Performance Review Liability Risk Management & Compliance Game Plan



Volumes have been written about employee performance reviews and why and how to perform them. Even so, the HR industry has largely overlooked a crucial aspect of the process – namely, how performance reviews directly affect a company's liability risks. That's a massive blind spot because the performance review may be the single most significant source of evidence in subsequent litigation between the company and employee being reviewed. Negative performance reviews can play a key role in justifying a company's decision to terminate, deny a bonus or promotion, or take other unfavourable action against an employee. But in real-world cases, the performance review too often works to the ***employee's*** advantage. Here's an 8-step game plan to ensure that your own employees don't use performance reviews as Exhibit A in their legal case against your organization.

The Legal Perils of Employee Performance Review

An employee's failure to perform up to reasonable and clear standards is just cause to terminate without notice. But persuading a skeptical judge, arbitrator, or labour tribunal that the particular employee deserved to be fired for poor performance is a tall order. A venerable 2001 Manitoba case called *Boulet v. Federated Co-operatives*, 2001 MBQB 174 (CanLII), lays out the 4 things an employer must prove to make the case:

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

The performance review should serve as documentation of your compliance with the *Boulet* factors. Reviews are also crucial in human rights cases where employees claim they were wrongfully terminated or otherwise adversely treated on the basis of race, age, sex, religion, national origin, disability, or other personal characteristics protected from employment discrimination. Last but not least, by documenting the timing of performance issues, the review can help you defeat reprisal complaints of employees who get fired for poor performance after exercising a right

protected by anti-reprisal laws, e.g., reporting a safety violation to a government OHS agency (assuming, of course, that the claim is baseless and that reprisal didn't actually factor into the termination decision).

But does it work? There's an emerging theory that performance reviews actually increase employer liability risks. To test the theory, we did a broad search of 5 years of reported cases from Canadian courts (but not arbitrators or tribunals) in which performance reviews were cited as evidence either with regard to whether dismissal was wrongful or how much in damages a wrongfully dismissed employee should receive.

Performance Reviews as Evidence in Wrongful Dismissal Court Cases (2019 to 2024)

Total Cases	Cases Where Performance Reviews Helped Employer	Cases Where Performance Reviews Helped Employee
37	11	26

Although our "study" isn't scientific, it supports the view that performance reviews are doing more to hurt than help employers' cases in wrongful termination litigation. Based on the common pitfalls that employers fall into, here's a game plan for managing the legal aspects of performance reviews.

Step 1. Be Consistent in Use of Performance Reviews

Inconsistent use of performance reviews is a lightning rod for liability, particularly in cases alleging employment discrimination. The review process must be transparent, fair, and consistent. "Transparency builds trust and reduces fear," notes an Ontario HR lawyer. "When employees don't understand the process including what, when, and how their performance is being measured, they remain alert and apt to bring a legal challenge."

Employer Wins: A federal court ruled that denying promotion to a 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),* 2009 FC 574 (CanLII)].

Employer Loses: Ontario's top court found no just cause to fire an accountant for performance based on 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 [*Black v. Robinson Group Ltd.*, 2004 CanLII 9235 (ON CA)].

Step 2. Let Employees Know If They're at Risk of Termination

A negative performance review isn't enough to provide employees the fair warning of termination required by *Boulet*. You also need to spell out that termination will be the consequence of continued poor performance to put poorly performing employees on proper notice.

Example: An Ontario court found that a negative performance review telling a collection agent to be careful and that company would 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 [*Fanous v. Total Credit Recovery Ltd.*, [2006]

OJ No 3036].

Step 3. Avoid Mixed Messages in Negative Performance Reviews

It might be normal to feel sympathy for an employee to whom you're directing a negative review. While you want to provide encouragement and something positive for the employee to hang onto, you also need to be careful not to contradict your message. Recognize that even an explicit warning may be compromised when accompanied by a positive or blame-deflecting message that creates a mixed signal.

Example: A Sask. court ruled that performance review expressly listing radio station manager's shortcomings 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 the station's problems [*Schutte v. Radio CJVR Ltd.*, 2007 SKQB 465 (CanLII) (case overturned 2 years later by Sask. Court of Appeal on other grounds)].

