A Tale Of Two Documents

Employers and HR professionals have become increasingly aware to the requirement to document misconduct and build the case for termination of employment. Sometimes, we do not intend to go that far, and only plan to issue a letter of expectations. The best of intentions, however, can go awry and we can overstep. While our notes to file may always be a blow to the employee, they can have more force than intended if we are not mindful of the distinction between administration and discipline.

The importance of this distinction is illustrated by the recent arbitral decision of *College of New Caledonia –and- Faculty Association of the College of New Caledonia*, [2019] B.C.C.A.A.A. No. 124 (Saunders). In that case, Arbitrator Saunders was tasked with determining the nature and consequent impact of a document intended to be a letter of expectations.

A letter intended by the employer to set out expectations was, in the end, determined to be a disciplinary letter. While this may sound trivial, the distinction is incredibly important because letters of expectations are within management rights and therefore not generally arbitrable. Disciplinary letters, in contrast, are perfectly arbitrable. The distinction therefore is central for the employee wishing to challenge the letter, and the employer wishing to avoid a grievance.

In making this distinction, Arbitrator Saunders noted the letter in the case before him was in response to a specific incident of culpable misconduct, the tone in the letter was accusatory rather than supportive in nature, and the employee was told to bring a union representative to the meeting and was encouraged in the letter to apologize. These, the arbitrator said, were all signs that it was in essence a disciplinary letter.

Lessons to be Learned

This case raises important considerations for employers and HR professionals. It demonstrates how a simple misstep is possible and might have significant consequences.

What can we take away from the decision of Arbitrator Saunders? Here are a few important lessons:

First, even though the letter states expressly that it is not a disciplinary letter, a reprimand by any other name remains a reprimand. The essential character of the letter will determine its status. You cannot just call it what you want it to be. The

importance of having a letter of expectations address administrative matters cannot be overstated. When the letter gets into addressing misconduct, its essential character will come into question. The vital lesson then is that an employer cannot disguise a disciplinary letter as a letter of expectations and, likewise, the employer should not chastise the employee in a letter of expectations. In that vein, letters of expectations should be problem solving and aimed at collaboratively finding solutions.

Second, part of the problem, as recognized by Arbitrator Saunders, is the various lists and criteria for determining the character of a letter. He notes that such lists and criteria are limited in their usefulness as, in the end, the weighing will always involve subjectivity because some factors will invariably point in each direction. This means there is not a checklist to which you can refer in order to keep yourself in the clear. Each case will be decided on its facts as the character of the letter is a factual determination.

Third and finally, while union representation at any remedial meeting may be an important feature of a unionized work environment, there is a decided difference between welcoming a union representative to a meeting, and suggesting or actively directing that the employee bring a union representative with him or her. Unionized employees are almost always welcome to bring representation to a meeting, but when we tell someone they ought to do so, it sends a clear message that they may need union protection and, frankly, since an employee cannot grieve a letter of expectations, the only inference to be drawn is that the letter is disciplinary.

The next time you are drafting or addressing a letter of expectations, remember that the letter is only as administrative as its content.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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