BLG PUBLICATION

Borden Ladner Gervais

"Seriously — this is your last chance"!

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Steve, a production worker, was discharged after he "travelled" up the progressive discipline ladder for repeated violations of the company's rules. Joanne, a truck driver, had her employment terminated when she attended work under the influence of alcohol after having previously been given time off to attend a residential treatment program. Scott, a long-term employee with an otherwise clean record, lost his employment when he stole scrap metal from the plant. Christine? Well, she was discharged for the second time because she violated the agreement she entered into directly with her employer setting out terms of continued employment.

In each of the above cases, the employee's bargaining agent (union) filed a grievance seeking, among other things, reinstatement. And while the conduct of Steve, Joanne, Scott and Christine was obviously different, their respective employers are willing to give them **one final chance** to repair, and redeem, the employment relationship. How can that be accomplished?

Although different terms are used — last chance agreements ("LCA"), never-never letters, conditional reinstatement agreements — a three-party agreement between the company, union and employee, which addresses the past and, importantly, what is expected of the employee in the future, can be an effective tool in giving certain employees a further, and last chance, to keep their job. If done properly, an LCA can impose terms and conditions of continued employment that bind the workplace parties and an arbitrator. What follows are some important legal and practical things to consider:

1. LCAs effectively alter the employment relationship as they impose terms and conditions of employment on the subject employee that, for a set period of time, are different from other bargaining unit employees. It is therefore essential that the LCA be entered into between the company, the union and the employee. An LCA between an employer and employee only will generally not be enforceable, as an employer cannot negotiate terms and conditions of employment directly with an employee. This is what happened in Christine's case.
2. Do not use "one size fits all" LCAs. They should be fact-specific. For example, if an employee has been terminated for the ongoing breach of company rules (Steve) or a single act of misconduct (Scott), the LCA need not address regular and consistent attendance in the future. Along the same lines, an LCA should unambiguously set out the types of misconduct that will lead to termination.
3. LCAs are often used in cases of (mis)conduct arising from a drug/alcohol addiction. In Joanne's case, for example, the employer was prepared to reinstate her if she attended and completed a further residential treatment program, regularly attended AA meetings and agreed to random testing in the workplace. It is important that the LCA in Joanne's case: refer to her disability; outline the steps taken to accommodate her in the past; comment on how the employer is currently willing to accommodate Joanne; and provide that any further accommodation would result in undue hardship to the employer. LCAs do not diminish an employer's duty to accommodate disabled employees. As such, they are closely scrutinized by arbitrators.

4. Every LCA should speak to the end result — termination of employment — if it is found that there has been a breach of the terms and conditions of the LCA. Indeed, that is the "*raison d'être*" of a LCA. If the result isn't automatic — *i.e.,* the LCA provides that the employee may be subject to further discipline, up to and including discharge — it will have significantly less force and effect.
5. Stemming from the last point, the LCA should also limit, or take away, the arbitrator's statutory right to alter or amend the penalty (discharge) if s/he finds there to have been a breach. The LCA should provide that the arbitrator shall have no jurisdiction to substitute a lesser penalty by virtue of the *Labour Relations Act*, as the parties have agreed to a specific penalty – termination. Without that provision, it will be open for an arbitrator to decide what the outcome will be.
6. In addition, it is suggested that an LCA should include a confidentiality clause, provide that the LCA is without prejudice to any other cases between the company and the union and, if requested, confirm that the union has fulfilled its obligation to represent the employee under the *Labour Relations Act*.

One final point: It is not uncommon for unions to push back against entering into LCAs (for somewhat obvious reasons). Accordingly, LCAs should be used sparingly in order to get the union onside. When that is done, LCAs can be very effective tools in either salvaging the employment relationship or ending it, with less debate.

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