

Ontario Agencies Supporting Individuals with Special Needs
(OASIS)

Managing in a Unionized Environment

Presented by:

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AGENDA

1. Challenges & Common Difficulties for Employers
2. Challenges in the Industry
3. Duty to Accommodate
4. Workplace Investigations
5. Discipline
6. Tips & Strategies for Effective Labour Relations

1. Challenges & Common Difficulties for Employers

A. Lack of Flexibility

- Bargaining unit work
- Seniority vs. meritocracy
- Hours of work / scheduling
- Contracting out and temporary assignment
- Lay-Offs, bumping
- Grievance and arbitration procedures
- Job security

B. Reactive v. Proactive

↪ Reactive

- ↪ Resistance to change
- ↪ Grievances
- ↪ Fueled by habit
- ↪ “Fire-fighting”

↪ Proactive

- ↪ Relationship-building
- ↪ Mutual respect
- ↪ Problem-solving
- ↪ Strategic planning
- ↪ Encourage discussion
- ↪ Listen
- ↪ Provide feedback

C. Adversarial Environment

- Resistance to Change
- Avoid emotionalism
- Regard subordinates as associates, not antagonists
 - Their cooperation is easier to obtain in a positive atmosphere; learn how to gain this cooperation

D. Grievances and Arbitration

- Proper grievance (breach of CA) v. improper grievance (I dislike my manager)
- Important who attends
- Use relationship to your advantage
- Streamlined arbitrations (s. 50 LRA, expedited hearings, mediation, bundling grievances)

2. Challenges in the Industry

A. *Current Landscape*

- Fiscal environment and lack of funding; government deficits
- SEIU and Personal Support Workers (PSWs)
 - Sweet\$16 campaign
- OPSEU
 - Developmental Service Workers
- CUPE
 - Unite for Fairness campaign

B. Bargaining in the Industry

- First contract negotiated between CUPE & Community Living Upper Ottawa Valley
 - October 2013
- Community Living Guelph (Wellington) & CUPE
 - May 2013
 - 2 year agreement
 - Average annual wage increase 0.8%
 - 0% in year one
- Community Living Greater Sudbury & OPSEU
 - April 2013
 - 4 year agreement
 - Average annual wage increase 0.8%
 - 0% in year one

B. Bargaining in the Industry

- Bargaining:
 - Set tone
 - Longer terms with deferred increases
 - Lump sums vs. wage increases
 - Wage re-openers
 - Revisit old language
 - Need to be creative

→ *“We needed to voice our opinions and change things for the better before people started to quit. That's why we joined the union!”*

- Personal Support Worker, Hamilton

3. Duty to Accommodate

A. *Duty to Accommodate*

- Obligations arise under the Ontario *Human Rights Code*, the *Workplace Safety and Insurance Act* and potentially the collective agreement

B. Restrictions and Reasonable Accommodations

- Making facilities accessible to and usable by disabled workers
- Altering job and work methods
- Permitting part-time or modified work schedules
- Obtaining modified tools, equipment, devices
- Bundling duties

C. *Meaningful Work*

- All work assigned to the employee must be meaningful and productive, and it should have value to the department/agency and the employee
- Intent is to return the employee to meaningful work and, whenever possible, to the job duties held prior to injury, illness or disability
- Obligated to offer reasonable accommodation, not obligated to offer perfect accommodation

Brant (County) v. Ontario Public Service Employees Union, Local 256, 2013 ONSC 1955:

- Arbitrator upheld a grievance finding the employer had failed to properly accommodate an employee, a paramedic, who had suffered a workplace injury
- The issue was whether the employer was required to accommodate the employee by allowing him to "ride third" in an ambulance, or whether it could choose to provide other "reasonable" accommodation
- The employer had refused the requested "ride third" placement, on the basis of safety concerns
- The arbitrator held that the parties' collective agreement required the "ride third" accommodation, the doctor's medical report was sufficient to satisfy that provision, and the safety concerns did not amount to undue hardship
- The employer's policy, and the submissions of the applicant before the arbitrator, amount to an unreasonable denial of accommodation required by the *Code* in circumstances of temporary disablement by workplace injury

D. Documentation

- Functional abilities form
- Offer of modified work
- Alternate, modified work form
- Employee progress report
- Certificate of fitness to return to work
- Independent medical examination (where necessary)

Ottawa Hospital v Canadian Union of Public Employees, 2011 CanLII 92507 (ON LA):

