

# Current Workplace Issues

## Handling Employees with Performance Deficiencies

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Managing employees with attendance and performance deficiencies is often a major challenge for human resource officers. It's not just the time involved or the cost of counselling and evaluation. There is a significant impact on co-workers, especially if the "problem" employee has been with the organization for many years.

Some managers (and not just in the non-union work place) argue that it is best to terminate and cut your losses. But others will tell you that the dynamics and risks in a lawsuit or arbitration are felt well beyond the corporate financial statements - especially if a medical condition such as alcoholism is involved. If the employer has not factored the condition into its management of the poor performance, there may be human rights implications, potential for aggravated damages (where reinstatement is not available) and a residue of unfair treatment which can affect remaining workers for a long time. So how can a so called "last chance agreement" help?

A last chance agreement is a set of negotiated terms of employment by which a final opportunity to salvage a career will be governed. For the terms to be effective, the employee needs a negotiator to speak for and explain things to him or her. In the unionized sector, such agreements are basically unenforceable without a union rep involved. If the worker is suffering from a disability, fairness and enforceability of the agreement are well served by a negotiated process.

The purpose of a last chance agreement is to spell out the obligations of the employee with respect to a rehabilitation plan to be measured by a defined threshold for future performance. To be effective, the agreement must include:

1. The requirement for the employee to participate in an employer sanctioned treatment or counselling program. Reports on status and prognosis will be provided to the employer as the circumstances may require.
2. Specific performance or attendance criteria to be measured and reported by a designated supervisor(s). Feedback will usually be in writing at regular intervals.
3. A time frame which is lengthy enough to justify the effort and allows for rehabilitation; but is not so onerous that the employee's status is forever "probationary".
4. Prescribed triggering events which distinguish minor slips from major defaults. Arbitrators have emphasized that a breach of any fundamental provision, once proven, gives rise to an automatic right of termination. For less serious breaches, the risk of dismissal is still there but arbitrators are prepared to review the full circumstances and to assess the merits and culpability (willfulness versus neglect) according to the presence or absence of a variety of factors:
  - Delay in providing written report of status with rehabilitation program.
  - Unavoidable obstruction in attendance at counselling session.
  - Covenants of indefinite duration with lengthy compliance.
  - Single slip failure to attend counselling session but where no evidence of prohibited consumption.

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- Unique and serious stressors such as tragic death of spouse or child.
- Absenteeism or other grounds unrelated to disability or other matters which gave rise to the last chance agreement.

The benefit of the last chance agreement is that if the employee succeeds, there is no need to settle a dispute; if the employee fails then there is an agreement which prescribes the consequences.

While the decisions in other provinces have been more circumspect, the signal from the Alberta Courts is that last chance agreements, when fairly negotiated and administered, can be relied upon as an effective tool for addressing serious defaults by an employee. These sorts of problems, which arise only occasionally, can nonetheless divide the work place and seriously affect morale. The effort put into counselling and potential rehabilitation greatly outweighs the cost and frustration of lengthy legal proceedings.

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