Step 4. Give Poorly Performing Employee Fair Chance & Ample Time to Improve

In addition to fair warning, you must give employees a fair opportunity and ample time to improve performance issues you identify during the review. That may require rescheduling annual year-end reviews if you're planning to terminate the employee before the year comes to an end.

Example: An Ontario court found there was no just cause to fire a senior employee despite repeated negative performance reviews and warnings. What the employee needed and didn't get, according to the court, was a long-term improvement plan. Instead, he got just a series of deadlines for accomplishing unrealistic improvement goals [*Kurtz v. Carquest Canada Ltd.*, 2015 ONSC 7997 (CanLII)].

Step 5. Follow Fair & Benign Performance 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. And while it requires a review that isn't simply negative but also abusive, it can work. There are 3 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 court [*Ata-Ayi v. Pepsi Bottling Group (Canada) Co.*, [2006] O.T.C. 1079 (SC)].

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—especially in Ontario, where courts have repeatedly ruled that employees can't sue their employers for negligent infliction of mental distress for "conduct in the course of employment." [See, for example, *Piresferreira v. Ayotte*, 2010 ONCA 384 (CanLII)].

Bad Faith: An employee who receives a negative review could claim that you acted in bad faith, particularly if you deliver the review in a mean, nasty, or abusive way.

The risk is greatest in B.C. where the Court of Appeal has ruled that the employer's duty to act in good faith in terminating an employee also applies during the actual employment relationship [*British Columbia v. Taylor*, 2024 BCCA 44 (CanLII)].

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

Step 6. Don't Fire Employees for Poor Performance after Giving them a Positive Review

Inconsistency between what you say (or don't say) in the review and how you subsequently treat the employee can also doom your legal defence. The most common pitfall? Lowering the boom on employees after giving them positive reviews. Such was the scenario in 17 of the 26 wrongful dismissal court cases we found where performance reviews were cited as evidence in an employee's favour.

Example: A B.C. court found no just cause to fire an office manager for incompetence where 4 years of positive performance reviews demonstrated that the company was satisfied with his performance [*Van Aggelen v. I.C.C. Liquid Gas Ltd.*, [1988] B.C.J. No. 2066].

Another common problem is firing employees for poor performance after bestowing them with raises, bonuses, promotions, and other rewards. Some courts consider this kind of double-cross a form of bad faith justifying extra termination notice, *Wallace*, punitive, and other aggravated damages.

Step 7. Address Previous Violations or You May End Up Condoning Them

Another way a positive performance review can compromise your legal position is where you ignore a problem or transgression that predates the review. Failing to speak up about the problem might be seen as condoning whatever it was that the employee did wrong. This may limit your ability to terminate or discipline the employee after the performance review takes place. According to one court: "When an employer becomes aware of misconduct on the part of his servant, sufficient to justify dismissal, he may. . . dismiss, or overlook the fault. . . . If he retains the servant in his employment for any considerable time after discovering his fault, that is condonation, and he cannot afterwards dismiss for that fault without anything new."

Example: A Newfoundland court ruled that by waiting 27 months to investigate long distance phone abuses by an officer manager, and giving him positive performance reviews in the interim, the company effectively condoned any breaches and had no just cause to terminate for dishonesty [*Lambe v. Irving Oil Ltd.,* 2002 CanLII 22789 (NL SC)].

Step 8. Take the Terror Out of Your Performance Review Process

Recognize that the performance review process can be very scary for employees. According to HR lawyers and experts, there are ways you can make the performance review process less terrifying and more positive. One of them is to actually engage the employee in the process. "Frequently, employers will simply read or allow the employee to read and comment on responses from a written review with the manager then reading the employee's own comments back. "A performance review should not involve

reading content," notes one B.C. HR lawyer. "Before the performance review, content should be read and questions created by each participant. The process of the review should be a conversation with questions and responses, notes, and confirmations of the position of both parties."

Another strategy is to desensitize employees by repeatedly exposing them to the process. Make performance reviews an ongoing aspect of communication between an employee and supervisor by establishing regular performance feedback, monthly meetings, and quarterly performance reviews – and calling them such.