- Ms. Myre, the employee, was acknowledged as an excellent ward clerk when she was at work, but she had a very high rate of absenteeism
- Her attendance was monitored under the hospital's attendance policy and the hospital found that her absenteeism was excessive, and unlikely to improve
- The grievor had problems with her back and had had two surgeries
- The hospital was of the view that Ms. Myre was insufficiently cooperative with health plans created with the occupational health and safety staff monitoring her absenteeism, and had failed to provide sufficient medical documentation to support her absences and disability
- In April 2008, the hospital applied an option provided in the policy to reduce an employee to part-time hours for a six-month period, which Ms. Myre grieved
- The arbitrator dismissed the grievance
- The grievor was not fulfilling the employer's expectations, either to attendance at work, or to the specific type of medical documentation sought
- There was no suggestion that the grievor's level of absenteeism was anything but excessive

E. Undue Hardship

- Employers must accommodate to the point of **undue hardship**
- Standards for assessing undue hardship:
 - Cost
 - Health and safety requirements
 - Outside sources of funding
 - Impact to other employees
 - Size of operations
 - Interchangeability of workforce and facilities

Toronto Assn. for Community Living and C.U.P.E., Loc. 2191 (Hynes), (2005) 138 L.A.C. (4th) 378:

- Employee was a p/t staff member employed for 7 years who grieved concerning work scheduling, harassment and discharge
- After missing her scheduled weekend shift, employee was informed that if she continued to refuse to work weekend shifts her employment would be terminated
- Employee responded that she could not work Sundays for religious reasons; was a member of a registered Church, had a genuine personal belief in the teachings of the Church, she faithfully kept the Sabbath every Sunday and attended both Sunday services
- Employer continued to present options to her in order to accommodate her religious worship
- The arbitrator allowed her grievance in part, none of the accommodation alternatives offered by the employer were reasonable; the employer was obliged to offer the grievor full and not merely partial accommodation, to the point of undue hardship
- An offer of accommodation cannot be said to be reasonable if it does not fully accommodate an employee's religious beliefs and practices, if full accommodation is available and does not create undue hardship
- Employer was not entitled to discharge the employee, the arbitrator held that the employer could accommodate the grievor without undue hardship
- Employee was reinstated with a three-day suspension substituted for discharge

E. Undue Hardship

- Impact to other employees:
 - Employee morale
 - Misconceptions
 - Bumping and displacement
 - Short-staffing and work assignments

Renaud v. Central Okanagan School District No. 23 (SCC) [1992]

“...employee morale [may]...be taken into account [but it]... must be applied with caution. The objection of employees based on well-grounded concerns that their rights will be affected must be considered. On the other hand, objections based on attitudes inconsistent with human rights are ... irrelevant”

4. Workplace Investigations

A. Collective Agreement Issues

- Time limits for investigation and discipline
- Right to union representation
- Right to notice
- Consequences of an improper investigation

B. Time Limits

- General obligation to act promptly
 - Risk of condonation otherwise
- Time limits at investigation stage
 - Different trigger points for starting the clock
 - Example: *“No discipline shall be enacted after 5 days from the date of the incident or the date the employer becomes aware of the incident.”*
- Or time limits once investigation is complete
 - Example: *“No discipline shall be imposed more than 5 days after the conclusion of the employer’s investigation.”*

C. *Right to Union Representation & Right to Notice*

Right to Union Representation:

- ↪ No right unless explicit in C. A.
- ↪ The stage when right applies is variable:
 - ↪ *“When interviewed in the course of a disciplinary investigation”*
 - ↪ *“During disciplinary interview”*
 - ↪ *“A meeting for the purpose of discussing a serious dissatisfaction”*
 - ↪ *“Where discipline may result”*
 - ↪ *“Where discipline is being imposed”*
- ↪ Possible obligation to inform employee of rights

Right to Notice:

- ↪ No right unless explicit in C. A.
- ↪ May be right to *notice* and to *reasons/explanation*
- ↪ Stage when notice required is variable:
 - ↪ *“24 hours in advance of an interview of a disciplinary nature”*
 - ↪ *“Prior to a disciplinary interview”*
 - ↪ *“When being disciplined”*
 - ↪ *“...shall be notified in writing of the grounds for the discharge or suspension, with a copy provided to the union within x days”*

