Think Before You Write — The Importance of a Well-Drafted Discipline Letter

March 31, 2016

There are different schools of thought as to the amount of detail that should be contained in a discipline/discharge letter. On the one hand, there is the "less is more" approach: briefly refer to the facts, the nature of the breach (i.e. the CBA, rules/regulations/policies), and the penalty being levied. The other hand contains the "more is more" approach: detail the facts, investigation results and conclusion. The third hand (yes, there is always a third hand in labour law) holds the hybrid approach: include enough detail to avoid being criticized for not disclosing the reason(s) for the discipline/discharge, but don't box yourself into a situation where you can't prove all the points raised in the communication, which is the risk of the "more is more" approach. While each case should be looked at on its own merits, and subject to any collective agreement requirements, I am generally a proponent of the third approach.

What is most important, however, is the need to get it right. The reason for this is simple. Every disciplinary sanction issued can be questioned by way of grievance, and every grievance can be advanced to arbitration. Since the employer must establish that it had just cause to impose the disciplinary sanction, the contents of the disciplinary communication, which sets the stage, have to be accurate if the employer is to be ultimately successful.

A recent arbitration decision involving a waste-management company is a good example of how a well-drafted and well thought-out discharge letter can lead to a successful result in arbitration.

In that case, the employer was responsible for the safe, secure and appropriate handling of medical and hazardous waste, including pharmaceuticals. It operated pursuant to a certificate of approval from the Ontario government which required, among other things, ongoing training of employees.

The employer operated two plants in close proximity to each other. Hazardous waste was processed, treated and/or destroyed at "Plant A". Plant A operated 24/7. Non-hazardous ("specialty") waste was handled at "Plant B". Plant B, which operated more restricted hours, also housed the employer's administrative offices and truck yard, which was a large, fenced-in, secure area.

The employer collected waste at various locations across Ontario. At the conclusion of their shift, drivers would "drop" their trailers containing waste in the truck yard. Trailers would then be brought from Plant B to Plant A for processing. Empty trailers would then be transferred back to Plant B for pick up by drivers on the next shift.

At approximately 10:00 pm one evening, a supervisor from the processing plant (Plant A) went to check an alarm that was set off in the administrative offices. While investigating the alarm, the supervisor came across an employee from Plant A in the truck yard. The employee was at the back of an open trailer next to pails of pharmaceutical waste. The supervisor confronted the employee, as it was unusual for an employee scheduled at Plant A to be in the truck yard, adjacent to pails of waste .

The employer commenced an investigation into the incident. A review of video surveillance revealed that two other employees from Plant A attended Plant B with the employee. However, since one of the employees took steps to hide from the supervisor while the other fled the scene upon his arrival, the supervisor did not see them that night. As part of the investigation, the three employees were interviewed. They each offered all-too-similar explanations for being at Plant B.

The employer determined it had cause to terminate the employment of the three employees, and issued similar, but not identical termination letters. Each letter noted that the employee was away from his work area and in possession of (pharmaceutical) waste containers, without the knowledge or permission of his supervisor. The letters then went on to address the specific behaviour of each employee: one was found to have conceal ed his actions when he was confronted by the supervisor; the second was found to have concealed himself "by hiding" from the supervisor; and the third was found to have concealed himself by leaving the premises. Importantly, despite the suspicious circumstances, the employer did not allege what it could not have proven – theft or attempted theft of waste.

The terminations were upheld at arbitration. In closing submissions, the union argued that the employer failed to establish what it was "really trying to prove" – that is, attempted theft of waste. The arbitrator didn't accept the union's argument. Rather, he found that the employer had proven each of the grounds spelled out in the termination letters. He concluded that the terminations were based on actual facts – not conjecture or speculation.

This case shows just how crucial it is to think before you write. Had the employer prepared "cookie cutter" letters, or made broad unsupported allegations, the results at arbitration might have been very different. The case is a good example of how the contents of a disciplinary communication must be consistent with the results of an investigation, and how a properly worded letter lays the foundation for a successful arbitration.

By

Clifford J. Hart

Expertise

Labour & Employment

BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 725 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

blg.com

BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749