Performance Reviews: The 7 Most Common Legal Pitfalls & How to Avoid Them

While performance reviews get a lot of attention in the HR media, their impact on employer liability is often overlooked. That's a shame because performance reviews not only provide employees the feedback they need to improve but also insulate the organization from liability for termination if they don't. At least that's the theory. In actual litigation, the performance review often works to the *employee's* advantage. Understanding why is crucial to ensuring that your own employees don't use performance reviews as Exhibit A in their wrongful dismissal case against your organization.

The Perils of Performance Review

An employee's failure to perform up to standard is just cause to terminate. But persuading a skeptical judge/arbitrator that the particular employee deserved to be fired for poor performance is a tall order. A 2001 Manitoba case called *Boulet v. Federated Co-operatives* ([2001] M.J. 306) lays out the 4 things you must prove to make the case:

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

The performance review should serve as documentation of compliance with the *Boulet* factors as well as discrimination laws when the poorly performing employee is a minority. 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, the *Insider* compiled all reported court cases from Canada over a 10-year period in which performance reviews were cited as evidence in a wrongful termination suit. Findings:

Total Cases	Cases Where Performance Review Helped Employer Win	Cases Where Performance Review Helped Employee Win
76	17	49

Although our "study" isn't scientific and excludes arbitration or labour boards, it supports the view that performance reviews are doing more to hurt than help employers' cases for termination based on poor performance.

7 PERFORMANCE REVIEW LEGAL PITFALLS TO AVOID

In analyzing the cases, we noticed 7 common performance review pitfalls that employers fall into:

Trap 1. Inconsistent Use of Performance Reviews

Inconsistent use of performance reviews is a lightning rod for liability.

Example: 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.*].

Example: Federal court rules 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 Expressly Warning of Termination

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

Example: Ontario court finds that 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 [*Fanous v. Total Credit Recovery Ltd*.].

Trap 3: Sending a Mixed Signal

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

Example: Sask. court rules 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.* (case overturned 2 years later by Sask. Court of Appeal on other grounds)].

Trap 4: Not Giving Employee Enough Time to Improve

In addition to fair warning, employees must be given a fair opportunity and ample time to improve the performance issues you identify during the review [*Kurtz v. Carquest Canada*] Ltd.].

Example: No just cause to fire senior employee despite repeated negative performance reviews and warnings. What the employee needed and didn't get, according to the Ontario court, was a long-term improvement plan, not just a series of deadlines for accomplishing unrealistic improvement goals [

Trap 5: Abusive 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 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 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—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*].

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

Trap 6: Firing Employees for Poor Performance after 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 37 of the 48 court 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 fire 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., [1988] B.C.J. No. 2066, Nov. 9, 1988].

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.

Trap 7: Not Following Up after a Negative Performance Review

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

Example: Newfoundland court rules 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.*].