E. Investigation Do's and Don'ts

- Check collective agreement **FIRST**
- Follow all *potential* collective agreement requirements
- Consider inviting union rep. even if not required
- Generally have 2 interviewers
- Take detailed notes
- Advise that cooperation is expected
- Failure to cooperate can be used against employee
- Consider *suspending pending further investigation*
- Put allegations to suspect *before* disciplining

E. Investigation Do's and Don'ts

- ↪ Ask about any similar instances
 - ↪ Has the employee done this before?
 - ↪ Have other employees done this before?
- ↪ Ask about mitigating circumstances, such as:
 - ↪ Provocation
 - ↪ Personal or health problems
 - ↪ Spur of the moment v. pre-meditated
 - ↪ Economic circumstances
 - ↪ Lack of prior warnings

F. Working WITH the Union

- Rules of conduct:
 - Reasonable; clearly communicated; understood
 - Union agreement helpful but not essential
- Inform union of results of investigation
 - As soon as feasible [they also don't like surprises]
 - As much information as is safe
 - Re-assure them investigation has been thorough
- Give suspect chance to respond to allegations
- Invite them to provide further evidence
- Assure them of desire for fair process, open minds

G. Key Things to Remember for Investigations

- Collective agreement compliance
- Reasonable rules
- Respect right or desire for union representation
- Fairness
- Consistency

H. Consequences of an Improper Investigation

- Prevent use of evidence obtained improperly
- Nullify discipline
- Compensate employee for notice period
- Fewer consequences where right not substantive

5. Discipline

A. *What is Discipline?*

- Traditionally, discipline focused on negative impact on employee's work record
- Discipline was:
 - Response to misconduct
 - With intent to punish

A. *What is Discipline?*

- More recently, focus is on:
 - Blameworthy nature of employee's behaviour
 - Rehabilitative character of employer's response
- Includes sanctions which may not be punitive but which attempt to correct deficient behaviour

A. *What is Discipline?*

- Goals of Discipline:
 - Specific deterrence (prevent repeat of the misconduct)
 - General deterrence (message throughout the organization)
 - Justice, punishment
 - Foundation to build a case for “cause”

B. What is Progressive Discipline?

- Intended to give employees a reasonable opportunity to correct their conduct
- Provides employees with some inducement or incentive to reform their conduct

B. What is Progressive Discipline?

→ The Exception:

A single incident of serious misconduct by an employee (e.g. assault, theft, fraud, harassment) may justify the employer immediately moving to a more serious penalty, such as suspension or discharge

B. What is Progressive Discipline?

- Progressive discipline includes:
 - Verbal warning
 - Written warning
 - One-day suspension without pay
 - Three-day suspension without pay
 - Longer period of suspension and final warning or “last chance”
 - Discharge

C. *Grounds for Discipline*

- ↪ Absence from work (culpable v. non-culpable)
- ↪ Failure to call in
- ↪ Abuse of leave of absence
- ↪ Carelessness
- ↪ Insubordination
- ↪ Policy breach
- ↪ Alcohol / drugs
- ↪ Criminal charges / convictions
- ↪ Incarceration
- ↪ Damage to employer property
- ↪ Falsification of records
- ↪ Theft
- ↪ Fighting / threatening
- ↪ Bullying and harassment
- ↪ Client abuse

D. The Culminating Incident

- Usually the final incident of misconduct justifying a review of the employee's discipline record by the employer to decide the appropriate penalty
- The purpose of progressive discipline is to get to a culminating discipline

E. Alternatives to Discipline

- What is the nature of the problem?
- Consider: is management part of the problem?
- Alternatives:
 - Clarify roles, policies, procedures
 - Further training, education, orientation
 - Creative solutions: employee takes ownership of problem
 - Employee Assistance Program (EAP)

G. Determining Whether “Cause” Exists

- Investigate:
 - Interview potential witnesses
 - Interview the potential grievor
 - Review documents
 - Consider whether “expert” help is required, for example, forensic accountants
 - Consider mitigating circumstances

Kingston General Hospital v Ontario Public Service Employees' Union, Local 444, [2012] O.L.A.A. No. 410

- The hospital attempted to re-open its case in order to call evidence of an additional incident of alleged sexual misconduct in the workplace by the grievor
- The purpose of the evidence was to provide an additional basis for the discharge of the grievor from employment
- The employer knows that it cannot discipline or discharge an employee on a whim, and that it must have and be able to prove that it had just cause to do so
- In a discipline or discharge case the employer must prove just cause, and the grievor and the union are entitled to fair advance notice of the employer's position so that the case to be met can be properly prepared
- As a matter of fairness, the employer is not allowed to rely on grounds that it was aware but failed in a timely way to show just cause
- The arbitrator dismissed the application and held that the grievance was based on one incident of sexual misconduct
- The employer made a decision to rely on only one incident and could not now rely on the second incident

