



Posted on: May 1, 2010

ASSESSING EMPLOYEE PERFORMANCE TIPS FOR PERFORMANCE REVIEWS, PROBATION PERIODS AND POLICY MANUALS

May 2010

Nicole Mangan

Richards Buell Sutton Employment Law Newsletter, May 2010

Successful relationships between employers and employees can help keep a business productive. There are two key time frames where the performance of employees is usually assessed. The first is during the probationary period for a new employee and the second is during a performance review for an existing employee. No matter what style of performance assessment you use a few key tips can be useful in making sure that the assessment of performance is effective if problems exist.

Probationary Period Assessments

A probation period does not exist automatically when a new employee is hired. Before an employer can dismiss an employee at any time during a probation period without providing reasonable notice or pay in lieu of notice there are two key criteria that must be met. First, a probationary period must be agreed to by both the employer and the employee. Second the probation period must be limited to the period provided for in the *Employment Standards Act* (the "Act") that permits termination without any notice or pay in lieu of notice. With respect to the first criteria the best way to confirm the employer and employee have agreed to a probation period is to make sure the agreement is documented in writing. With respect to the second criteria the Act currently allows an employee to work for three months before they are entitled to severance pay. For this reason many probationary periods are three months or less. A probationary period can be longer than three months, however, the law will not permit the employee to be terminated after three months unless the minimum severance pay required by the Act is provided or just cause exists. Any extension to a probationary period must also be agreed to by the employer and the employee - it can not be imposed unilaterally.

Although not all the case law is consistent, on the whole, an employer is permitted to assess whether an employee is "suitable" for a particular position during a probationary period. This is different than the just



cause standard that must be met to justify termination of a non probationary employee without any notice or pay in lieu of notice. However, an employer is still required to be forthright in their assessment during a probationary period. For example, the right to terminate an employee for not being “suitable” could be lost if the employer has not been clear and honest with an employee about the employer’s expectations or the employee’s performance. As a result it remains important to ensure the employee understands the expectations for the position and is not told everything is going well if that is not the reality.

Performance Review Assessments

It may be best to avoid committing to the dates on which an employee will receive a performance review in an employment contract. This is because the employer may be expected to then ensure that performance reviews occur at those times – especially if there are performance issues the employer wishes to rely on to justify termination. If an employment contract does identify when performance reviews will be conducted an employer should ensure there are procedures in place to meet this obligation. Whether the date is set by contract or through less formal procedures, it is important to ensure these reviews are conducted if performance issues exist. Address the issues in the review – particularly if they will be relied on later to justify terminating a person’s employment – and ensure the problem as well as the expectation for the appropriate standard is understood. Follow up and assess whether any improvement has actually occurred.

In some cases an employer’s failure to address a performance issue on scheduled review dates has prevented the employer from arguing successfully that they had just cause to terminate an employee.

Compliance with Policies and Procedures

If you have policies and procedures that establish expectations there are a few tips that can help ensure employees are aware of these expectations.

- Provide employees with copies of any key policies or amendments. It can also be useful to obtain an acknowledgement that the employee has received the policy or the amendment.
- Make sure copies of policies are kept in a well known and accessible location. This can be an online or physical location as long as it is well known and accessible to employees.
- Place a statement in the policy that it forms part of the employment terms.
- Make sure the policy contains a clear statement that the employer can amend the policy from time to time.
- Give reasonable advance notice of any policy changes and their effective date.
- Provide clear warning of the consequences to an employee for failure to follow the policy (e.g. discipline or dismissal for cause).



RICHARDS
BUELL
SUTTON

Established in 1871

This last point is key. Some cases have determined that if an employee knows about a policy but does not understand how seriously a violation will be treated then just cause will not exist for termination if the policy is violated. In addition, even if the consequences are stated in the policy, it is important to ensure the consequence is proportionate to the violation. If the stated consequence is not proportionate with the type of violation a court may not uphold the consequence even though it is stated in the policy or well known.

Conclusion

Probation periods, performance reviews, and policies are all useful tools to help ensure expectations are understood and being met. Each of them can be used to help ensure expectations are clearly communicated and any performance issues are addressed to help keep the relationship working.



700 - 401 W GEORGIA ST.
VANCOUVER, BC V6B 5A1
CANADA

TELEPHONE
604 682 3664

FAX
604 688 3830

RBS.CA