reviews are okay as long as the criticism is reasonable and made in good faith. "Criticism may not be

agreeable, but it is necessary," said the Ontario court [*Ata-Ayi v. Pepsi Bottling Group (Canada) Co.*].

Infliction of Mental Distress: The second theory is infliction of mental distress. The good news is that at least so far, the courts haven't bought into this. Again, Ontario has been the main battleground. A series of cases from that province have ruled that employees can't sue their employers for negligent infliction of mental distress for "conduct in the course of employment."

The bottom line: As long as your methods are fair, consistent and constructive, you're allowed to give employees negative performance reviews.

Trap 4: Firing Employees for Poor Performance after Positive Reviews

Be aware that performance review SNAFUs come not just from what you say in the performance review but inconsistency between what you say and how you treat the employee. The most common pitfall is lowering the boom on employees after giving them positive reviews. Such was the scenario in nearly 75% of the wrongful dismissal cases we found where performance reviews were cited as evidence in an employee's favour.

Example: BC court finds no just cause to office manager for incompetence where 4 years of positive performance reviews demonstrate that company was satisfied with his performance [*Van Aggelen v. I.C.C. Liquid Gas Ltd.*].

Firing employees for poor performance after awarding them raises, bonuses and other performance also undermines the credibility of the argument that an employee was fired for poor performance. In fact, some courts consider this conduct a form of double crossing that opens the door to extra termination notice, *Wallace* and even punitive damages for carrying out the termination in bad faith.

Trap 5: Not Following Up a Negative Performance Review

Another variation on the watch-what-employers-do-not-what-they-say-in-the-performance-review theme is not following up with employees to correct the performance problems you raise. Over time, toleration of inadequacies becomes condonation and precludes the possibility of putting your foot down and demanding that employees improve.

Example: A company that waited 27 months to investigate alleged long distance phone abuses by an officer manager—and giving him positive performance reviews in the interim—had condoned any breaches and had no just cause to terminate for dishonesty, according to a Newfoundland court [*Lambe v. Irving Oil Ltd.*].

Conclusion

Performance reviews create a standard not only for employees but also your organization for subsequent performance-based disciplinary action and termination. Employers sometimes don't recognize these liability implications until it's too late. Still, abolishing performance reviews because they create liability risks is like abolishing donuts because they cause obesity. Liability risks stem not from use but misuse of the performance review. As long as you understand the risks, you should be able to manage them.