H. Should You Suspend Immediately?

→ CONSIDER:

→ Risk

- To employer

- To other employees

- To clients

→ Potential Sabotage

- In investigation

- Of documentation or other evidence

I. Document! Document! Document!

- Admissible at arbitration if relevant
- Usually entered or put into evidence through a witness
- Documentary evidence may be:
 - Evidence of cause
 - Corroborating evidence
 - Notes may be used to refresh memory

Examples of Documentation

- ↪ Client records
- ↪ Medical records
- ↪ Attendance records
- ↪ Employee discipline record
- ↪ Employer rules and/or policies
- ↪ Proof of training attended
- ↪ E-mails
- ↪ Performance reviews
- ↪ Notes
- ↪ Witness statements

Non-Disciplinary Documentation

- Memos to file and anecdotal notes not generally disciplinary if:
 - Not addressed to employee
 - Simply document an incident
- Memos to file and anecdotal notes can be evidence of discipline if:
 - Document a verbal warning
 - Written by someone exercising authority

J. Determining the Appropriate Discipline

- ↪ Severity of conduct
- ↪ Impact of conduct on others
- ↪ Employee's past record of offences
- ↪ Employee's acceptance or refusal to accept responsibility for conduct
- ↪ Past responses to similar conduct
- ↪ Whether any "mitigating circumstances" which may serve to increase or decrease penalty

Examples of “Mitigating Circumstances”

- ↪ Discipline record
- ↪ Personal or health problems
- ↪ Isolated incident
- ↪ Provocation
- ↪ Spur of the moment v. premeditated
- ↪ Economic hardship
- ↪ Seriousness of offence
- ↪ Employer practice in similar past circumstances
- ↪ Failure to warn the employee

Apologies

- Regarded favorably by arbitrators
- Theory - employees who acknowledge their misconduct are more likely to correct it in future
- Repeated denials lead to no sympathy

Condonation

- Was employee lulled into a false sense of security?

Past Employer Response in Similar Circumstances

- Similar misconduct should be treated in a like fashion
- Nothing is ever without precedent

Delay in Disciplining

- If employer delays, discipline may be reduced
- If delay too long, looks like condonation

K. Content of Discipline Letter

- Describe inappropriate conduct/behaviour in concrete terms
- State correct behaviour
- Refer to existing standard or policy
- Describe negative impact on organization/work environment

K. Content of Discipline Letter

- State requirement and deadline to improve
- State level of discipline imposed (e.g. suspension)
- Warn what future discipline will be (i.e. “up to and including discharge for cause”)
- Offer assistance

L. Issuing Discipline

- Meet with the employee
- Ensure that human resources (or other organizational witness) and a union steward are present
- Discuss reasons for discipline (same as outlined in letter of discipline)
- Provide employee with copy of any written documentation confirming discipline

M. Role of Union in Discipline Process

- Provide advice to employee
- Duty of fair representation
- Collective agreement procedural obligations
- Advise employee re: grievance process
- Act as a resource to employee discipline meetings

Ashby v. Canadian Union of Public Employees Local 2936-2, 2002 CanLII 40843 (ON LRB):

- Dispute over whether Community Living employee signed settlement agreement under coercion and duress following discharge letter
- Held that the agreement was not made under duress or undue pressure from the union

6. Tips & Strategies for Effective Labour Relations

A. Know the Law, Know your Contract, Know your History

- The laws and rules that govern unionized work are complex, and vary widely depending on the union involved
- It is essential that you become familiar with the laws and rules that directly affect your organization and team. These include:
 - Collective agreement
 - ESA, OHSA, WSIB, LRA
- What have relations been like in the past?
- Are there any points of special sensitivity that you need to be aware of?

Middlesex Community Living v. Ontario Public Service Employees Union, Local 144 (Hayden Grievance), [2010] O.L.A.A. No. 119

- The grievors claimed that the employer violated the collective agreement and the Employment Standards Act by not paying the correct amount of wages for attending mandatory training sessions
- The employer's preliminary objection alleged that the union had breached the collective agreement by filing grievances that concerned a matter already dealt with and disposed of by an arbitrator
- The arbitrator held that Community Living was not required to pay

B. Fairness, Mutual Respect and a Cooperative Work Environment

- Ensure that rules are clear, concise and unequivocal
- All employees must have notice of the rules, and any discipline for a breach
- Rules should be reasonable and related to legitimate workplace standards
- Treat every employee fairly, impartially, with dignity and mutual respect

B. Fairness, Mutual Respect and a Cooperative Work Environment

- Performance Standards
 - Fair and reasonable based on actual production data
 - Clearly set out employee productivity expectations
 - Consistent enforcement is the key: ensure all employees are treated equal

C. *Communication*

- ↪ Two types of poor communication:
 - ↪ “Up” – from employees to management
 - ↪ “Down” – from management to employees
- ↪ Ways to improve communication:
 - ↪ Publish a regular employee newsletter
 - ↪ Hold regular meetings with employees (e.g. state of the business, town halls)
 - ↪ Publish minutes of labour-management meetings
 - ↪ Post information in the workplace
 - ↪ Encourage discussion, listen, provide feedback in a timely manner

D. Consistency

- Closely linked to fairness; employees may feel that rules, policies or procedures are not applied consistently
- Ensure that rules and policies are clear and that all members of management apply them the same way
- “Say what you mean, and mean what you say”
- Make valid distinctions based on objective facts

E. Relationship Building

- Foster a positive relationship with union representatives by working with them on strategies that reward positive behaviors, not just punishing negative ones
- Treat all employees fairly, consistently and with mutual respect
- Encourage an open and honest relationship between employees and management
- Try to understand the employee's point of view
- Do not make commitments that you cannot keep

F. Performance Management

- “Performance Management”
 - The process of creating a work environment in which people are enabled to perform to the best of their abilities
- Narrow context
 - Simply “performance appraisals” or “work evaluations”
- Broader Context:
 - Comprehensive system that begins when a job is first identified as needed, and ends when an employee leaves your organization

F. Performance Management

- Improved performance = successful organization
- Fairness: people understand what is expected of them and have a reasonable opportunity to meet expectations
- Avoids disciplinary approach and litigation

G. Dealing with Disputes

- Enforce: “Work now, grieve later” rule
- Examine context of dispute - are supervisors part of the problem?
- Examine issue after taking into account employer policies, rules and regulations and prior response to similar incidents
- Ensure compliance with collective agreement

G. Dealing with Disputes

- Consistent approach by management
- Where appropriate, deal with union committee concerning inappropriate employee or union response
- Remember to “manage” the situation, not let the situation manage you

Daniel Pugen, Partner

Biography



Daniel Pugen is a partner in the firm's Labour and Employment Group in Toronto. He represents and advises management on a variety of labour and employment issues including employment standards, hiring, termination of employment, employment contracts and policies, labour relations, collective bargaining, privacy, human rights, workers' compensation, occupational health and safety, and labour and employment arising in corporate transactions.

Mr. Pugen has represented clients in most sectors of the economy and in both the private and public sectors. He has appeared as counsel in cases before labour arbitrators, administrative tribunals, including the Ontario Human Rights Tribunal, the Ontario Labour Relations Board and the Workplace Safety and Insurance Appeals Tribunal, as well as in the Courts.

Mr. Pugen regularly provides training for clients' managers and other staff on workplace and human resources issues, with a particular focus on workplace violence and harassment. He also regularly speaks at conferences, writes on a variety of labour and employment issues and is chief editor and principal contributor of the Ontario Employer Advisor, the firm's labour and employment law blog.

Mr. Pugen is a member of the Law Society of Upper Canada, the Ontario Bar Association and the Canadian Bar Association.

Melissa Kennedy, Labour Relations & Employment Specialist



Biography

Melissa Kennedy is a Labour Relations Specialist in our Labour & Employment Group in Toronto.

Ms. Kennedy is a highly regarded human resources and industrial relations professional experienced in preparing for labour arbitrations, collective bargaining, workplace investigations, and human resources training and policies.

Ms. Kennedy has a strong knowledge of employment legislation, human resources management software and employee relations in union and non-union environments.

Ms. Kennedy obtained her CHRP (Certified Human Resources Professional) designation in 2011 from the Human Resources Professional Association and obtained her B.Comm. (Hons) in Human Resources Management in 2007 from the University of Guelph. She is currently completing her Masters of Industrial Relations (MIR) from Queen's University.

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